Law Council
OF AUSTRALIA

Foreign Evidence Amendment Bill 2008

Senate Committee on Legal and Constitutional Affairs

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Table of Contents

Introduction

The Law Council of Australia is grateful for the opportunity to make a submission to the Senate Committee on Legal and Constitutional Affairs ('the Committee') in respect of the *Foreign Evidence Amendment Bill 2008* (Cth) ('the Bill').

If enacted, the Bill would substantially alter the law on admissibility of foreign testimony and foreign business records in Australian criminal and related civil proceedings.

The Law Council first became aware of the Bill upon its introduction into the House of Representatives on 3 December 2008.

The Bill came to the attention of the Law Council Criminal Law Liaison Committee which identified a number of concerns with the Bill. These concerns can be summarised as follows:

- inadequate process of consultation and review;
- the displacement of established principles of admissibility in respect of the admission of foreign material that appears to consist of a business record;
- the introduction of a presumption that foreign testimony complies with the requirements in section 22; and
- the retrospective operation of proposed subsections 22(3) and 24(4).

The nature of these concerns is outlined in the following submission.

Key Features of the Foreign Evidence Amendment Bill 2008

Adducing Foreign Evidence under the existing provisions of the Foreign *Evidence Act 1994* (Cth).

Part 3 of the *Foreign Evidence Act 1994* (Cth) ('the Act') concerns the use of 'foreign material'[1] as evidence in criminal and related civil proceedings (including proceeds of crime proceedings).

Section 22 of the Act outlines the requirements for adducing foreign testimony in Australian courts. It requires that the testimony must have been taken on oath or affirmation or under such caution or admonition as would be accepted, by courts in the foreign country concerned. The testimony must also have been signed or certified by a judge, magistrate or officer in the particular foreign country.

Pursuant to section 23 the testimony need not be in the form of an affidavit or a transcript of a court proceeding and may be reduced to writing or audio or video taped.

Section 24 of the Act permits foreign material to be adduced in Australian proceedings to which the Act applies. However, subsection 24(2) provides that 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; or
- the evidence would not have been admissible had it been adduced from the person at the hearing.

Subsection 25(1) provides the court with discretion to direct that foreign material not be adduced as evidence if it appears to the court's satisfaction that, having regard to the interests of the parties to the proceeding, justice would be better served if the foreign material were not adduced as evidence.[2] Subsection 25(2) lists a range of matters the court must take into account in deciding whether to exercise this discretion, including: the extent to which the foreign material provides evidence that would not otherwise be available; the probative value of the foreign material; and whether the exclusion of the foreign material would unfairly prejudice any party to the proceedings.

These provisions generally preserve the application of existing Australian laws with respect to business records.

Rationale and purpose of the Foreign Evidence Amendment Bill

The primary purpose of the Bill is to streamline the process for adducing foreign material that appears to consist of a business record.[3]

If enacted, the amendments proposed in the Bill would:

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[1] The term 'foreign material' is defined to mean the testimony of a person that was obtained as a result of a request made by or behalf of the Attorney-General to a foreign country for the testimony of a person, and any exhibit annexed to such testimony. See *Foreign Evidence Act 1994* (Cth) ss3, 21 and 22. Sections 10(1) and 12(1) of the *Mutual Assistance in Criminal Matters Act 1987* (Cth) empower the Attorney-General to request the appropriate authority of a foreign country to arrange for the taking of evidence or the production of a document or article for the proposes of a proceeding or investigation relating to a criminal matter in Australia, and to arrange for such evidence to be sent to Australia.

[2] Section 25A excludes the operation of section 25 for certain criminal proceedings, such as proceedings under the *Proceeds of Crime Act 2002* (Cth) or for 'designated offences'.

[3] Explanatory Memorandum to the *Foreign Evidence Amendment Bill 2008* p.1.

