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Submission to the Senate Standing Committee on Legal and Constitutional Affairs

Foreign Evidence Amendment Bill 2008

18 February 2009

1. Introduction

The New South Wales Council for Civil Liberties ('CCL') is committed to protecting and promoting civil liberties and human rights in Australia.

CCL is a Non-Government Organisation (NGO) in Special Consultative Status with the Economic and Social Council of the United Nations.

CCL was established in 1963 and is one of Australia's leading human rights and civil liberties organisations. Our aim is to secure the equal rights of everyone in Australia and oppose any abuse or excessive power by the State against its people.

The New South Wales Council for Civil Liberties (the CCL) is grateful for the opportunity to make a submission to the Committee. We would be happy to elaborate on any matters, in writing or in person, that the Committee may wish.

2. Summary

The object of the Foreign Evidence Amendment Bill is to "streamline" the provisions in the Commonwealth Evidence Act 1995 by admitting into evidence in a criminal prosecution documents obtained under the Foreign Evidence Act 1994 unless the accused can prove that the documents are not reliable or probative or are privileged.

This is contrary to the existing provisions in the Commonwealth Evidence Act 1995 where the prosecutor must establish that the documents are properly admissible. The Bill reverses the onus of proof - the accused will have the onus of proving that the documents are not admissible.

It may as a result alter due process in criminal proceedings in a way which is inconsistent with human rights standards concerning due process and the right to a fair trial.

The Bill is based on the extraordinary rules introduced by the Bush Administration for the Guantánamo Bay trials, including for the planned trial of David Hicks.

Under those rules the prosecutor could get into evidence any document even if it was obtained by torture or contained hearsay. All the prosecutor had to prove was that the document had probative value to a reasonable person. It was then up to the detainee to prove that the document was not reliable under the totality of the circumstances.

Those rules were specially formulated for the Guantánamo Bay trials and are the contrary to those for normal US military trials and civilian criminal trials in the US where the onus is on the prosecutor.

The Bill, like the Guantánamo Bay rules, reverses the onus of proof and places it on the accused. It is, however, worse than those rules in that there is no need for a prosecutor under the Bill to establish that the documents in question had probative value to a reasonable person.

Despite the fundamental change contained in the Bill:

- The matter was not referred to the Australian Law Reform Commission which drafted the model for the original Commonwealth Evidence Act, and as recently as 2006 carried out a major review of its provisions.

- It was not referred to in Commonwealth Evidence Amendment Bill 2008 which the Attorney General introduced in May 2008 to update the Commonwealth Evidence Act 1995 for changes which he considered necessary in the ten years which had passed since the Act was enacted.

- The matter was not raised for consideration by the Senate Legal and Constitutional Committee when it carried out an extensive review of the Commonwealth Evidence Amendment Bill and reported in September 2008.

- There was no consultation with any professional body before the Bill was introduced into the House of Representatives on 3 December 2008. This is inconsistent with the extensive and detailed consultation on the original Commonwealth Evidence Act 1995 and each amendment since.

- There has been no consultation with any professional body since the Bill was introduced, other than other statements that no changes will be made. This is puzzling when the Bill is expressed to operate retrospectively and a short delay for proper consideration by the Committee would not affect the date of its operation.

- The House of Representatives was unaware in passing the Bill that the Law Council of Australia had written to the Attorney General raising serious concerns.

- The Bill will create a lack of uniformity - when the fundamental object of the Commonwealth Evidence Act 1995 and all amendments made since was to create uniformity in matters of evidence throughout Australia.

- The Bill favours foreign business records over Australian business records on the unsupported basis that foreign business records, regardless which country they are from, are more reliable and probative than Australian business records.

- From our inquiries it appears that the Bill represents "world's worst practice" in the proper administration of justice.

It is submitted that the Committee should recommend that the Bill be referred to the Australian Law Reform Commission for review and that in

the meantime, the Bill be amended as highlighted in red in the attachment "A".

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3. The Foreign Evidence Amendment Bill 2008

The Attorney General in presenting the Foreign Evidence Amendment Bill 2008 to the House of Representatives stated that its main purpose was to "streamline" the process for adducing foreign business records as evidence in Australian court proceedings.

In the words of the Attorney General in the second reading speech:[1]

> "The main purpose of the Foreign Evidence Amendment Bill 2008 is to streamline the process for adducing business records as evidence in Australian court proceedings." and
>
> "The bill would amend the Foreign Evidence Act to provide that business records obtained through mutual assistance will be presumed to be admissible unless the court is satisfied the records are not reliable and probative, or are privileged."

The business records to which the Attorney General referred are documents described in the Bill as documents "appearing" to be foreign business records. They need not be business records, only appear to be so.

At present the Foreign Evidence Act 1994 provides that foreign material obtained under the Act, including foreign business records, are only admissible in Australian court proceedings if they accord with the Commonwealth Evidence Act 1995.

Under the Commonwealth Evidence Act all business records, whether Australian or foreign, are admissible in evidence if they met certain statutory requirements and are not excluded from evidence by the court as provided in the Act.

