## SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

## INQUIRY INTO THE FOREIGN EVIDENCE AMENDMENT BILL 2008

### Questions on Notice

The Attorney-General's Department appreciates the opportunity to further assist in the Committee's consideration of the Foreign Evidence Amendment Bill 2008. This submission addresses the Questions on Notice arising from the Public Hearing on 20 February 2009. As requested by the Committee, this submission also addresses additional issues raised by the Law Council of Australia in its written submission dated 19 February 2009.

### Question 1

**What are the parameters that govern the ability of the court to determine the weight to be given to particular evidence?**

1. The amendments in the Foreign Evidence Amendment Bill 2008 do not alter the existing parameters that govern the ability of the court to determine the weight to be given to particular evidence. Rather, the Bill concerns a threshold question of whether foreign business records are admissible—that is, whether they should be allowed into proceedings for assessment by the tribunal of fact.

2. Weight is only considered once a determination has been made by a court that evidence is admissible. The weight given to evidence depends on a variety of factors, including the perceived authenticity of a document, the credibility of a witness, and the availability of contradictory or corroborative testimony in each particular case. It is ultimately a matter for the court or jury to decide the weight that is to be given to the evidence.

3. The laws of evidence contain rules which govern both the admissibility of evidence and, in some limited circumstances, the weight that should be given to that evidence. For example, the *Evidence Act 1995* (Cth) (the Commonwealth Evidence Act) provides rules for the court to issue warnings to a jury regarding the weight to be given to certain limited types of evidence (see sections 165 and 165A).

**What relationship is new section 24A intended to have with the court's inherent discretion to allocate weight?**

4. Proposed section 24A of the Bill provides the court with an additional discretion to limit the use to be made of foreign material (including business records), where a particular use may be unfairly prejudicial to a party to the proceeding. A similar discretion is contained in section 136 of the Commonwealth Evidence Act. This discretion forms part of the court's consideration of the admissibility of particular evidence. The discretion does not affect the court's inherent discretion to determine the weight to be given to evidence once it is admitted into proceedings.

**Can the Department provide a step-by-step explanation of the treatment by a tribunal of fact of a piece of potential evidence where it is <u>an Australian business record, subject to the Commonwealth Evidence Act</u>?**

5. Part 3 of the *Foreign Evidence Act 1994* (Cth) provides a means of adducing *foreign* material, obtained in response to a request by the Attorney-General to a foreign country. It does not apply to

evidence obtained in Australia for use in domestic proceedings, or where the person providing the evidence is in Australia and able to attend the proceedings.

6. The rules governing the admissibility of Australian business records vary according to the jurisdiction in which the proceedings are held. Where Australian business records are sought to be adduced in federal or Australian Capital Territory court proceedings, the evidentiary rules contained in the Commonwealth Evidence Act would apply.

7. First, a party would seek to adduce a business record as evidence before a court. As a matter of practice, unless the opposing party formally objects to its tender, the record would normally be admitted by the court into evidence. If the opposing party objects, they may do so on a number of grounds. For example, the opposing party may object on the basis that the record is not admissible as evidence as it is not 'relevant evidence' within the meaning of section 55.

8. The admissibility of an Australian business record may also be challenged under the rules of evidence in Chapter 3 of the Commonwealth Evidence Act. This includes the rules against hearsay, opinion, tendency and coincidence, and privileged evidence. If the opposing party satisfies the court that the business record falls within any of these categories, it would then be a matter for the party seeking to adduce the evidence to establish that the record falls within a relevant exception to the rules of exclusion.

9. If the Australian business record is admissible under exceptions to the exclusionary rules of evidence, a party may submit to the court that it should nevertheless exercise its discretion to exclude the evidence under Part 3.11 of the Commonwealth Evidence Act. The court has a specific discretion to exclude improperly or illegally obtained evidence, and a general discretion to exclude evidence if its probative value is substantially outweighed by the danger that the evidence might:

(a) be unfairly prejudicial to a party
(b) be misleading or confusing, or
(c) cause or result in undue waste of time.

10. There is also a mandatory exclusion of evidence under section 137 of the Commonwealth Evidence Act where the probative value of the evidence is outweighed by the danger of unfair prejudice to the defendant.

**Can the Department provide a step-by-step explanation of the treatment by a tribunal of fact of a piece of potential evidence where it is apparently a foreign business record, subject to the existing Act?**

11. Under the current provisions of the Foreign Evidence Act, foreign business records may be adduced as evidence unless the records would not have been admissible had the person given evidence orally in the proceedings (paragraph 24(2)(b)). The court also has a general discretion under section 25 to prevent the foreign material being adduced.

