Law Council
OF AUSTRALIA

Mr Peter Hallahan
Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100, Parliament House Canberra ACT 2600

Dear Mr Hallahan,

INQUIRY INTO THE EVIDENCE AMENDMENT BILL 2008

The Law Council is grateful to the Committee for the opportunity to contribute to the current Inquiry.

The *Evidence Amendment Bill 2008* ("the Bill") amends the *Evidence Act 1995* to address uncertainties, problems and shortcomings in the application of the Act which have emerged since its enactment over a decade ago.

As noted in the Explanatory Memorandum, the Bill is the product of an extensive consultation and review process.

The Bill reflects the contents of a model Bill approved by the Standing Committee of Attorneys-General (SCAG) in July last year.

The provisions of the SCAG model Bill are in turn a product of a joint Inquiry into the uniform Evidence Acts which was conducted by the Australian Law Reform Commission, the NSW Law Reform Commission and the Victorian Law Reform Commission ("the Commissions") in 2004 - 2005.

The provisions of the SCAG model Bill are generally faithful to the Commissions' recommendations. While the provisions of the current Bill are generally faithful to the provisions of the SCAG model Bill.[1]

The SCAG model Bill has already been enacted in NSW.

The Law Council had at least two opportunities to provide input into the consultation and review process which has culminated in the introduction of the Commonwealth Bill.

[1]However, as explained in the Second Reading Speech and Explanatory Memorandum, those provisions of the model Bill which implement a general confidential relationships privilege and those which extend client legal privilege and public interest immunity to pre-trial proceedings are not included in the current Bill. Those provisions are currently being considered by Government in the context of formulating its broader response to the December 2007 ALRC Report 107 *Privilege in Perspective*. That Report recommended that a separate Act be created to cover various aspects of the law and procedure governing client legal privilege claims in federal investigations.

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First, the Law Council made a submission in response to the Issues Paper (ALRC IP 28) that was released by the ALRC in December 2004. A copy of that submission is available at: http://www.lawcouncil.asn.au/sublist.html?month=&section=LCA&year=2005

Secondly, the Law Council made a submission in response to the Discussion Paper, (ALRC DP 69), that was jointly produced by all three Commissions in July 2005. A copy of that submission is available at: www.lawcouncil.asn.au/get/submissions/2419368844.pdf

Some of the arguments advanced by the Law Council in those submissions were not adopted by the Commissions in their final report. In fact, several of the Commissions' final recommendations, which are now reflected in the current Bill, were at odds with the position advanced by the Law Council.

For the information of the Committee, Attachment 'A' contains a brief summary of some of the key amendments introduced by the current Bill and the relevant position adopted by the Law Council in relation to each in its submissions to the ALRC.

However, notwithstanding the fact that some of the amendments introduced by the current Bill do not accord with the Law Council's submissions to the ALRC, the Law Council does not object to the passage of the Bill in its current form.

The Law Council recognises that the Bill is the product of a considered and transparent policy process to which interested stakeholders have had the opportunity to contribute.

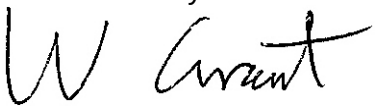
More importantly, the Law Council recognises that the provisions of the model Bill have already been enacted in one jurisdiction and are likely to be introduced in others. Therefore, in the interests of achieving greater uniformity in evidence laws, the Law Council does not wish to urge upon Parliament any departure from the provision of the model Bill.

The Law Council notes, however, that the current Bill does not deal with the extension of the privilege provisions in the *Evidence Act* to preliminary court proceedings. The Government has deferred any consideration of amendments of that nature to a later date. When this matter is considered and addressed by the Government, the Law Council would like the opportunity to provide further input.

To that end, some preliminary comments from the Federal Litigation Section of the Law Council are set out in Attachment 'B'. The comments concern the operation of section 123 of the *Evidence Act.* Unfortunately, time has not allowed for these comments to be considered or endorsed by the Council of the Law Council.

If you have any questions or wish to discuss the Law Council's submission further, please do not hesitate to contact me.

Yours sincerely



Bill Grant
Secretary-General

29 July 2008

Attachment A

Relevant Amendments – with summary of Law Council position as advanced in submissions to the ALRC

1. Competence: Lack of capacity to give evidence

Section 13 of the Evidence Act currently sets out the circumstances in which certain persons may be determined to lack the capacity to give sworn evidence and the circumstances in which those persons may nonetheless be able to give unsworn evidence.

The Bill's digest explains the proposed amendments to that section as follows:

"Item 3 repeals and replaces existing section 13 and sets out a new test for determining competence to give sworn and unsworn evidence. It implements Recommendations 4-1 and 4-2 [of the Commissions' Report].