The Attorney General stated in his second reading speech:

> "Part 3 of the Foreign Evidence Act 1994 provides a means of adducing foreign material, obtained in response to a mutual assistance request to a foreign country, as evidence in Australian criminal and related civil proceedings. The provisions are designed to facilitate the use of evidence obtained from foreign countries. However, the current provisions are not always adequate to meet the special evidentiary problems associated with obtaining and using evidence from foreign countries which have differing criminal laws and procedures."

The Foreign Evidence Amendment Bill will override the Commonwealth Evidence Act as regards foreign business records obtained under the Foreign Evidence Act by providing a new process for admitting them in evidence. In this way, the existing provisions contained in the Commonwealth Evidence Act 1995 are to be "streamlined".

At present the Commonwealth Evidence Act 1995 places the onus on the prosecutor to establish that a document is a business record. Once having done

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1 3 December 2008 Second Reading Speech in House of Representatives

this the prosecutor must prove that the document (whether foreign or Australian) is properly admissible in evidence in accordance with the provisions in that Act.

Now under the Bill documents which appear to be foreign business records will be admissible in evidence unless the accused can prove that the documents are not reliable or probative, or are privileged. Not only does this reverse the onus of proof but alters the well established rules in the Commonwealth Evidence Act under which business records are admitted into evidence.

Further, the existing safeguards in the Commonwealth Evidence Act for excluding documents from being admitted into evidence, including these in sections 135 to 138, are to be replaced in the Bill with a more limited discretion in the court. No reason is given why these existing safeguards should not remain.

As the law currently stands the provisions that apply to the admissibility of foreign business records are the same provisions that apply to the admissibility of Australian business records. Further there is no distinction in the application of those provisions in Commonwealth criminal proceedings and in Commonwealth civil proceedings (which comprise by far the majority of Commonwealth civil proceedings).

What is proposed by the Bill is a special rule which will allow for far more foreign business records to be admitted into evidence than would otherwise be admissible under the current provisions, but only in Commonwealth criminal and related civil proceedings. The rules of evidence for admissibility of Australian business records in any type of Commonwealth proceedings criminal or civil is unchanged by the Bill.

No satisfactory explanation has been made for these distinctions, nor why a special rule is needed for foreign business records and only in Commonwealth criminal proceedings. It is not a satisfactory explanation that a prosecutor may have difficulty in complying with the law in having documents admitted into evidence. No State or Territory of Australia has adopted this approach, and nor are we aware of any other country having done so.

It is an important rule of evidence in all Commonwealth proceedings, criminal and civil, that hearsay evidence is inadmissible. This rule is subject to several equally important exceptions, one of which is business records (Australian or foreign) that contain a statement relevant to an issue in the proceeding. However for any business record (Australian or foreign) to override the hearsay rule a Commonwealth Court or Tribunal must as the law currently stands be satisfied that:

(a) the document is in fact a business record (s69(1) Commonwealth Evidence Act 1995); and

(b) the relevant statement in the business record was made:

- by a person who had or might reasonably be supposed to have had personal knowledge of the statement; or

- on the basis of information directly or indirectly supplied by a person who had or might reasonably be supposed to have had personal knowledge of the statement (s69(2) Commonwealth Evidence Act 1995).

The party tendering the business record has the onus of proving the above two matters to the Court's reasonable satisfaction (s48 Commonwealth Evidence Act 1995).

The Bill removes each of these important safeguards.

Under the Bill a document need only to appear to consist of a business record.

There is no requirement in the Bill that a Court has to be satisfied that a statement in the business record was made by a person who had or might reasonably be supposed to have personal knowledge of the statement.

The Bill places the onus on the accused to somehow show that the document is not reliable or probative or is privileged; a task that will be difficult.

The Bill makes other changes to the Foreign Evidence Act 1994 which time does not permit to be covered in this submission.

4. Documents obtained under the Foreign Evidence Act

The new "streamline" provisions in the Foreign Evidence Amendment Bill 2008 apply to all documents which appear to be foreign business records - no matter in which foreign country the business is run nor how credible the business.

For example, the business records of a business in Zimbabwe controlled by Robert Mugabe have the same status as those of Coca-Cola in the USA, and a greater status than those of the Commonwealth Bank.

Whilst Australian business records are generally regarded as accurate it does not necessarily follow that the same is true of foreign business records.

Even Australian business records to be admissible in evidence must comply with the Commonwealth Evidence Act. This is no longer to be the position under the Bill with documents which appear to be foreign business records obtained under the Foreign Evidence Act. They need not comply with the Commonwealth Evidence Act.

No greater credibility can be given to the documents obtained under the process in the Foreign Evidence Act than those which are not. For example, the provisions of the Act are met if a person currently employed in the foreign business states (not necessarily under oath) before an appropriate person that he believes that documents exhibited to him or her come from the records of the foreign business.

There is no requirement that the person concerned knows anything of the contents of the business records.