- provide an additional optional requirement in relation to foreign testimony that also it has been taken under an obligation to tell the truth imposed, whether expressly or impliedly, by or under a law of the foreign country (the existing requirements are for it to have been taken on oath, affirmation or under caution or admonition accepted by the foreign country for the purpose of testimony in its courts);

- create a presumption that the requirements as to the form of the foreign testimony have been met, unless evidence sufficient to raise a doubt is adduced to the contrary;

- provide that foreign material that appears to consist of a business record may be adduced unless the court considers the business record is not reliable, probative, or is privileged;

- give the court discretion to limit the use that may be made of foreign evidence, where there is a danger that a particular use of the foreign evidence may prejudice a party.

During the Bill's Second Reading Speech, the Attorney-General said that the current provisions in Part 3 are inadequate to meet the special evidentiary challenges associated with obtaining and using evidence from foreign countries with different systems of criminal investigation and procedural law, particularly where the foreign material is a business record. [4]

It was said that as the Act currently requires that business records must comply with the rules of evidence that apply in the jurisdiction in which the proceedings are being heard, Australian authorities experience considerable difficulties in obtaining business records from foreign countries in a form that complies with these admissibility requirements. As a result, reliable evidence obtained through mutual assistance may not be able to be admitted into evidence in court in Australia.[5]

When the Bill was debated in the House of Representatives on 5 February 2009, Members of the House expressed the view that the proposed amendments were necessary to ensure the successful prosecution of a number of cases arising from Operation Wickenby.[6] It was said that the current Act makes it difficult to gain access to foreign business records, which are frequently the central pieces of evidence in cases where tax has been evaded through the transfer of money to other countries or where money has been earned through business activity in another country. It was contended that if the Bill was not passed in a timely manner there is a risk that some of these cases will be put at risk.[7]

The Law Council would be concerned if the primary motivation for introducing the proposed amendments was to overcome certain practical inconveniences arising from Operation Wickenby. As will be discussed further later in this submission, introducing a regime that departs from established principles of evidence law is not a justifiable response to investigative difficulties experienced in one, albeit high profile, investigation.

The Proposed Amendments – Foreign Evidence Amendment Bill 2008

The Bill inserts a definition of 'business record' into the Act, based on that contained in the UEL. Under the Bill, 'business record' is defined to mean 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.

[4] House of Representatives, Parliamentary Debates, 3 December 2008, Hon Robert McClelland.
[5] House of Representatives, Parliamentary Debates, 3 December 2008, Hon Robert McClelland.
[6] House of Representatives, Parliamentary Debates, 4 February 2009, Hon Dr Kelly, Hon Mr Dreyfus, Hon Mr Mayes, at pp. 5-14.
[7] House of Representatives, Parliamentary Debates, 4 February 2009, Hon Dr Kelly, Hon Mr Dreyfus, Hon Mr Mayes, at pp. 5-14.

The Bill amends section 22 of the Act by providing that testimony which is obtained overseas can be admitted in a domestic proceeding provided that it is obtained and received in circumstances where the person giving the testimony is doing so under a legal obligation to tell the truth. This requirement is an additional option to the requirements for a formal oath or affirmation or caution or admonition to have been given to a person before the testimony is provided. Proposed subsection 22(3) provides for a presumption that the testimony obtained overseas was obtained in the above circumstances unless there is evidence to the contrary.

The Bill also amends section 24 of the Act by introducing provisions directed specifically to the admission of foreign business records. Proposed subsection 24(4) provides:

> *(4) If the foreign material appears to consist of a business record, the business record is not to be adduced as evidence if:*
>
> *(c) the court considers that the business record is not reliable or probative; or*
>
> *(d) the business record is privileged from production in the proceeding.*

The Bill also introduces subsection 24(5) which provides that, in order to remove doubt, if foreign material is *adduced* in a proceeding, it is *admissible* in the proceeding. Proposed subsection 24(6) further provides that subsection 24(5) has effect despite any Commonwealth, State or Territory Law about evidence.