Proposed section 13 provides that all witnesses must satisfy the test of general competence in subsection 13(1). The revised test provides that a person is not competent to give sworn or unsworn evidence about a fact if the person lacks the capacity to understand, or to give an answer that can be understood, to a question about the fact, and that incapacity cannot be overcome.

Proposed subsection 13(3) provides that a person is not competent to give sworn evidence if he or she does not have the capacity to understand that he or she is under an obligation to give truthful evidence. This is a restatement of existing subsection 13(1).

Proposed subsection 13(5) provides that if a person is not competent to give sworn evidence, then he or she may be able to give unsworn evidence providing the court has told the person:

- *that it is important to tell the truth*
- *that he or she should inform the court if asked a question to which he or she does not know, or cannot remember the answer, and*
- *that he or she should agree to statements believed to be true and should not feel pressured into agreeing with any statements that are believed to be untrue.*

Proposed subsection 13(8) provides that in informing itself of the competence of a witness, the court is entitled to draw on an expert opinion."[1]

Law Council Position

In its response to the Commissions' Discussion Paper issued in 2005, the Law Council indicated its general agreement with the above changes.

In short, the Law Council submitted that:

[1] Bills Digest, *Evidence Amendment Bill 2008*, 18 June 2008, no. 140, 2007–08, page 10.

- The test for competence of a witness, whether sworn or unsworn, should not be commitment to truth but capacity to give evidence;
- The existing test of competence to give sworn evidence should be retained;
- The existing test for competence to give unsworn evidence should be amended;
- It should be made clear that a court may seek expert opinion in informing itself on the competence of a witness.

As such, the Law Council broadly supported the changes as they appear in the Amendment Bill.

However, in discussing the precise terms of the test of competency, the Law Council submission to the ALRC differed slightly from the test now proposed in new section 13(1)(b). The Law Council submitted to the ALRC:

"*The test for competence must centre on the capacity of the witness to understand the questions put and to respond to them.* ***The Law Council agrees that concepts such as rational or intelligible answers import subjective notions which will differ widely. No doubt the same may be said of the notion of "answers which can be understood". Each of these tests depends, at least in part, upon the capacity of the listener to understand the answer and determine whether it is valid.*** *It is important to distinguish here between the test for competence and the weight to be given to evidence. Witnesses often give answers which seem totally illogical, irrational or unbelievable, but that should not result in the witness being declared incompetent. It may result in the court not accepting the evidence.*

A more appropriate test may be whether the response shows that the question is understood by relating to the question asked. This is no doubt part of determining whether a person understands questions put to them. If the answers do not relate to the questions asked then a real issue arises as to whether the witness has understood the question. If that is a general position, then the capacity of the witness to understand becomes an issue. The real test of competence should centre on the person's capacity to communicate, that is to understand and respond. (Emphasis added.)

2. Compellability: Exceptions for 'de facto partners'

In relation to the compellability provisions of the Evidence Act, the Bill proposes to replace the term 'de facto spouse' with the term 'de facto partner'.

It is proposed to insert a new definition of 'de facto partner' into the Dictionary. This definition will clarify the criteria that should be used by the court when determining whether someone is in a de facto relationship for the purposes of the Evidence Act.

The new definition will also clarify that whether the persons in the relationship are different sexes or the same sex is irrelevant to determining whether they are in a de facto relationship.

As a result of these changes, a person who is in a same-sex de facto relationship will be able to object to giving evidence against their partner under section 18 of the *Evidence Act.*

Law Council Position

In its submission to the Commissions' Discussion Paper issued in 2005, the Law Council supported the need to amend the definition of defacto relationship to make it non gender specific.

3. Narrative Form Evidence

Under section 29(2) of the *Evidence Act* as it currently stands, a witness may give evidence in narrative form if:

(a) the party that called the witness has applied to the court for a direction that the witness give evidence in that form; and
(b) the court so directs.

Item 10 of the Bill proposes to replaces existing subsection 29(2) with a new subsection which would allow the court *on its own motion* or on application from the party that called the witness, to direct that a witness give evidence wholly or partly in narrative form, rather than question and answer format.

According to the Explanatory Memorandum, the purpose of the amendment is to "*give the court flexibility to receive the best possible evidence without the need for application by a party.*"[2] It is suggested that the ability to depart from the question and answer format may be particularly useful for witnesses such as children and people with an intellectual disability.

Law Council Position

In its response to the initial ALRC Issues Paper, the Law Council did not agree with the proposal that the court, on its own motion, should be able to direct that a witness may give evidence in narrative form.