For example, there may be a file note in the documents which suggests that an Australian farmer sought a bribe for exporting wheat to the foreign business. Whilst this may appear in the file note, the facts may be that the person who made the file note subsequently reported to his superior that he misunderstood what the Australian farmer had said. This subsequent report, may or may not, be recorded in the documents exhibited to the person and may not be known to him or her.

Further this new "streamline" process is in practice usually only open to the prosecutor. The accused may have limited means of seeing the relevant foreign business records apart from those tendered into evidence by the prosecutor. Not infrequently, discovery of the business records reveals discrepancies and explanations for particular records which might otherwise be adverse to an accused.

For example, a document obtained under the Foreign Evidence Act as amended by the Bill might have suggested that Dr Haneef donated $10,000 to a UK charity for use to fund terrorists. But other records of the business not produced may show that whilst the charity used the funds for that purpose this was not intended or known by Dr Haneef, and in fact was kept secret from him.

Under the Bill the document damning Dr Haneef would be allowed into evidence in a criminal prosecution against him unless he could prove it was were not reliable or probative. But how does he do this when he may have limited access to the other business records of the UK charity?

In the real world foreign business records are kept for the purposes of the foreign business. They are not necessarily an accurate or complete record for the purpose of proving the guilt in Australian criminal proceedings of an Australian charged with an Australian offence.

It is understandable why foreign business records should be treated with greater caution in admitting them as evidence in a criminal prosecution than Australian business records, but the Bill does the opposite; it makes it easier to get them into evidence and thereby gives them greater reliability and probity than Australian business records.

5. The Guantánamo Bay Rules

The Supreme Court of the United States invalidated President Bush's original attempt to create military commissions to try alleged terrorists (including David Hicks) in Hamden v Rumsfeld.[2]

In that case the Supreme Court stated:

> "Another striking feature of the rules governing Hamdan's commission is that they permit the admission of any evidence that, in the opinion of the presiding officer, "would have probative value to a reasonable person." 6(D)(1). Under this test, not only is testimonial hearsay and evidence obtained through coercion fully admissible, but neither live testimony nor witnesses' written statements need be [**2787] sworn."

and

> "The procedures and rules of evidence employed during Yamashita's trial departed so far from those used [***770] in courts-martial that they generated an unusually long and vociferous critique from two Members of this Court. See id., at 41-81, 66 S. Ct. 340, 90 L. Ed. 499 (Rutledge, J., joined by Murphy, J., dissenting). Among the dissenters' primary concerns was that the commission had free rein to consider all evidence "which in the commission's opinion 'would be of assistance in proving or disproving the charge,' without any of the usual modes of authentication." Id., at 49, 66 S. Ct. 340, 90 L. Ed. 499 (Opinion of Rutledge, J.).
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> 46 The dissenters' views are summarized in the following passage: "It is outside our basic scheme to condemn men without giving reasonable opportunity for preparing defense; in capital or other serious crimes to convict on 'official document...affidavits; ... documents or translations thereof; diaries ..., photographs, motion picture films, and ... newspapers' or on hearsay, once, twice or thrice removed, more particularly when the documentary evidence or some of it is prepared ex parte by the prosecuting authority and includes not only opinion but conclusions of guilt. Nor in such cases do we deny the rights of confrontation of witnesses and cross-examination." Yamashita,

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2 Hamden v Rumsfeld 126 S. Ct. 2749 (2006)

> 327 U.S., at 44, 66 S. Ct. 340, 90 L. Ed. 499 (footnotes omitted)."

and

> "As the Court explains, the Government has made no demonstration of practical need for these special rules and procedures, either in this particular case or as to the military commissions in general, ante, at 165 L. Ed. 2d, at 772-773; nor is any such need self-evident. For all the Government's regulations and submissions reveal, it would be feasible for most, if not all, of the conventional military evidence rules and procedures to be followed."

The US Congress then passed the Military Commissions Act 2006 in an attempt to remedy the position. Under section 949(9)(2) of the Act the Secretary of Defence had power to prescribe procedures and rules of evidence for military commission's proceedings including:

> "(E)(i) Except as provided in clause (ii), hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial may be admitted in a trial by military commission if the proponent of the evidence makes known to the adverse party, sufficiently in advance to provide the adverse party with a fair opportunity to meeting the evidence, the intention of the proponent to offer the evidence, and the particulars of the evidence (including information on the general circumstances under which the evidence was obtained). The disclosure of evidence under the preceding sentence is subject to the requirements and limitations applicable to the disclosure of classified information in section 949j(c) of this title.
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> (ii) Hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial shall not be admitted in a trial by military commission if the party opposing the admission of the evidence demonstrates that the evidence is unreliable or lacking in probative value."

On 18 January 2007 the Secretary of Defence submitted to Congress the US Manual for Military Commissions within which was contained the US Military Rules of Evidence. These were the rules to apply to the Guantánamo Bay trials.

The rules included the following:

> "**Rule 401. Scope of probative evidence in military commissions**
>
> Evidence has "probative value to a reasonable person" when a reasonable person would regard the evidence as making the existence of any fact that is of consequence to

a determination of the commission acting more probable or less probable than it would be without the evidence."