12. Paragraph 24(2)(b) overcomes the requirement for the foreign witness to be present at the proceedings, but otherwise imports all other laws of evidence applicable in the jurisdiction in which the proceedings are being held. As New South Wales, Tasmania, the Australian Capital Territory and the Commonwealth operate under legislation modeled on the Uniform Evidence Act, a party adducing foreign business records in these jurisdictions would need to satisfy requirements substantially similar to those discussed above under the Commonwealth Evidence Act.

13. Where foreign business records are sought to be adduced in proceedings in other States or the Northern Territory, the applicable rules of evidence imported by the Foreign Evidence Act will

vary.  Most State and Territory Evidence Acts contain an exception to the hearsay rule for business records.  However, the requirements to meet this exception varies between jurisdictions—see for example, section 93 of the Queensland *Evidence Act 1997*, section 55 of the Victorian *Evidence Act 1958* and section 79C of the Western Australian *Evidence Act 1906.*  Further, where business records have been produced by a computer, some Australian jurisdictions require testimony about the reliability of the computer such as that it is regularly used to store or process information and that it was operating properly at the relevant time.

14. The variation in evidentiary rules between jurisdictions causes significant difficulties where the foreign evidence is required for use in more than one Australian jurisdiction.  Foreign countries are often unwilling or unable to expend resources to reproduce the same material in a format that complies with the different requirements of each jurisdiction.

**Can the Department provide a step-by-step explanation of the treatment by a tribunal of fact of a piece of potential evidence where it is apparently a foreign business record and subject to the provisions in this Bill?**

15. The Foreign Evidence Amendment Bill 2008 would apply a four-pronged test to govern the admissibility of foreign business records in Australian criminal and related proceedings.

16. First, the party adducing the business records would be required to satisfy the court that the material appears to meet the definition of a business record in subsection 3(1) of the Foreign Evidence Act (as amended).  This will require the adducing party to prove that the material appears to form part of the records belonging to or kept by an entity for the purposes of a business.  This definition imports the definition of 'business record' contained in paragraph 69(1)(a) of the Commonwealth Evidence Act.

17. If the court is satisfied that this requirement is met, the court would then need to consider whether the business records can be adduced.  If the court considers that the records are not reliable or probative, or are privileged, then they must not be adduced as evidence (proposed subsection 24(4)).

18. Third, the court would consider whether to exercise its discretion in proposed section 24A to limit the use to be made of the foreign material.  This discretion is in the same terms as paragraph 136(a) of the Commonwealth Evidence Act.

19. Finally, the court would need to consider whether justice would be better served if the material were not adduced in the proceedings (section 25).  In such cases, the court could direct that the material not be adduced, even if the court considers that the material is reliable and probative.  This is an extremely broad discretion and is intended to provide the court with an unfettered ability to consider matters relevant to its exercise.  This could include consideration of issues which are addressed by the rules of evidence which the Law Council has referred to at page 11 of its submission.

20. The effect of these provisions is discussed further at Question 3.

## Question 2

**Why were the safeguard provisions on hearsay evidence, which appear in the Commonwealth Evidence Act at section 69, not included in this Bill?**

21. Section 69 of the Commonwealth Evidence Act provides an exception to the general rule that hearsay evidence must not be admitted.  Section 69 provides that business records may be admitted,

even though they may be technically hearsay evidence, where the person providing the material gives evidence that representations contained in the business record were made either:

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

22. This requirement often exceeds the requirements of the law of the requested country, making it onerous, and sometimes impossible, for the country to strictly comply with Australia's request. In some countries, particularly those with a civil law system, business records are often provided under cover of a simple letter from the business. The experience of this Department and the Commonwealth Director of Public Prosecutions is that foreign witnesses can be unwilling to attest to these matters because they do not understand the reasons for or context of the requirement, and are not required to attest to such matters for the purposes of proceedings in their own country.

23. The foreign business records most commonly the subject of requests are those that typically are reliable and probative, for example, bank statements, records of commercial transactions, internet records and records provided by government agencies such as birth or marriage certificates. It is not the reliability or probity of the records that is in issue, it is the difficulty of obtaining the records under testimony sufficient to satisfy the technical requirements of admissibility in the relevant jurisdiction.