The Bill also inserts the following new section 24A into the Act:

> *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.*

Clauses 15 and 16 of the Bill provide that the amendments made to section 22 relating to foreign testimony and to section 24 relating to foreign material apply in relation to testimony taken or foreign material obtained *before or after* the commencement of the Bill where that evidence is adduced after the commencement of the Bill.

Law Council Concerns

Inadequate process of consultation and review

The Law Council is concerned that the proposed amendments, particularly those relating to evidence of foreign business records, make very significant changes to the rules of evidence applied in courts.

In 2004 and 2005 the Australian Law Reform Commission (ALRC), along with the NSW Law Reform Commission and the Victorian Law Reform Commission, engaged in an extensive review of the Uniform Evidence Law (UEL).[8] That legislation contains comprehensive provisions dealing with the admissibility of business records. Submissions were made to the Commissions by a large number of bodies, including the Commonwealth Director of Public Prosecutions. No submission appears to have been made that the business records provisions in the UEL needed to be amended to deal more effectively with foreign evidence.

In that regard, it should be noted that the UEL does in fact make allowance for the difficulties with adducing foreign evidence. For example, s 48(4) provides:

> *(4) A party may adduce evidence of the contents of a document in question that is not available to the party, or the existence and contents of which are not in issue in the proceeding, by:*
>
> > *(a) tendering a document that is a copy of, or an extract from or summary of, the document in question; or*
> >
> > *(b) adducing from a witness evidence of the contents of the document in question.*

The definition of "unavailable document" in the UEL includes "(e) it is not in the possession or under the control of the party and … it cannot be obtained by any judicial procedure of the court". Section 49 provides for special procedures where copies of "a document that is in a foreign country" are relied upon. Accordingly, there is no reason why a submission could not have been made to the Commissions proposing special rules for foreign business records.

After extensive review, the Commissions concluded that the business records provisions in the UEL were working well and should not be amended.[9] The current proposed amendments are of such significance that a reference on the issue to the ALRC would be appropriate.

Displacement of established principles of admissibility

The Law Council is concerned that the Bill would affect the admissibility of foreign material that appears to consist of business records by introducing a procedure for adducing such material that departs from established principles of evidence law.

Laws governing the admissibility of evidence are currently contained in statutes in each Australian jurisdiction.[10] If the Bill is enacted, the current statutory and common law rules of evidence on admissibility of business records will no longer apply to foreign material that appears to consist of a business record.

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[8] ALRC Report 102 *Uniform Evidence Law* (December 2005).
[9] ALRC Report 102 *Uniform Evidence Law* (December 2005) para 8.157.
[10] *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW); *Evidence Act 2001* (Tas); *Evidence Act 1977* (Qld); *Evidence Act 2004* (NT); *Evidence Act 1929* (SA); *Evidence Act 1958* (Vic); *Evidence Act 1906* (WA).

Scope and meaning of the phrase 'foreign material that appears to consist of a business record'

As noted above, the Bill inserts a definition of business records into the Act, which is based on the definition used in the UEL. The proposed definition is relatively broad in scope, including documents that form 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. However, proposed subsection 24(4) provides:

> *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. (emphasis added)*

Unlike the UEL, which contain provisions that assist the court in determining whether a document may or may not consist of a business record, the Bill provides the court with no such assistance, nor does it include a requirement of reasonableness. This makes it difficult to ascertain the limits of what can be taken to be a business record.

For example, the 'business records rule' in section 69 of the UEL focuses on the representations made in the business record, and requires an assessment of the quality of knowledge of the person who made those representations. This rule recognises that a business record, being hearsay, cannot be tested by cross examination when its maker is not called as a witness. No such assessment is required by the proposed amendments.

Further, the proposed definition of 'business record' provides only limited guidance as to the potential scope of foreign material to which the proposed amendments to section 24 apply.