Rule 402. Evidence having a "probative value to a reasonable person" generally admissible

All evidence having probative value to a reasonable person is admissible, except as otherwise provided by these rules, this Manual, or any Act of Congress applicable to trials by military commissions. Evidence that does not have probative value to a reasonable person is not admissible.

Rule 802. Hearsay rule

Hearsay may be admitted on the same terms as any other form of evidence except as provided by these rules or by any Act of Congress applicable in trials by military commissions.

Rule 803. Admissibility of hearsay

(a) Hearsay evidence may be admitted in trials by military commission if the evidence would be admitted under the rules of evidence applicable in trial by general courts-martial, and the evidence would otherwise be admissible under these Rules or this Manual.

(b)(1) Hearsay evidence not admissible under section (a) may be admitted in trials by military commission if the proponent of the evidence makes known to the adverse party:

(A) the intention of the proponent to offer the evidence; and

(B) the particulars of the evidence (including information on the general circumstances under which the evidence was obtained, the name of the declarant, and, where available, the declarant's address).

(2) The proponent of the evidence may satisfy the requirement of subsection (1) by notifying the opposing party, in writing, of the statement and its circumstances 30 days in advance of trial or hearing and by providing the opposing party with any materials regarding the time, place, and conditions under which the statement was produced that are in the possession of the proponent of the evidence. Absent such notice, the military judge shall determine whether the proponent has provided the adverse party with a fair opportunity under the totality of the circumstances.

> (3) The disclosure of information under this section is subject to the requirements and limitations applicable to the disclosure of classified information in Mil. Comm. R. Evid. 505.
>
> (c) Hearsay evidence otherwise admissible under subsection (b)(1) shall not be admitted if the party opposing the admission of the evidence demonstrates by a preponderance of the evidence that the evidence is unreliable under the totality of the circumstances."

It can be seen that under those rules hearsay evidence is admissible, including that in foreign business records if the prosecutor proves that the records have probative value to a reasonable person. It is then up to the accused to prove that the records are "unreliable under the totality of the circumstances".

This places the onus of proof on the accused as does the Foreign Evidence Amendment Bill.

In *Boumedierie v Bush*[3] the United States Supreme Court referred to the Military Commission Rules of Evidence and found that a detainee's ability to confront witnesses may be "more theoretical than real" given the minimal limitations placed by the rules upon the admission of hearsay evidence (at 2269). The court noted that "there are in effect no limits on the admission of hearsay evidence; the only requirement is that the tribunal deem the evidence "relevant and helpful".

The Bill is more onerous than the Guantánamo Bay rules in that it is necessary under those rules for the prosecutor to prove the business records have probative value to a reasonable person. No such requirement is imposed on the prosecutor by the Bill.

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3 *Boumedierie v Bush* S. Ct. 2229, 2262 (2008)

6. No consultation

The Foreign Evidence Amendment Bill 2008 was introduced in the House of Representatives on 3 December 2008 and passed on 5 February 2009.

The Attorney General has not appeared to have consulted the Australian Law Reform Commission nor any professional body in preparing the Bill, nor has he apparently done so since the Bill was introduced.

Of course the Attorney is under no obligation to do so but this is in contrast to the extensive consultation which took place on the original Commonwealth Evidence Act and each subsequent amendment.

In passing the Bill on 5 February 2008 the House was not aware of the concerns of the Law Council of Australia expressed in its letter to the Attorney General dated 15 January 2009.

7. The consultation and time taken by the Commonwealth to get the Evidence Act 1995 right

The Commonwealth Evidence Act 1995 was the result of a recommendation by the Senate Standing Committee on Constitutional and Legal Affairs for a comprehensive review of the law of evidence to be undertaken by the Australian Law Reform Commission with a view to enacting a modern Evidence Act.[4]

In accordance with the recommendation the Federal Attorney General requested the Commission to:

> "...review the laws of evidence applicable in proceedings in Federal Courts and the Courts of the Territories with a view to producing a wholly comprehensive law of evidence based on concepts appropriate to modern conditions and anticipated requirements".[5]

The Commission did so and published an Interim Report in 1985[6] and a Final Report in 1987.[7]

In the process the Commission engaged in lengthy consultations and prepared two discussion papers and sixteen research papers. These were distributed widely to legal professional bodies, magistrates, academics involved in teaching evidence, federal and State judges and retired judges, the police, practitioners and other interested persons and organisations. Many submissions were received and considered. In addition regular meetings were held with consultants over a period of approximately two years to discuss the draft proposals. These proposals were then revised and brought together after further consultation into the Model Evidence Act attached to the Final Report.

The Model Evidence Act dealt in detail with the conditions in which business records could be admitted into evidence.

The Commission considered that representations contained in business records that met certain requirements should be admitted into evidence subject to being excluded under the general exclusionary and discretionary provision of a court recommended by the Commission.

It was not suggested in the Commission's Interim Report or Final Report that the admissibility of foreign business records should be subject to more relaxed rules than Australian business records.