In its submission on the Issues Paper, the Law Council stated that, as it remains the adversarial responsibility of the parties to collect and present evidence at trial, the parties should be entitled to retain control over the presentation of oral testimony through the process of examination in chief. The Law Council submitted that to undermine this responsibility by allowing witnesses to testify in narrative form would undermine the adversarial process. The Law Council was of the view that in criminal cases whether defense witnesses testify in narrative form should be a decision that remains in the hands of the parties.

The Law Council also expressed concern that allowing prosecution witnesses to testify in narrative form may result in the prosecution be given too much opportunity under section 38 to successfully seek leave to subsequently cross- examine their own

[2] *Evidence Amendment Bill 2008* Explanatory Memorandum, page 7.

witnesses and thereby admit prior inconsistent statements or use leading questions to adduce favorable evidence.

In its later response to the Discussion Paper, the Law Council supported the proposed amendment to s 29(2) but only to the extent that those amendments might be applied to Aboriginal and Torres Strait Islander witnesses.

4. Improper Questions in cross-examination of witnesses

Under section 41(1) of the *Evidence Act* as it currently stands a court *may* disallow a question put to a witness in cross examination if it is misleading or unduly annoying, harassing, intimidating, offensive, oppressive or repetitive. Section 41(2) provides a non-exhaustive list of the types of factors the court may take into account in deciding if a question is of a type described in section 41(1). Those factors include any relevant condition or characteristic of the witness, including age, personality and education and any mental, intellectual or physical disability to which the witness is or appears to be subject.

Item 13 of the Bill seeks to amend section 41 of the *Evidence Act* so that the section provides that the court *must* disallow improper questions.

The amended section also expands the basis on which a question may be regarded as improper to include any question which:

(a) is misleading or confusing; or
(b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; or
(c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate; or
(d) has no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability).

Further the amended section expands the non-exhaustive list of the types of factors the court may take into account in deciding if a question is of a type described. The expanded list includes the following:

(a) any relevant condition or characteristic of the witness of which the court is, or is made, aware, including age, education, ethnic and cultural background, gender, language background and skills, level of maturity and understanding and personality; and
(b) any mental, intellectual or physical disability of which the court is, or is made, aware and to which the witness is, or appears to be, subject; and
(c) the context in which the question is put, including:
    (i) the nature of the proceeding; and
    (ii) in a criminal proceeding—the nature of the offence to which the proceeding relates; and
    (iii) the relationship (if any) between the witness and any other party to the proceeding.

The amended section clarifies that a question is not a disallowable question merely because:

(a) the question challenges the truthfulness of the witness or the consistency or accuracy of any statement made by the witness; or
(b) the question requires the witness to discuss a subject that could be considered distasteful to, or private by, the witness.

Law Council Position

In its submission to the Commissions' Discussion Paper, the Law Council did not comment on whether the court should have the discretion to, or should be required to, disallow questions of a certain nature. *(In the Commissions' Discussion Paper it was proposed that the court's power to disallow questions under section 41 should remain discretionary except where improper questions were directed at 'vulnerable witnesses', in which case the court should be compelled to disallow the question(s).*[3] *The ALRC and NSWLRC changed their position on this matter in the Final Report – recommending instead that the court should be required to disallow improper questions in all circumstances.)*[4]

The Law Council did, however, push for some additional amendments to this section.

The Law Council submitted that it was appropriate that there be express recognition in the *Evidence Act* of the frequent vulnerability of Aboriginal and Torres Strait witnesses under cross-examination. The Law Council pushed for greater recognition of the particular position of Aboriginal and Torres Strait Islanders in cross-examination than was proposed by the ALRC and that is now proposed by the Bill. The Law Council considered that Aboriginal or Torres Strait Islander identity of the witness ought to be listed amongst the relevant conditions or characteristics of witnesses to be taken into account when considering if a question is improper.

Moreover, the Law Council suggested that consideration should be given to adopting the approach taken to vulnerable witnesses in s.21A of the *Evidence Act 1977* (Qld) which allows the court to make particular orders permitting a witness to testify with a support person present, through closed circuit television or in a closed court where a "special witness" (for instance, a witness under 16 years or a witness suffering from mental or physical impairment) is to give or is giving evidence in any proceeding.

5. The Hearsay Rule – unintended assertions

Section 59 of the *Evidence Act* sets out the general exclusionary hearsay rule:

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

[3] Proposal 5-2 and 5-3, ALRC Discussion Paper 69, *Review of the Uniform Evidence Acts.*
[4] Recommendation 5-2, ALRC Report 102, *Uniform Evidence Law*. Note also that the VLRC differed from the ALRC and the NSWLRC on this point for several reasons – see paragraphs 5.119 – 5.132.