This amendment raises the concern that a wide range of foreign material, including material that does not in fact fit the broad definition of business records will be able to be adduced as evidence. The Law Council queries the necessity for including the phase 'appears to consist of' in subsection 24(4), given both the broad definition of 'business record' and the 'streamlined' procedure for adducing such material. The use of such an ambiguous term further adds to the barriers faced by a party seeking to challenge to admission of foreign material, and further dilutes the principles of evidence law designed to protect against the use of material that is unreliable, irrelevant or unfairly prejudicial to the defendant.

An alternative option would be for this legislation to incorporate a provision such as sectin 183 in the UEL:

> *If a question arises about the application of a provision of this Act in relation to a document or thing, the court may:*
>
> *(a) examine the document or thing; and*
>
> *(b) draw any reasonable inferences from it as well as from other matters from which inferences may properly be drawn.*

Foreign Business Records Will Become Prima Facie Admissible

Under the current provisions of the Act, in order for foreign material to be adduced in Australian courts, it must comply with the rules of admissibility operating in the relevant Australian jurisdiction or jurisdictions.[11]

[11] See *Foreign Evidence Act 1994* (Cth) s24(2)(b).

Proposed subsection 24(4) would alter this position by distinguishing foreign material that appears to consist of a business record from other forms of foreign material, and by providing that if the foreign material appears to consist of a business record, the business record is not to be adduced if:[12]

- the court considers that the business record is not reliable or probative; or
- the business record is privileged from production in the proceedings.

The effect of this amendment is to provide that foreign material that appears to consist of a business records will be *prima facie* admissible in Australian proceedings, unless the court is satisfied that the foreign material is not probative, not reliable or for some reason are a privileged document.

This amendment effectively places the burden on the party against whom the records are tendered to resist admissibility. Under the proposed subsection 24(4), in order to challenge the record as evidence, a party to the proceedings must either:

- be able to present argument or further material to impugn the reliability of the business record;
- establish that the business record could not rationally affect the assessment of the probability of the existence of a fact in issue in the proceeding; or
- establish a claim for privilege.

These requirements are in stark contrast to the established principles applying to the use of all other business records, which are based on the general prohibition of the use of hearsay evidence, and the requirement that the tendering party should bear the burden of establishing that the evidence constitutes an exception to that rule (see below).

By reversing the onus of demonstrating admissibility in relation to foreign business records, the proposed amendments to section 24 provide a much broader ambit for adducing foreign business records in domestic proceedings when compared to the existing provisions of the Act.

No good reason for shifting the onus in this way has been identified. The general principle adopted in the UEL is that the party adducing evidence bears the burden of establishing the factual requirements for admissibility. This reflects the practical reality that the party in possession of the evidence is usually in a better position to address those factual issues. That is certainly true when the prosecution adduces evidence of foreign business records. The prosecution will have the record and will usually have greater resources than the defence. It will be very difficult for the defence to demonstrate that an apparent business record is unreliable on the face of the document and the defence will confront great hurdles in obtaining other evidence to establish lack of reliability.

Displacement of General Exclusionary Rules

Proposed subsections 24(5) and (6) provide:

> *(5) To avoid doubt, if foreign material is adduced in a proceeding in accordance with this Division, the foreign material is admissible in the proceeding.*
>
> *(6) Subsection (5) has effect despite any Commonwealth, State or Territory law about evidence.*

These subsections give effect to the rationale behind the amendments as outlined in the Second Reading Speech and the parliamentary debates, namely that the Bill is designed to establish a Code for dealing with foreign evidence that departs from the rules of evidence currently operating in the various Australian jurisdictions. They explicitly preclude the operation of Commonwealth, State or Territory

[12] *Foreign Evidence Amendment Bill 2008* Clause 11.

laws in relation to adducing foreign material that appears to consist of a business record in domestic proceedings. This is perhaps the most concerning of the proposed changes.