In its Final Report the Commission stated:

> "In addition, the law of evidence is badly in need of reform in all areas. The present law is the product of unsystematic statutory and judicial development. It is a highly complex body of law which is arcane even to most legal practitioners. It contains traps and pitfalls which are likely to leave the unrepresented litigant baffled, frustrated and

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4 Senate Standing Committee on Constitutional and Legal Affairs Report on the Reference: The Evidence (Australian Capital Territory) Bill 1972

5 Terms of Reference dated 18 July 1979

6 Australian Law Reform Commission Report ALRC 26

7 Australian Law Reform Commission Report ALRC 26

> defeated. There are also many areas of uncertainty in the law of evidence - areas on which definitive law is yet to be pronounced by the courts. The need for reform is also demonstrated by what happens in practice: the complexities are ignored, oversimplified versions of the law are applied and judges try to discourage use of its technicalities."

Before issuing the Final Report the Commission formulated draft proposals to test the viability both of a uniform comprehensive Evidence Act and of particular reforms of the law of evidence.

In 1991 the Standing Committee of Attorney Generals gave in-principle support to the uniform evidence laws based on the Commission's Model Evidence Act.

After further consultation the Commonwealth published the Evidence Bill 1993, being basically the Commission's Model Evidence Act.

The Bill was referred to the Senate Standing Committee on Legal and Constitutional Affairs. The Committee issued an interim report[8] and then a final report.[9]

In February 1995 the Bill was passed by the Senate with amendments. These were agreed to by the House of Representatives and the Bill was enacted as the Evidence Act 1995.

The Minister of Justice (Mr Kerr) in the second reading speech to the Bill said

> "The bill provides a modern and comprehensive law of evidence to apply in federal courts and, with the agreement of the Australian Capital Territory government, in the courts of the ACT. Comprehensive evidence law reform is not easy. Many challenges have accumulated over too many years for that to be the case. But this government is taking evidence law reform out of the too hard basket and making it an important feature of the law reform agenda.
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> The bill has three main objectives. The first is for the first time to provide an evidence law to *apply* in proceedings in federal courts. At present, by operation of section 79 of the Judiciary Act 1903, the evidence laws of the state or territory in which a federal court is sitting apply in that court, in addition to the common law, which is applied under section 80 of the Judiciary Act. There are significant differences between the various state and territory statutes dealing with evidence. Thus, the preparation by a practitioner of a case before the Federal Court of Australia may differ depending on where the hearing will take place and, if evidence is limited, its outcome may depend on where the hearing is held. Indeed, where the hearing of a

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8 Senate Standing Committee on Constitutional and Legal Affairs: Evidence Bill 1993

9 Senate Standing Committee on Constitutional and Legal Affairs: Evidence Bill 1993

> proceeding in a federal court is adjourned for further hearing in another state, the evidence law which applies in the proceeding changes.
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> The second major aim of the bill is a modern law of evidence for our nation. Reform of the legal system is essential to ensure that it meets the needs of contemporary Australia. Reform of the law of evidence is an essential component of reforming the legal system. The current law of evidence is a significant cause of cost and delay in many proceedings. Also, where relevant evidence is excluded because of an overly technical or inappropriate rule of evidence injustice may result. On the state of present evidence laws, and the need for their reform, the Law Reform Commission said:
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> The present law is the product of unsystematic statutory and judicial development. It is a highly complex body of law which is arcane even to most legal practitioners. It contains traps and pitfalls which are likely to leave the unrepresented litigant baffled, frustrated and defeated. There are also many areas of uncertainty in the law of evidence-areas on which definitive law is yet to be pronounced by the courts. The need for reform is also demonstrated by what happens in practice: the complexities are ignored, oversimplified versions of the law are applied and judges try to discourage use of its technicalities."

The Senate Standing Committee on Legal and Constitutional Affairs stated the following in its Interim Report on the Bill:

> "1.23 With some notable exceptions, there was also general support for the Bill as a comprehensive effort at a law reform. For example, Mr Justice Smith doubted that a better set of proposals could have been put before Parliament, and a number of witnesses, having contemplated law reform for such a long time, expressed their reluctance to "derail the train" as it approached its destination. As Mr Peter Waight put it:
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> > Lawyers would not agree about many of the things in [the Bill] but it certainly represents a massive advance on what we have there. It simplifies the law considerably. It will cut down costs.
>
> 1.30 Speaking in support of the legislation, the Attorney-General's Department observed that, in attempting to introduce a comprehensive evidence law, the Bill necessarily had to steer between competing

viewpoints and competing interests across a whole range of areas, and that it was too much to expect the Bill to solve all problems in this area:

> No-one has suggested that this bill will be the end of evidence law reform. There will inevitably be particular issues which will need further attention and inevitably our society changes. The needs of evidence law will change.

1.33 On the issue of monitoring, the Minister for Justice expressed his belief that this was among the continuing responsibilities of the Government, and proposed both raising the broader issue with the NSW and ACT Governments, as well as instituting "mechanisms to ensure that the courts and practitioners quickly bring to attention problems and misinterpretations so that appropriate solutions can be devised in consultation with the courts and professional bodies".