The effect of section 59 is that out of court representations will not fall foul of the hearsay rule where they are relied upon as proof of the existence of a fact that the maker of the representation was not intending to assert or establish through his or her representation.

The example offered by the ALRC is of a child who answers the phone and replies "hello Daddy". It is suggested that, under section 59, this out of court statement could be admitted to prove the fact that the call was from the child's father without breaching the hearsay rule. This is because the child did not intend to assert through his or her statement that his or her father was on the phone. Rather, the child intended to greet his or her father.[5]

Some confusion and disagreement has arisen about how this section ought to be interpreted and implied. In particular there has been considerable debate, in light of the decision of the court in R v Hannes (2000) 158 FLR 359, about how the court should determine whether an assertion was intended or not by a person's out of court representation, direct or implied.

Items 17 and 18 of the Bill propose to amend to section 59 so as to clarify the meaning of 'intention' in that section. The new provision will provide that evidence of a previous representation is not admissible to prove the existence of a fact *that it can be reasonably supposed* that the person intended to assert by the representation. In deciding whether it can be reasonably supposed the person intended to assert a particular fact, the court may have regard to the circumstances in which the representation was made.

The Explanatory Memorandum explains that the new "*test proceeds on the basis that intention may be properly inferred from the external and objective manifestations normally taken to signify intention. Although direct evidence of subjective intention can be considered, investigation or proof of the subjective mindset of the person who made the representation is not required."*[6]

Law Council Position

In its submission to the Commissions' Discussion Paper, the Law Council did not support the creation of an objective test to determine intention. The Law Council submitted that the proposed objective test would not address the problem of uncertainty and lack of clarity in the application of the hearsay rule. The Law Council stated that in practice, it would be very difficult to attempt to apply an objective test to determine whether it was intended or unintended that an out of court representation contained a certain direct or implied assertion.

The Law Council expressed the view that a different approach was necessary. It was suggested that hearsay prohibition should be drafted to cover all out of court assertions, and that any exceptions to the prohibition should be based on the probative value of the evidence sought to be excluded. In other words, in the Law Council's view in criminal proceedings, hearsay should be defined to encompass all out of court assertions, express or implied, intended or unintended and whether made by words or conduct.

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[5] Paragraphs 7.19 – 7.22, ALRC Report 102, *Unifrorm Evidence Law*. At common law, the statement was held by the High Court in *Walton v The Queen* to be hearsay and therefore inadmissible as evidence of the identity of the caller.

[6] *Evidence Amendment Bill 2008* Explanatory Memorandum, page 11.

Where this rule appears to operate so as to exclude probative evidence it should be admitted through an exception to the prohibition, either drafted in specific terms or drafted more generally.

6. The Hearsay Rule – evidence admitted for a non-hearsay purpose

Section 60 of the *Evidence Act* contains an exception to the hearsay rule for evidence that is admitted for a non-hearsay purpose.

Item 22 of the Bill amends section 60 by inserting a subsections (2) and (3).

New sub-section 60(2) of the Evidence Act will confirm that section 60 permits evidence admitted for a non-hearsay purpose to be used to prove the facts asserted in the representation, whether or not the person who made the representation had first-hand knowledge based on something they said, heard or otherwise perceived. (This amendment is in response to the High Court's decision in Lee v The Queen (1998) 195 CLR 594 which suggested that section does not apply to hearsay evidence more remote than first-hand hearsay).

New sub-section 60(3) is intended to ensure that evidence of an admission in criminal proceedings that is not first hand, will be excluded from the scope of section 60.

Law Council Position

In its submission to the Commissions' Discussion Paper, the Law Council opposed this amendment. The Law Council recommended that section 60 be repealed entirely – arguing that evidence that was inadmissible should not become admissible by reason only that the evidence served another unrelated purpose.

In the event that recommendation was not accepted, the Law Council called for section 60 to be amended to apply only to first-hand hearsay.

7. The Opinion Evidence Rule

Section 76(1) of the Evidence Act provides that "evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed."

Section 79 of the *Evidence Act* provides that "if a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge."

Item 38 adds, at the end of section 79, proposed subsection 79(2), which clarifies that the exception to the opinion rule covers expert evidence relating to child behaviour and development, particularly in cases of sexual assault.

to avoid doubt and without limitation to subsection (1), a reference in that subsection to specialised knowledge includes a reference to specialised knowledge of child development and child behaviour (including specialised knowledge of the impact of

sexual abuse on children and their development and behaviour during and following the abuse).