In the UEL there is a specific rule concerning 'hearsay evidence', where a witness gives evidence as to the out of court assertion of another person who is not called as a witness. In general, hearsay evidence is inadmissible if it is sought to be used to prove the truth of the fact asserted. There are various rationales as to the basis for the rule. These include the fact that the evidence may be unreliable. However, an even more important rationale is the lack of opportunity to cross-examine the witness on the fact asserted.

There are a range of exceptions to the rule concerning hearsay evidence in the UEL, including an exception for business records (s 69). The ALRC has explained that hearsay evidence should only be admitted where it is the best evidence available and it is shown to have reasonable guarantees of reliability.[13] For example, under the UEL, the hearsay rule does not apply to the business record (so far as it contains a representation) if the representation was made: [14]

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

Furthermore, a representation in a business record will not be admissible under the hearsay exception

> *if the representation:*
>
> *(a) was prepared or obtained for the purpose of conducting, or for or in contemplation of or in connection with, an Australian or overseas proceeding; or*
>
> *(b) was made in connection with an investigation relating or leading to a criminal proceeding.*

The ALRC has recently affirmed the importance of the latter provision, pointing out that, without it, "a note deliberately written in a police officer's notebook with the intention of implicating a person in alleged criminal activities could be admissible as evidence of the fact asserted by the note".[15] Thus, "fabricated evidence could be admissible as evidence of the truth of the representation made, even though the maker of the representation might not be available for cross-examination". The ALRC added that, "unless there were clear indications that the representation was a fabrication or unreliable, the evidence could not be excluded" under other provisions in the UEL.

These principles endeavour to strike an appropriate balance between ensuring that reliable, relevant and probative evidence is adduced and protecting the rights of defendants to test evidence against them.

The proposed amendments will mean that the courts will be unable to draw upon the established rules of evidence to determine if the evidence is accurate and reliable. There is no requirement that a representation contained in foreign business record be made by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact, as is required in the context of domestic business records. There is no requirement that the representation was not made in connection with an investigation relating or leading to a criminal proceeding.

Further, quite apart from the non-application of the hearsay exclusionary rule, almost all the other exclusionary rules in the UEL are displaced. Proposed subsections 24(5) and 24(6) make it clear that foreign material which meets the requirements of subsection 24(4) "is admissible in the proceeding" notwithstanding any provision in the UEL or other principles of evidence law.

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[13] ALRC 102, paras 7.10 – 7.7.12.
[14] *Evidence Act 1995* (Cth) s69.
[15] ALRC 102, para 8.151.

This means that even if the foreign material contains:

- opinion evidence that would be excluded under section 76 of the *Evidence Act 1995* (Cth);
- tendency evidence that would be excluded under sections 97 or 101;
- identification evidence that would be excluded under sections 114 or 115;
- an admission that would be excluded under sections 84, 85 or s90; or
- unlawfully or improperly obtained evidence that would be excluded under section 138;

the foreign material may still be admitted, provided it meets the requirements of subsection 24(4).

The Law Council can see no justification whatsoever for this significant departure from established principles of evidence law. None has been advanced to explain this outcome.

Some examples of the significance of this displacement may be given:

- An apparent foreign business record contains an expression of opinion regarding an issue that would normally require expertise to be established under section 79 UEL. Since the exclusionary rule relating to opinion evidence in section 76 UEL does not apply, there would be no obligation on the party adducing the evidence to show that the person who made the representation possessed the necessary expertise.
- An apparent foreign business record contains an allegation of the accused committing a criminal offence that is similar to an offence with which he or she is charged in Australia. Since the exclusionary rule relating to tendency evidence in section 97 and section 101 UEL does not apply, this evidence would be admissible unless the court exercised a discretion to exclude it.
- An apparent foreign business record contains an assertion by a person identifying the accused as having done some act. Since the exclusionary rules relating to identification evidence in section 114 and section 115 UEL do not apply, this evidence would be admissible unless the court was persuaded the identification was "not reliable" or exercised a discretion to exclude it.
- An apparent foreign business record contains a confession by the accused to commission of a crime. The confession was obtained by torture, although there are some reasons to believe that it is reliable. Since the exclusionary rule relating to "admissions influenced by violence and certain other conduct" in section 84 UEL does not apply, this evidence would almost certainly be admissible. The gross impropriety of the methods used to obtain the evidence would not be a basis for discretionary exclusion.
- An apparent foreign business record contains evidence that has been unlawfully obtained. Since the exclusionary discretion relating to "improperly or illegally obtained evidence" in section 138 UEL does not apply, this evidence would almost certainly be admissible. The unlawfulness of the methods used to obtain the evidence would not be a basis for discretionary exclusion.

The Law Council appreciates that the collection of foreign business records is likely to be a complex and lengthy process, particularly where multiple records are required from multiple countries to be used in multiple Australian jurisdictions. Like many law enforcement and investigative authorities, the Law Council supports the adoption of uniform evidence laws across all Australian jurisdictions to improve efficiency and consistency for the collection and admission of all forms of evidence, including business records.

However, the complexities and practical inconveniences arising from the collection of foreign business records and the delay this may cause for criminal proceedings in Australia do not justify the introduction of a regime that departs from the principles that have been developed in Australian to deal with the use of business records as evidence.

The Law Council is of the view that the principles currently governing the admissibility of foreign business records should not be abandoned in favour of a 'streamlined procedure', particularly if such a procedure is proposed in order to overcome suggested practical difficulties faced in the context of a single investigation.

Such a radical move away from the rules of admissibility established in the UEL requires a demonstration of the clearest necessity. Given the flexible provisions of the UEL and the possibility of receiving evidence from a witness overseas using audio-visual technology, the Law Council is not persuaded that the current rules present a serious impediment to successful prosecutions. Certainly, such an impediment has not been demonstrated.

Admission of foreign testimony

Pursuant to the current provisions of the Act, in order for foreign testimony to be adduced in Australian courts, it must have been taken on oath or affirmation or under such caution or admonition as would be accepted, by courts in the foreign country concerned. The testimony must also have been signed or certified by a judge, magistrate or officer in the particular foreign country.

The Bill seeks to change these requirements by amending section 22 as follows:

> *(1) The testimony must have been taken:*
>
> *(a) on oath or affirmation; or*
>
> *(aa) under an obligation to tell the truth imposed, whether expressly or by implication, by or under a law of the foreign country concerned.*
>
> *(b) under such caution or admonition as would be accepted, by courts in the foreign country concerned, for the purposes of giving testimony in proceedings before those courts.*
>
> *(2) The testimony must purport to be signed or certified by a judge, magistrate or officer in or of the foreign country to which the request was made.*
>
> *(3) It is presumed (unless evidence sufficient to raise doubt is adduced to the contrary) that the testimony complies with subsection (1) and (2). (proposed amendments underlined).*

If passed, these amendments will have the effect of presuming that all testimony obtained overseas can be adduced in Australian courts, unless the party resisting the admission of the testimony raises a doubt that the testimony fails to comply with subsections 22(1) and (2).

These amendments stand in stark contrast to the principles governing testimony of witnesses in domestic proceedings.

At common law, witnesses must give evidence under oath.[16] In all Australian jurisdictions, legislation provides that evidence must be given under oath or affirmation, unless permitted to be unsworn. For example, section 21 of the Uniform Evidence Act provides:

> *A witness in a proceeding must either take an oath, or make an affirmation, before giving evidence.*

[16] *Brunsgard v Jennings* [1974] WAR 36 at 38; *R v Brown* [1977] Qd R 220 per Williams J; *R v Williams* [1989] 1 Qd R 601 at 602.