1.36 On the evidence before it, the Committee accepts the desirability of enacting more uniform, comprehensive and easily comprehensible evidence laws throughout Australia.

1.37 The Committee also accepts that there has probably been more extensive consultation over the content of this particular Bill than over any other comparable piece of legislation, and endorses the observation frequently made during its hearing that it would be unfortunate to forestall the process further. The pursuit of perfection should not obstruct the achievement of the best outcome possible. The Committee also accepts that, in some cases, the need for the Bill and its NSW counterpart to remain complementary may militate against certain amendments. Specifically, in canvassing any proposed amendments the Committee accepts that:

- few issues arise as regards the likely effect of the Bill on civil trials;
- the Bill represents both a compromise and a package negotiated after much consultation; and
- any amendments to the Bill must be made carefully, given the danger that an

amendment in one place may have implications elsewhere.

1.38 The Committee notes that most of those who provided it with evidence were generally supportive of the Bill and its approach, including the proposed period of 6 months or so before the proclamation of the Bill to enable the courts and the legal profession to become familiar with its provisions.

1.39 The Committee accepts that some monitoring of the implementation of the Bill will be necessary, but feels that this would most appropriately be undertaken by a Committee composed of judges, counsel and other practitioners with daily experience of the legislation in operation."

8. 2006 Report into the Commonwealth Evidence Act 1995

In 2004 the Australian Law Reform Commission, the New South Wales Law Reform Commission and the Victorian Law Reform Commission, ("Commissions") commenced an inquiry into the operation of the Commonwealth Evidence Act 1995 and the corresponding state and territory uniform Evidence Acts to determine what changes were necessary as ten years had passed since the Act was enacted.

The Commissions issued their Report entitled "Uniform Evidence Law" in February 2006 and the following appears:

> "*Uniform Evidence Law*, being ALRC 102 (2005), NSWLRC 112 and VLRC FR, represents the culmination of an eighteen-month inquiry into the operation of the uniform Evidence Acts. The inquiry commenced on the eve of the tenth anniversary of the *Evidence Act 1995* (Cth) and the Evidence Act 1995 (NSW). These Acts were the product of an extensive research effort by the ALRC in the 1980s, which resulted in two reports: ALRC Interim Report, *Evidence* (ALRC 26) (1985); and a final report, *Evidence* (ALRC 38) (1987).
>
> The primary objectives of this Inquiry are twofold: to identify and address any defects in the uniform Evidence Acts; and to maintain and further the harmonisation of the laws of evidence throughout Australia. In respect of the latter, in addition to the Commonwealth and New South Wales, Tasmania, and Norfolk Island have also enacted legislation based on the uniform Evidence Act. During the course of this Inquiry, the governments of Victoria, Western Australia and the Northern Territory signalled their intention to enter into the uniform Evidence Act regime. Hence, the Inquiry has provided a strong impetus for the realisation of a truly uniform evidence regime in Australia."

and

> "Based on the submissions received, and the consultations held, it is clear that, generally the uniform Evidence Acts are working well, and that there are no major structural problems with the legislation, or with the underlying policy of the Acts. While areas of concern were identified, and have been addressed in this Report, the clear message conveyed to the Commissions is that a major overhaul of the uniform Evidence Acts is neither warranted nor desirable."

In November 2005 the Standing Committee of Attorney Generals established a working group to consider the Report. The group produced a draft Bill largely in line with the Commission's recommendations. This was endorsed by the Attorney Generals in July 2007.

9. Commonwealth Evidence Amendment Act 2008

In May 2008 the Attorney General introduced into the House of Representatives the Evidence Amendment Bill 2008 to implement the majority of recommendations in the Uniform Evidence Law Report of the Commissions.

In the Second Reading speech to the Bill the Attorney General said:

> "This bill marks an important step in evidence law reform.
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> Members would be aware that the Commonwealth, New South Wales, Tasmania, the Australian Capital Territory and Norfolk Island have been part of a uniform evidence law regime for over 10 years.
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> In 2005, the Australian, New South Wales and Victorian Law Reform commissions were asked to inquire into the operation of that regime and to propose updates and amendments. Their work took some 18 months, involved consultations in every state and territory and more than 130 written submissions. This culminated in their report, *Uniform evidence law*.
>
> The commissions reported that the uniform evidence laws are working well. They found major structural problems with the legislation or with its underlying policy. Their recommendations were aimed at fine tuning the acts and promoting uniform evidence laws that are more coherent and accessible; less complex and reform unsatisfactory and archaic aspects of the common law. These reforms will increase efficiencies for the courts, legal practitioners and business and in turn, benefit the broader community who access the courts.
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> In developing this bill, the Commonwealth has worked constructively with the states and territories through the Standing Committee of Attorneys-General. The standing committee established a working group which considered the report's recommendations and developed a model bill that implemented many of the commissions' recommendations. The model was also considered by an expert reference group. The standing committee endorsed the final model bill at its meeting in July 2007."

and

> "Many of the amendments proposed in this bill today are largely technical and in some cases they address developments in case law. For example, the amendments:
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> - provide further guidance on the hearsay rule;
> - introduce a general test for the coincidence rule;

- help to ensure the reliability of admissions in criminal proceedings; and

- provide that the court may make an advance ruling or advance finding in relation to any evidentiary issue."