The Explanatory Memorandum explains the need for the amendment as follows:

"Expert opinion evidence on the development and behaviour of children can be relevant to a range of matters in legal proceedings, including testimonial capacity, the credibility of a child witness, the beliefs and perceptions held by a child, and the reasonableness of those beliefs and perceptions. Such evidence can, in certain cases such as child sexual assault matters, be important in assisting the court to assess other evidence or to address misconceived notions about children and their behaviour. However, the [Commissions'] Report found that courts show a continuing reluctance in many cases to admit this type of evidence. This amendment highlights that the exception covers this particular type of expert opinion evidence."[7]

Law Council Position

In its submission to the ALRC Issues Paper and in its submission to the Commissions Discussion Paper, the Law Council expressed the view that the current provisions on opinion evidence are adequate to deal with this category of expert evidence, and that no specific statutory provision encouraging the reception of this type of opinion evidence was either necessary or justified.

8. Admissions in criminal proceedings

Section 85 of the *Evidence Act* is concerned with admissions made by a defendant to investigating authorities and the circumstances in which such admissions may be admissible in evidence.

Item 40 of the Bill seeks to amend s85(1) to clarify that it applies, not just to admissions made "in the course of official questioning", but to admissions made "to or in the presence of, an investigating official who at the time was performing functions in connection with the investigation of the commission, or possible commission, of an offence".

Law Council Position

In its submission to the Commissions' Discussion Paper, the Law Council supported the amendments to s.85. The Law Council was of the opinion that s.85 needed amendment, firstly, to make clear it is concerned with the actual reliability of the admission and, secondly, to make clear that it applies to all conversations between suspect and police, not merely conversations which can be categorized as official questioning.

9. Coincidence Evidence

Section 98 of the Evidence Act sets out the coincidence rule – that is, it sets out the limited circumstances in which evidence that two or more related events occurred may

[7] *Evidence Amendment Bill 2008* Explanatory Memorandum, page 17.

be admissible to prove that, because of the improbability of the events occurring coincidentally, a person did a particular act or had a particular state of mind.

Under section 98 as currently drafted, two or more events are taken to be related events if and only if:

(a) they are substantially and relevantly similar; **and**
(b) the circumstances in which they occurred are substantially similar.

Item 43 repeals the existing section 98 and replaces it with a new section which it is hoped will be easier to read and apply. The new section will apply where the party seeking to adduce the 'coincidence' evidence relies on any similarities in two or more events **or** relies on similarities in the circumstances in which the events occurred, or any similarities in both the events and circumstances in which they occurred.

Law Council Position

The amendment now proposed by the Bill differs from the amendment proposed in the Commissions' Discussion Paper.[8] The Law Council has not previously commented on the formulation of words now proposed.

In its submission to the Commissions Discussion Paper, the Law Council did submit, however, the *Evidence Act* would benefit from the insertion a section which contains a clear exposition of the presumption against admitting evidence of a defendant's prior misconduct.

10. Credibility of Witnesses

The current credibility rule in section 102 of the Evidence Act provides that evidence that is relevant only to a witnesses' credibility is not admissible. This section was interpreted literally by the High Court in *Adam v The Queen* (2001) 207 CLR 96 as meaning that evidence relevant in a proceeding in some way other than to the witness' credibility was not caught by the section (even though if it was inadmissible for that other purpose).

Item 45 of the Bill seeks to inserts a new section 101A into the Act. The effect of section 101A would be to clarify that evidence going to the credibility of a witness, which is

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[8] See Proposal 10-1 of ALRC Discussion Paper 69, *Review of the Uniform Evidence Acts*. A draft section 98 that embodied the ALRC's original proposal was included in Appendix 1 to this Discussion Paper, which read as follows:

"(1) Evidence that 2 or more events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to the similarities in the events and the similarities in the circumstances surrounding them, it is improbable that the events occurred coincidentally unless:

(a) the party adducing the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence; and

(b) the court thinks that the evidence would, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value."

relevant for another purpose but which is inadmissible for that purpose, is credibility evidence and is therefore not admissible pursuant to section 102.

Law Council Position

The Law Council proposed similar amendments to s.102 in its submission to the ALRC Issues Paper, and as such supported the proposed changes in its later submission to the Commissions' Discussion Paper.

11. Privilege against self incrimination

Section 128 of the *Evidence Act* sets out the circumstances in which a witness can object to providing evidence on the basis that it may incriminate him or her. The section also sets out the procedures to be followed by the court when this occurs. This may include requiring the witness to give the evidence but only after issuing him or her with a certificate which prevents that evidence being used against the witness in subsequent proceedings.