Pursuant to these principles, the court must be satisfied that the witness is providing testimony under oath or affirmation (unless providing unsworn evidence) before the evidence may be admitted.

In contrast, the proposed amendments remove the obligation for the party seeking to adduce the evidence to demonstrate that it was provided under oath or affirmation or other legal obligation to tell the truth or caution or admonition. The amended provisions *presume* that all foreign testimony meets these requirements and place the onus on the party resisting the admission of the testimony to demonstrate the court that the testimony did not comply with section 22.

Demonstrating that the testimony was not taken under oath or affirmation is likely to be a particularly onerous task for a defendant, particularly in the context of foreign testimony.

The Law Council is concerned by this significant departure from established principles of evidence law.

While there may be some identifiable need to allow for some flexibility as to the type of oath or affirmation or other caution or admonition or obligation under which foreign testimony is made, this would not appear to justify the insertion of a broad based presumption that all foreign testimony complies with these requirements.

The foreign countries in which such testimony is taken may have very different legal systems and procedures to our own that significantly depart from the principles we regard as fundamental to the administration of justice. This gives rise to the risk that in certain circumstances, foreign testimony may have been taken in accordance with procedures that would fall far short of Australian requirements, including the requirement that testimony be taken under some legal obligation to tell the truth. In such circumstances, it should not be up to the defendant or the party resiting the admission of the evidence to demonstrate the lack of compliance with these fundamental procedures. That obligation properly rests with the party seeking to adduce the evidence, most likely the State, which enjoys access to the witnesses providing the evidence and knowledge as to the procedures under which the testimony was taken.

The Law Council also queries the necessarily of the insertion of proposed section 22(3), in light of the flexibility already provided by subsections (1)(b) and that proposed by subparagraph 22(1)(aa).

These subparagraphs provide that foreign testimony can be admitted provided that the testimony was taken under an obligation to tell the truth, even if that obligation was only implied, as is proposed by subparagraph 22(1)(aa). This requirement appears unlikely to prove overly onerous for Australian investigation authorities to meet.

As noted above in respect of the admission of foreign business records, the Law Council is concerned that these amendments, which depart from the established principles of evidence law, have been introduced in order to overcome inconveniences or practical difficulties faced in a particular investigation. Such an approach to laws which have a critical bearing on the fair trial rights of individuals undermines the stability and certainty of established criminal principles by permitting departure from such principles at the convenience of the executive arm of Government.

Retrospective operation of proposed subsections 22(2) and 24(4)

Part 2 of the Bill deals with its application and transitional provisions.

Clauses 15-17 of the Bill provide that the amendments made to section 22 relating to foreign testimony and to section 24 relating to foreign material apply in relation to testimony taken or foreign material obtained *before or after* the commencement of the Bill where that evidence is adduced after the commencement of the Bill.

In other words, if enacted, these amendments would have retrospective effect: they would apply to testimony taken and material obtained *before* the Bill was enacted.

The Law Council is strongly opposed to the enactment of laws with retrospective effect. Such laws offend against basic rule of law principles, particularly when the law affects criminal proceedings or penalties.[17]

The retrospective operation of the proposed amendments is particularly problematic if one accepts that a primary rationale behind the Bill is to address operational difficulties or inconveniences faced in a particular investigation. To make significant changes to evidence law for the purpose of a single investigation is troublesome enough, let alone where such changes operate retrospectively, potentially making admissible evidence that, at the time is was taken or obtained, did not meet the requirements of the *Foreign Evidence Act*. This type of remedial legislating effectively absolves investigative authorities of their obligations to conduct criminal investigations in accordance with the law.

The Law Council recommends that if, contrary to the views of the Law Council, the amendments proposed to sections 22 and 24 are adopted that they apply only in relation to testimony or material obtained *after* the commencement of the Bill.

[17] See for example *University of Wollongong v Metwally* (1984) 158 CLR 447 at 47.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.