The Attorney General made no reference with respect to the May 2008 Evidence Amendment Act to any need to override the Commonwealth Evidence Act in the manner now contained in the December 2008 Foreign Evidence Amendment Bill.

The May 2008 Evidence Amendment Act Bill was passed by the House and referred to the Senate Standing Committee on Legal and Constitutional Affairs.

The Committee recommended that the Senate pass the Bill[10]. In doing so it made the following statement:

> "3.4 The ALRC expressed its warm support for 'the great bulk' of the amendments contained in the Evidence Bill, and stressed the importance of consistency and uniformity in evidence laws across jurisdictions.
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> 3.5 At the public hearing, Professor Les McCrimmon from the ALRC told the committee that the ALRC is hopeful that the Evidence Bill will prompt other jurisdictions to enact the uniform evidence legislation to ensure 'that we have a truly uniform Evidence Act regime applying across the country' and 'so that we are not in the position that we are in now where state courts are applying one type of evidence law and the federal courts another and jurisdictions differing in the evidence law that is applied'.
>
> 3.6 The Law Council of Australia (Law Council) submitted that it does not object to the passage of the Evidence Bill in its current form, despite the fact that some parts of the Evidence Bill do not accord with the position advanced by the Law Council during the ALRC's consultation process. The Law Council noted that 'the Bill is the product of a considered and transparent policy process to which interested stakeholders have had the opportunity to contribute'. Further:
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> > ...the Law Council recognises that the provisions of the model Bill have already been enacted in one jurisdiction and are likely to be introduced in others. Therefore, in the

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10 Senate Standing Committee on Constitutional and Legal Affairs: Evidence Amendment Bill 2008

> interests of achieving greater uniformity in evidence laws, the Law Council does not wish to urge upon Parliament any departure from the provision[s] of the model Bill."

and

> "3.8 The Commonwealth Director of Public Prosecutions (CDPP) informed the committee that it had been invited to provide input on a number of occasions during the drafting of the Evidence Bill, particularly in relation to section 128 which deals with the privilege against self-incrimination in other proceedings. The CDPP noted that subsection 128(10) of the Evidence Bill replicates the current subsection 128(8), in accordance with the CDPP's advice not to amend subsection 128(8) and, instead, to 'rely upon the very clear authority of *Cornwell* [*v The Queen* [2007] HCA 12]'."

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10. The reason for having proper rules of evidence

The Australian Law Reform Commission had this to say on the reasons for having proper rules of evidence:[11]

> "While much has been written in the past about the content of the laws of evidence, little has been written about the purposes that they should serve. The report discusses the competing policy objectives and sets out the policy framework that has been adopted. Pre-eminence is given to the factfinding task of the courts. The credibility of the trial system ultimately depends on its performance in this area. So the proposals are directed primarily to enabling the parties to produce the probative evidence that is available to them. Departures from this objective require justification - for example, balancing fairness, considerations of cost and time.
>
> The different nature and objectives of the civil and criminal trial have been taken into account. Both are adversary systems, but the former is a system for resolving disputes and the latter is an accusatorial system in which the State accuses the defendant of breaking the law. Individual liberty and civil liberties are at stake in criminal trials. Although issues equal to or approaching the seriousness of those raised in criminal proceedings are raised at times in civil proceedings - for example, questions of fraud, bankruptcy, divorce and custody - the differences between the essential nature and purposes of civil and criminal proceedings still apply whatever the subject matter of the particular proceedings. A traditional concern of the criminal trial system has been to minimise the risk of wrongful conviction. This is reflected in existing law where different rules apply to the prosecution and the defence. In the light of these considerations, a more stringent approach has been taken to the admission of evidence against an accused person (as distinct from admission for the accused's benefit). The distinction between the prosecution and the accused has also been recognised in other areas (for example, the compellability of the accused, cross-examination of the accused, unsworn evidence by the accused, evidence of prior conduct and character). The effect the proposed reforms will have on the balance between prosecution and defence in criminal trials, has been borne in mind at all times."

The rationale for the Commonwealth Evidence Act 1995 was expressed by the Commission in the following terms:

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[11] Australian Law Reform Commission Report ALRC38

> "The legislation sets out the rules to control the admissibility of evidence. The primary rule is that if evidence is relevant, directly or indirectly to an issue in a case, it is admissible unless otherwise excluded. If it is not relevant, it is inadmissible. The legislation defines relevant evidence as evidence which, if it were accepted, could rationally affect the assessment of the probability of the existence of a fact in issue. It also articulates the discretion inherent in the different definitions of relevance presently used by including a residuary discretion to exclude evidence where its probative value is outweighed by the disadvantages of its admission - for example, time, cost, risk of confusion etc (the approach taken in the US Federal Rules.) The legislation sets out those other rules of admissibility which will operate to exclude evidence which is relevant to the issues in a case. They include, in criminal trials, the common law discretion to exclude prosecution evidence where its prejudicial effect outweighs its probative value is retained. The proposals build upon but rationalise and reform existing law."