Item 63 of the Bill seeks to repeal the current section 128 and replace it with a new section.

Amongst other things the proposed new section would allow a witness to object not only to giving 'particular evidence' but also 'evidence on a particular matter' (This change should allow for a claims of privilege to be dealt with more systematically.)
The new section would also clarify that a certificate issued to a witness has effect despite any challenge, review, quashing or calling into question on any ground of the decision to give, or the validity of, the certificate concerned.

Finally, the new section would clarify that any certificate issued to a defendant under section 128 in a criminal proceeding for an offence can not be relied upon in a proceeding that is a retrial of the defendant for the same offence or a trial of the defendant for an offence arising out of the same facts that gave rise to that offence.

Law Council Position

In its submission to the ALRC discussion paper, the Law Council supported the streamlining of the process outlined in section 128 to allow the court to rule either on a question by question basis or in connection with a particular subject matter as the court deems appropriate.

The Law Council agreed with the ALRC's recommendation that the *Evidence Act* should be amended to clarify that a certificate issued under section 128, can not be relied upon in a retrial for the same offence. However, the Law Council was strongly opposed to extending this exception to a retrial in relation to an "offence arising out of the same circumstances."

12. Amendments relating to client legal privilege – third party communications

Section 118 of the *Evidence Act* prevents the admission of certain confidential communications and documents made for the dominant purpose of a lawyer providing legal advice to the client.

Item 61 of the Bill amends paragraph 118(c) to extend the privilege to confidential documents which may have been prepared by someone other than the client or lawyer (such as an accountant or consultant) for the dominant purpose of the lawyer providing legal advice to the client.

As the Explanatory Memorandum explains – "*this reflects developments in the common law consideration of legal advice privilege as discussed by the Full Federal Court in Pratt Holdings v Commissioner of Taxation (2004) 207 ALR 217.*"[9]

Law Council Position

In its submission to the ALRC Issues Paper, the Law Council supported an amendment of this type. The Law Council expressed the view such third party communications should fall within the scope of the privilege to encourage client's to seek all information required in order to receive proper legal advice.

13. Amendments relating to client legal privilege – waiver

Section 122 of the *Evidence Act* currently provides that client legal privilege is lost by consent or by knowing and voluntary disclosure of the substance of the evidence.

Item 62 of the Bill seeks to amend section 122 to provide that evidence may be adduced where a client or party has acted in a manner inconsistent with the maintenance of the privilege.

As the Explanatory Memorandum explains – "*This amendment ensures that new section 122 is concerned with the behaviour of the holder of the privilege, as opposed to the intention of the holder of the privilege, as has been the case under the current section 122."*[10]

This new section moves the statutory test under the Evidence Act closer to the common law test for loss of privilege set out in Mann v Carnell (1999) 201 CLR 1.

Law Council Position

In its submission to the Commissions' Discussion Paper the Law Council did not comment on this proposed change directly. However, in its submission on the earlier ALRC Issues Paper, the Law Council indicated general support for an amendment which would bring section 122 into closer alignment with the decision in *Mann v Carnell*. From this support for the amended section can be inferred.

[9] *Evidence Amendment Bill 2008* Explanatory Memorandum, page 26.
[10] Ibid.

Specifically, the Law Council submitted as follows:

"*The circumstances in which privilege can be waived has produced much recent litigation. Problems arise when there has been no intentional waiver but the material has been disclosed beyond the relationship of lawyer and client. The Council recognizes that such disclosure may make it inappropriate for the client to be able to prevent tender at subsequent trial. The Council supports the statement of principle in Mann v Carnell (1999) 201 CLR 1 at [29]: 'What brings about the waiver is the inconsistency which the courts, where necessary informed by the consideration of fairness, perceive between the conduct of the client and the maintenance of confidentiality, not some overriding principle of fairness operating at large.' Whilst generally the inconsistent conduct will originate in disclosure of the material in question in some cases it may be actions of the client which do not involve disclosure which make it inappropriate for privilege to be claimed – for example taking proceedings which directly concern the confidential communications in question and which proceedings cannot be satisfactorily resolved unless access to the communications is given to the court. With s 122 based on disclosure by the client there are difficulties in interpreting it to take into account every instance of inconsistent conduct which appears to rise to waiver."*

14. Warnings and directions to the Jury

Section 165 of the *Evidence Act* sets out the types of evidence that may be regarded as unreliable and the warning that may subsequently be given to a jury about that evidence.