24. For example, currently, bank statements obtained from international banks which are in no way implicated in criminal activities, may not be admissible because the employee of the bank refuses to include in his or her accompanying affidavit a statement that the bank records meet the requirements in section 69 of the Commonwealth Evidence Act. The employee may routinely produce records in response to subpoenas or search warrants seeking bank records for matters in his or her own country and be prepared to comply with the requirements of that jurisdiction. However, when asked to comply with the more onerous requirements under Australian law, such as those outlined above, the employee may refuse to do so. This may be because the bank employee fears that he or she may become a witness, or is concerned that to do so may be in contravention of the relationship with the account owner. The bank employee may simply not be prepared to comply with the requirements because they go beyond the foreign country's own law. In such cases, the requested country may not have the power or may be unwilling to compel the testimony.

25. The application of section 69 of the Commonwealth Evidence Act in a foreign context is further complicated by the fact that it is often not possible or practicable to call a foreign witness to clarify his or her evidence in person in Australian proceedings. This can mean that the evidence is not adduced at all.

26. The Law Council has suggested at page 12 of its submission that the use of videolink technology may assist in overcoming difficulties experienced in complying with the current evidentiary requirements. However, obtaining evidence via videolink is costly and resource intensive, and can generally only be done with the cooperation of the foreign country and the witness. An employee of a business who is reluctant to sign an affidavit which meets Australian requirements will often be even less inclined to appear before an Australian proceeding as a witness. Many foreign countries are unable to compel the attendance of a witness in such circumstances. For these reasons, it is often not viable to rely on videolink technology to adduce routine foreign business records.

## Question 3

**Doesn't the removal of the protections in section 69, combined with the reversal in the usual onus of proof so that it now lays with the defendant, push the balance too far in favour of the prosecutor?**

27. Experience has shown that the current provisions of the Foreign Evidence Act are resulting in reliable evidence being obtained from foreign countries, which is unable to be used in Australian proceedings because it fails to meet detailed requirements relating to admissibility. For example, in 45% of the 73 current mutual assistance cases where material has been provided to Australia, the evidence was not provided in admissible form. The majority of these cases related to business record evidence. In a further five cases, the material was only able to be obtained in admissible form by sending an Australian law enforcement officer to assist the foreign country in executing the request. While the difficulties in obtaining foreign business records are not new, the increasing relevance of this form of evidence to Australian criminal proceedings has highlighted these difficulties.

28. The Foreign Evidence Amendment Bill is designed to address these problems by giving the court appropriate flexibility to determine whether material should properly be admitted into proceedings, where it is in the interests of justice to do so.

29. This Bill is not intended to remove appropriate safeguards. However, the policy behind the Bill is that greater flexibility is needed to ensure that persons who are involved in serious crimes such as child pornography, drug trafficking, and white collar crime should not be permitted to evade justice by exploiting technical and practical problems in the rules governing the admissibility of foreign evidence in Australian criminal proceedings.

30. The Bill seeks to balance these overarching objectives by placing appropriate discretion with the court in determining whether foreign business records should be admitted. It is acknowledged that the Bill would provide a different, more flexible set of rules to govern the admissibility of foreign business records. That is the policy intent of the Bill. However, it does not follow that the Bill would fail to protect essential safeguards.

31. Subsection 24(4) of the Bill would provide that where the court is satisfied that the business records are not reliable or probative, or are privileged, the court must not admit the records into evidence. This provision would require the court to consider key rules of evidence and arrive at a conclusion about the integrity of the evidence. However, it would not require the court to reject otherwise reliable evidence solely on the grounds that it fails to meet one or more of the detailed rules of admissibility in the relevant jurisdiction.

32. Proposed subsection 24(4) is intended to provide 'umbrella' terminology, which would allow the court to consider well-established rules of evidence. The terms probative and reliable are deliberately left undefined. As such, there is scope for a court to take into account the rules of admissibility of evidence in the relevant jurisdiction in determining whether the particular material is probative and reliable. For example, the term 'probative value of evidence' in the Uniform Evidence Act is defined as the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue. It is likely a court would apply this definition when considering if evidence is 'probative', pursuant to subsection 24(4) of the Bill.

33. The Law Council suggests, at page 10 of its submission, that the Bill would prevent the court from considering Commonwealth, State or Territory rules of evidence when determining whether foreign business records may be adduced. This is incorrect. Proposed subsections 24(5) and (6)

operate to ensure that, where foreign material has been *adduced* in accordance with the requirements of Division 3 of Part 3, the evidence will be *admissible*, despite any other Commonwealth, State or Territory rules of evidence. However, these provisions do not preclude the court from considering issues raised by relevant rules of evidence in giving content to proposed subsection 24(4).