As regards hearsay evidence, the Commission had this to say:

> "Hearsay evidence should not be admitted against an accused person unless it is the best evidence that is available and it can be shown to have reasonable guarantees of reliability. On the other hand, an accused should be allowed to lead hearsay when it is the best evidence he has available to him. So, where the maker of the statement is not available, the hearsay rule should not exclude firsthand hearsay led by the prosecution on notice provided it satisfies specified guarantees of reliability. The rule should not exclude it when led by the accused if notice is given. Where the maker is available, he or she must be called and only statements made at or shortly after the relevant events should be admitted.
>
> As to more remote hearsay, specific categories of evidence should be admissible notwithstanding the rule on the basis of their reliability or necessity, or on both grounds. Categories include government and commercial records, reputation as to family relationships and public rights, telecommunications, commercial labels and tags and evidence in interlocutory proceedings. The rules relating to hearsay evidence and all other rules of admissibility are subject in both civil and criminal proceedings to the abovementioned exclusionary discretions which will enable the court to exclude evidence after comparing the probative value of the evidence and the disadvantages of receiving it."

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11. Recommendation

The NSW Council for Civil Liberties recommends that the rules for admissibility for foreign evidence be consistent with the rules for admissibility with local evidence.

To this end, we recommend that the Bill be amended as set out in Annexure A.

"A"

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Schedule 1—Amendments

Part 1—Amendments

Foreign Evidence Act 1994

1 Subsection 3(1)

Insert:

business has a meaning affected by clause 1 of Part 2 of the Dictionary in the *Evidence Act 1995*.

2 Subsection 3(1)

Insert:

business record means a document that:

(a) is or forms part of the records belonging to or kept by a person, body or organisation in the course of, or for the purposes of, a business; or

(b) at any time was or formed part of such a record.

3 Subsection 3(1)

Insert:

proceeds of crime law means the *Proceeds of Crime Act 2002* or the *Proceeds of Crime Act 1987*.

4 Subsection 3(1) (paragraph (a) of the definition of *related civil proceeding*)

Omit "the *Proceeds of Crime Act 2002* or the *Proceeds of Crime Act 1987*", substitute "a proceeds of crime law".

5 Paragraph 20(1)(c)

Omit "the *Proceeds of Crime Act 2002* in relation to a designated offence", substitute "a proceeds of crime law".

6 At the end of subsection 20(2)

Add:

; or (c) a proceeding under a law that is a corresponding law within the meaning of a proceeds of crime law.

7 After paragraph 22(1)(a)

Insert:

(aa) under an obligation to tell the truth imposed, whether expressly or by implication, by or under a law of the foreign country concerned; or

8 At the end of section 22

Add:

(3) It is presumed (unless evidence sufficient to raise doubt is adduced to the contrary) that the testimony complies with subsections (1) and (2).

9 Subsection 23(1)

Omit "an audio or video tape", substitute "a tape, disk or other device from which sounds or images are capable of being reproduced".

10 Subsection 24(1)

Omit "subsection (2)", substitute "this section".

11 Subsection 24(2)

Repeal the subsection, substitute:

(2) The foreign material is not to be adduced as evidence if it appears to the court's satisfaction at the hearing of the proceeding that the person who gave the testimony concerned is in Australia and is able to attend the hearing.

(3) Foreign material may be adduced as evidence and used even if it is not admissible in the foreign country to which the request referred to in section 21 was made or the place where proceedings are instituted.

(43) ~~If t~~The foreign material ~~does not appear to consist of a business record, the foreign material~~ is not to be adduced as evidence if the evidence would not have been admissible in accordance with the Commonwealth Evidence Act 1995 had it been adduced from the

person who gave the testimony concerned at the hearing of the proceeding

(5) In addition to the requirements of (43) ~~I~~if the foreign material appears to consist of a business record, the business record is not to be adduced as evidence if:

(a) the court considers that the business record is not reliable or probative; or

(b) the business record is privileged from production in the proceeding.

(6) To avoid doubt, if foreign material is adduced in a proceeding in accordance with this Division, the foreign material is admissible in the proceeding.

(7) Subsection (6) has effect despite any ~~Commonwealth,~~ State or Territory law about evidence.

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12 After section 24

Insert:

24A Discretion to limit use of foreign material

In addition to the discretions conferred and duties imposed on a court to exclude or limit the use of evidence constituted by foreign material (including s135, 136, 137 and 138 of the Commonwealth Evidence Act 1995) ~~T~~the court may limit the use to be made of foreign material if there is a danger that a particular use of the foreign material might be unfairly prejudicial to a party to the proceeding concerned.

13 Subsection 26(1)

Omit "specified foreign material was", substitute "specified documents or things were".

Note: The heading to section 26 is altered by omitting "**foreign material**" and substituting "**requests made to foreign countries**".

14 Subsection 26(2)