Items 71 and 72 amend section 165 and inserts new sections 165A and 165B which deal with warnings in relation to children's evidence and delays in prosecution. These changes clarify that a trial judge is not to give a warning about the reliability of the evidence of a child solely on account of the age of the child. The courts are to treat child witnesses the same as adult witnesses when determining whether a warning is appropriate and are prohibited from suggesting that children as a class are unreliable witnesses or their evidence is inherently less credible.

The amendments also clarify the scope of information to be given to the jury about the forensic disadvantage a defendant may have suffered because of the consequences of delay, and when such information should be given - that is, only if a party applies for it and only if the party has suffered a significant forensic disadvantage because of the consequences of delay.

<u>Law Council Position</u>

In its submission to the Commissions'' Discussion Paper, the Law Council agreed with the amendments relating to warnings for children's evidence.

It was stated that the law of evidence has moved resolutely away from the old technical rules relating to categories of unreliable witnesses and mandatory corroboration warnings towards a careful consideration of the evidence in each case and the factors bearing upon its reliability.

The Law Council's submissions made no mention of warnings relating to forensic disadvantage resulting from delay.

15. Evidence of traditional law and custom exempted from the hearsay and opinion evidence rule.

Items 34 of the Bill seeks to insert a new section 72 into the Evidence Act which would state that the hearsay rule does not apply to evidence of a representation about the existence or non-existence, or the content, of the traditional laws and customs of an Aboriginal or Torres Strait Islander group.

Item 36 of the Bill seeks to insert a new section 78A into the Act which would state that the opinion rule does not apply to evidence of an opinion expressed by a member of an Aboriginal or Torres Strait Islander group about the existence or non-existence, or the content, of the traditional laws and customs of the group.

Item 93 of the Bill seeks to insert the following definition of 'traditional laws and customs" into the Act's Dictionary:

"traditional laws and customs of an Aboriginal or Torres Strait Islander group (including a kinship group) includes any of the traditions, customary laws, customs, observances, practices, knowledge and beliefs of the group."

These amendments are designed to ensure that whether evidence of this type is admitted will depend on relevance and reliability – rather than other considerations such as the qualifications of the witness.

Law Council Position

The Law Council supported, in principle, the proposal of the ALRC to amend the *Evidence Act* to provide an exception to the hearsay and opinion evidence rules for evidence relevant to Aboriginal or Torres Strait Islander traditional laws and customs.

However, in its submission to the Commission's Discussion Paper, the Law Council perceived some difficulty in the proposal's limitation to "traditional" laws and customs. It was submitted that the interpretation of the expression by the Courts would likely limit the benefit of the amendments to those normative rules of Aboriginal and Torres Strait Islander societies which can be demonstrated to have existed since prior to the assertion of sovereignty by the British Crown. The Law Council submitted that a more appropriate approach to providing an exception to the hearsay and opinion evidence rules ought commence with consideration of evidence as to the relevant group's current observance and acknowledgment of traditional laws and customs. This proposal was not expressly adopted in the definition of 'traditional laws and customs' in the Dictionary of the Amendment Bill.

Attachment B

Comments of the Federal Litigation Section of the Law Council of Australia on Section 123 of the *Evidence Act 1995 (Cth)*

Part 3.10 of the *Evidence Act* is concerned with the circumstances in which different types of privilege, including client legal privilege, may be claimed, waived and abrogated in criminal and civil trails.

In its submission to Australian Law Reform Commission (ALRC) Discussion Paper 69 "Review of the Uniform Evidence Acts" the Law Council strongly supported the extension of the provisions of Part 3.10 to pre-trial proceedings.

However, the Law Council did not specifically comment on whether section 123 of the *Evidence Act,* which falls within Part 3.10, should be extended in this way.

Section 123, headed *Loss of Client Legal Privilege*, provides:

> *In a criminal proceeding, this Division does not prevent a defendant from adducing evidence unless it is evidence of:*
>
> *(a) a confidential communication made between an associated defendant and a lawyer acting for that person in connection with the prosecution of that person; or*
>
> *(b) the contents of a confidential document prepared by an associated defendant or by a lawyer acting for that person in connection with the prosecution of that person.*

The effect of this section is that the right of a party to claim client legal privilege is abrogated where evidence is sought to be adduced by an accused in a criminal proceeding, unless the accused is seeking the evidence from a co-accused.

A useful discussion of section 123 is contained in paragraphs 14.148 – 14.169 of the ALRC's Final Report 102, where the ALRC confirmed that section 123 was intended to apply **only** to the adducing of evidence rather than to pre-trial processes, such as subpoenas.