34. Section 25 of the Act provides the court with a general discretion to direct that foreign material (including business records) not be adduced as evidence where it is in the interests of justice to prevent the material being adduced. As discussed above, this discretion is drafted in the broadest possible terms and would provide scope for the court to consider all relevant issues, including those discussed at page 11 of the Law Council's written submission. It is expected that courts would not discharge lightly this direction to identify and uphold the interests of justice.

35. The Bill is limited in application to a particular form of evidence that is generally considered to be accurate and reliable. The Bill is further limited to business records obtained in accordance with the laws of the requested country and provided to Australia through formal government-to-government channels. In most cases the records would have been prepared by disinterested third parties who rely on the accuracy of the records for the viability of their enterprise.

36. The Bill would require the court to consider the material before it and determine whether it should be admitted into evidence. We would expect that there would be cases where the court is satisfied, having regard to the nature of the record itself or the surrounding material, that the business record is not reliable and must not be admitted into evidence. In these cases, the non-adducing party would not be required to say anything nor lead evidence as to the reliability of the document. However, it would be open to all parties to challenge the admissibility of the records and all parties would be able to lead evidence on this issue.

37. Further, the Bill would apply to foreign business records sought to be adduced by *any* party to the proceedings. Under Australian law, both the prosecutor and defendant are able to seek assistance from the Australian Government in obtaining evidence located in another country.

## Question 4

**What safeguards are in place to establish the accurate content of foreign business records? What tools will judges have to establish that accuracy? What will be the process for checking the accuracy of records that have been translated from a language other than English?**

38. The prosecutor has a duty to the court to adduce evidence that has relevance and is admissible, although ultimately whether evidence is admissible is a matter for the court. Evidence can only be tendered pursuant to the provisions of the Foreign Evidence Act if it has been obtained following a formal request for assistance made by the Australian Government to the government of a foreign country. The material will have been obtained in accordance with the law of the requested country and must be provided under testimony. The court is entitled to take those matters into account when assessing the accuracy of the content of the document.

39. In assessing the accuracy of the content of foreign business records, the court can also take into account the nature of the document itself. In some circumstances, a court may be able to infer from the appearance of the document, for example bank account statements, invoices of sale, accounting records and ledgers, and audit statements, that the content of the document is accurate.

40. In the case of other records such as emails and correspondence from third parties, the court may not be able to assess the accuracy or otherwise of the content of the document from the document itself. However, it may be that any covering material accompanying the document provides assistance to the court in assessing the accuracy of the content. For example, in some circumstances a witness in the foreign country may be able to provide testimony about the process by which the material was obtained, and the source of the material.

41. In respect of the process for checking the accuracy of records that have been translated from a foreign language, the usual process is for the document to be provided to the Australian Government in the foreign language. The document is then translated into English by accredited translators in Australia. A copy of the document and a copy of the English translation of the document is provided to the non-adducing party.

## Question 5

**Item 7 of the Bill would see recognition of an obligation to be truthful 'by implication'. What rationale lies behind this form of words? Can you provide some examples of where an obligation to tell the truth is imposed on a person other than through oath, affirmation, caution or admonition?**

42. The Foreign Evidence Act has always provided different testimony requirements to those required in relation to domestic evidence. Many of Australia's mutual assistance partners, particularly in civil law countries, are not familiar with the common law requirements for testimony and do not require that evidence be taken on oath or affirmation. Section 22 of the Foreign Evidence Act was designed to accommodate these differences by accepting that evidence taken under caution or admonition could also be considered as testimony for the purposes of Part 3 of the Foreign Evidence Act.

43. However, not all foreign countries provide for evidence to be taken under caution or admonition. Some countries impose a legal obligation to tell the truth in other ways, such as through legislation which applies to certain categories of persons in their official capacity. For example, in Switzerland, the Netherlands and Belgium, police officers swear an oath on taking office that they will be truthful in the execution of their duties. As a result, these officers may be unwilling to sign an affidavit under oath, affirmation, caution or admonition. This is especially the case if the police officer has already provided a statement to that effect which, because it is not consistent with Australian requirements, needs to be accompanied by an affidavit.

44. The Bill would provide that evidence taken under an express or implied legal obligation to tell the truth would also be considered testimony for the purposes of Part 3 of the Foreign Evidence Act. It is appropriate that evidence taken in accordance with the procedures in a foreign country's legal system be considered as testimony, notwithstanding that it does not comply with Australian formalities concerning the taking of evidence.

## Question 6

**Did the Department conduct any consultation with non-government bodies in the formulation of the Bill? Why or why not?**

45. The Department did not consult with non-government bodies on the proposed terms of this Bill. In light of the increasing reliance on foreign business records and the reliable and accurate nature of this type of evidence, it was considered appropriate to progress amendments with a view to ensuring prompt consideration by the Parliament.

## <u>ADDITIONAL MATTERS RAISED IN THE SUBMISSION BY THE LAW COUNCIL OF AUSTRALIA</u>

46. This part of the submission seeks to address additional issues raised by the Law Council of Australia in its submission dated 19 February 2009, and not otherwise addressed above.

***The Bill is in response to a particular prosecution arising out of Operation Wickenby***

47. The Law Council notes the debate of the Bill in the House of Representatives and indicates that 'the Council would be concerned if the primary motivation for introducing the proposed amendments was to overcome certain practical inconveniences arising out of Operation Wickenby'.

48. Prosecutions arising out of Operation Wickenby do, by their nature, tend to involve the use of material obtained from overseas. However, it would be incorrect to suggest this Bill has been prepared solely to overcome practical inconveniences arising from one investigation.

49. Problems with Part 3 of the Foreign Evidence Act have been identified over recent years in many matters where foreign business records have been obtained through mutual assistance. As stated above, business record evidence is used in a variety of cases including prosecutions for money laundering, drug importation and child pornography. The amendments would assist in facilitating appropriate use of foreign business records, obtained through mutual assistance processes, in any criminal or related proceeding.

50. The difficulties that arise from the current application of Part 3 of the Foreign Evidence Act extend beyond practical inconvenience to operational agencies. In many cases, Australian agencies will have only one opportunity to obtain foreign material in admissible form from the other country. Where the country is unable to strictly comply with Australia's request in the time available, the evidence is not able to be used in Australian proceedings. This can mean that persons accused of serious crimes in Australia are able to evade justice because Australia's laws are not sufficiently flexible to facilitate effective cooperation with other countries.

***Inadequate consultation and review process***

51. The Law Council notes that no submissions were made about foreign business records to the Australian Law Reform Commission review of the Uniform Evidence Law in 2004-2005.

52. Since 1994, the admissibility of foreign material obtained through mutual assistance processes has been governed by the Foreign Evidence Act, rather than the Uniform Evidence Law. This may explain why submissions concerning the Foreign Evidence Act were not provided to the ALRC review.

53. Concerns about the adverse consequences arising from the current provisions of the Foreign Evidence Act have been raised over several years by Australian law enforcement agencies.

***Foreign material that <u>appears to consist of</u> a business record***

54. The phrase 'appears to consist of' is intended to overcome the need for the witness in the foreign country to provide detailed testimony to establish that the foreign material meets the definition of 'business record' in the Foreign Evidence Act. The adducing party would still need to satisfy the court that the foreign material appears to satisfy the definition of 'business record'.

55. In some cases, such as where the foreign material is a bank statement obtained from an international financial institution, or invoices of legitimate transactions from a business not involved in the alleged criminal conduct, the court may be satisfied that the material is a business record by examining the document on its face. In other cases, the adducing party may be required

to lead detailed evidence to satisfy the court that the document does in fact appear to be a business record.

***Admission of foreign testimony***

56. The Bill would also create a presumption that the foreign material complies with the requirements about the form of testimony in the Foreign Evidence Act, unless evidence sufficient to raise a doubt is adduced to the contrary: see proposed subsection 22(3). The Law Council has raised concerns that this presumption places the onus on the non-adducing party to establish that the foreign material does not comply with the testimony requirements in section 22. Subsection 22(3) is intended to ensure that the adducing party need only produce proof that these requirements have been met where another party to the proceedings has adduced evidence to raise doubt to the contrary. Where another party adduces evidence to raise doubt, the onus would be on the party adducing the foreign material to establish that the requirements of section 22 have been met.

***Retrospective application***

57. It is incorrect to suggest that the amendments would operate retrospectively. The Foreign Evidence Act regulates how evidence may be adduced in domestic proceedings. It does not regulate the way in which material is obtained through mutual assistance.

58. Currently, the court must assess whether the requirements of the Foreign Evidence Act have been met at the time the foreign material is sought to be adduced in the proceedings. The amendments in the Bill would apply to evidence that is sought to be adduced on or after the commencement of these amendments. It would not seek to rectify deficiencies in foreign evidence that has already been sought to be adduced but has been rejected by the court.