On this approach, s 123 would not have the effect of reversing the common law position that a person in possession or control of documents which are the subject of legal professional privilege cannot be compelled to produce those documents on subpoena issued by an accused person in criminal proceedings, even though the documents may establish the innocence of the accused or may materially assist his or her defence (*Carter v Northmore Hale Davy & Leake* (1994) 183 CLR 121 (Carter) at 130-131).

However, as the ALRC also acknowledged, there have been differing views expressed by the Courts regarding the effect of section 123, in particular the extent to which section 123 may overturn the rule in *Carter* (See for example: *R v Pearson* (Unreported, Supreme Court of NSW, Court of Criminal Appeal, Gleeson CJ, Smart and Sully JJ, 5 March 1996; *Wollongong City Council v Ensile* (No 5) [2005] NSW LEC 150; c.f.

Williams v R (2000) 119 A Crim R 490 at [32]; *DPP v Kane* (1997) 140 FLR 468 at 478; *Cahill v State of NSW (Dept of Community Services*) [2007] NSWIRComm 1).

There is also authority that by operation of the Supreme Court Rules and the Uniform Civil Procedure Rules, section 123 is applied to pre-trial proceedings in indictable criminal matters (*R v. Petroulias (No 22)* [2007] NSWSC 692 per Johnson J). (Note, however, that there is room to argue that *Petroulias (No 22)* should not be followed - both insofar as it relies on the application of the Supreme Court Rules to abrogate such an important privilege, and even if that was the effect of the Rules, that this would appear to be beyond the relevant rule making power in the Supreme Court Act).

In a more recent case, *Wollongong City Council v. Ensile Pty Ltd* ; *Wollongong City Council v Hogarth (No 5)* [2008] NSWLEC 150, Justice Jagot appears to go one step further by holding that section 123 as drafted **(**and irrespective of any extended reach given by the Supreme Court Rules) means that the privilege is abrogated, even at the pre-trial stage. In that case, in the context of a call for the documents under section 36 of the Act, her Honour held at [22] that section 123 of the Act does **not** prevent an accused from obtaining access to documents during a trial, not then in its possession, which might otherwise be the subject of a claim for client legal privilege under section 119 of the Act. In other words, her Honour held that the effect of s 123 is to abrogate client legal privilege in a criminal trial (including at the pre-trial stage). Although it is difficult to reconcile her Honour's decision with the High Court's decision in *Esso Australia Resources Limited v. Commissioner of Taxation* (1999) 201 CLR 49, it demonstrates that effect of section 123 on client legal privilege is not a settled issue.

In its final report on the Uniform Evidence Act, the ALRC recommended that

"The client legal privilege provisions of the uniform Evidence Acts should apply to any compulsory process for disclosure, such as pre-trial discovery and the production of documents in response to a subpoena and in non-curial contexts including search warrants and notices to produce documents, as well as court proceedings" (Recommendation 14-1)

However, the ALRC also recommended that:

"Section 123 of the uniform Evidence Acts should remain applicable only to the adducing of evidence at trial by an accused in a criminal proceeding." (Recommendation 14-6)

These recommendations were reflected in the model Bill endorsed by the Standing Committee of Attorney-General's and in the amendment Act passed in NSW in 2007 – see *Evidence Amendment Act 2007,* section 63 which inserts new section 131A in the *Evidence Act 1995 (NSW)*.

By specifically not extending section 123 to pre trial proceedings, the model Bill and the NSW Act seek to ensure that the Uniform Evidence Acts do **not** have the effect of reversing the common law position as expressed in *Carter* (and thereby effecting a dramatic curtailment of a fundamental legal right). If section 123 did have the effect of reversing *Carter*, potentially it would mean, for example, that the DPP could not claim

client legal privilege over legal advice (that previously would have been protected on longstanding authority). It would also mean that companies or individuals could not resist the production of legally privileged documents in answer to a subpoena issued in a criminal trial, contrary to the position that applied following *Carter*.

The Federal Litigation Section supports this decision not to extend section 123 to pre-trial proceedings.

However, the Federal Litigation Section is also of the view that even maintaining section 123 as presently drafted (the result achieved by the model Bill and the NSW Act specifically not extending section 123 to pre-trial proceedings and by the Commonwealth Act **not** dealing with s 123 one way or the other) means that a potential difficulty remains.

Cases such as *Ensile* gives rise to a fundamental issue, namely whether section 123 requires reconsideration and redrafting in order to remove any doubt that it was not intended to reverse *Carter*.

For these reasons, the Federal Litigation Section considers that the operation of section 123 requires further attention and that the provision should be amended so that it is clear that it does not operate to abrogate client legal privilege in criminal proceedings at the pre-trial stage.