CHAPTER 3

KEY ISSUES

3.1 As indicated in Chapter 1, the committee received seven submissions for this inquiry, most of which provided substantive comment on various aspects of the Foreign Evidence Amendment Bill 2008 (Bill).

3.2 The Bill amends Part 3 of the *Foreign Evidence Act 1994* (Act) to streamline the process for adducing foreign business records as evidence in Australian court proceedings (criminal and related civil proceedings). According to the Attorney-General's Department (department), such records comprise a significant proportion of Australia's requests under the mutual assistance regime. However, the current provisions:

> …are not always adequate to meet the special evidentiary problems associated with obtaining and using evidence from foreign countries which have differing criminal laws and procedures.[1]

3.3 In his Second Reading Speech, the Attorney-General summarised the intent and purported effect of the Bill as follows:

> The bill would amend the Foreign Evidence Act to provide that business records obtained through mutual assistance will be presumed to be admissible unless the court is satisfied the records are not reliable and probative, or are privileged. It is appropriate that the process for adducing business records be streamlined as this type of evidence is generally considered accurate and reliable. The court would retain a broad discretion to prevent foreign material being adduced if it is in the interests of justice to do so.[2]

3.4 In its submission to the inquiry, the department stated that the Bill is designed to 'promote more responsive and flexible measures in securing international crime cooperation, while retaining key safeguards and judicial discretion.'[3] However, the inquiry revealed concerns that the Bill might not achieve its objectives.

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1 The Hon Robert McClelland MP, Attorney-General, *House Hansard*, 3 December 2008, p. 12298; and Attorney-General's Department, *Submission 4*, p. 1.

2 The Hon Robert McClelland MP, Attorney-General, *House Hansard*, 3 December 2008, p. 12298. Note: the NSW Council for Civil Liberties disputed that foreign business records are necessarily reliable and/or probative: see *Submission 1*, p. 2 & pp 7-8; and the NSW Law Society condemned the dissimilar treatment of foreign business records and domestic business records: see *Submission 5*, pp 1-2.

3 Attorney-General's Department, *Submission 4*, p. 1. Also, see Mr Steven Marshall, Attorney-General's Department, *Committee Hansard*, Canberra, 20 February 2009, pp 9-10.

3.5 This chapter discusses some of the key issues raised in submissions and evidence, including:

- displacement of established legal principles;
- introduction of a new presumption;
- retrospective operation of certain provisions; and
- consultation and review.

Displacement of established legal principles

3.6 The displacement of established legal principles concerned most submitters and witnesses, who singled out four aspects of the Bill for particular comment: foreign material appearing to consist of a business record; *prima facie* admissibility of foreign business records; discretions of the court; and the displacement of general exclusionary rules. These issues are discussed below.

Appears to consist of a business record

3.7 Subclause 24(4) of the Bill provides:

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

3.8 The Law Council of Australia expressed concern not only with the breadth of the new definition of 'business record', but also the introduction of a procedure for adducing foreign material that *appears to consist of a business record*, a procedure which departs from established principles of evidence law.[4]

3.9 As an alternative, the Law Council of Australia suggested that subclause 24(4) be replaced with a provision similar to section 183 of the *Evidence Act 1995*. That provision allows the court to examine a document or thing, and draw reasonable inferences regarding the application of a provision of that Act.

3.10 The department informed the committee that the new definition of 'business record' mirrors paragraph 69(1)(a) of the *Evidence Act 1995*, and that the phrase 'appears to consist of a business record' performs a necessary function within the Bill:

> The definition may be more complex than foreign evidence laws provide. Witnesses in foreign countries may be reluctant to provide testimony to strictly prove that relevant records meet this definition, particularly where they are not required to attest to such matters in their own country.

4 Law Council of Australia, *Submission 3*, pp 7-8. Also, see NSW Law Society, *Submission 5*, p. 2.

> While the party adducing the evidence will still be required to satisfy the court that the foreign material appears to consist of a business record, the Bill would remove the requirement for testimony to be provided on this issue.[5]

Prima facie admissibility

3.11 The Bill creates two sets of requirements for admissibility under the Act: one for foreign records; and another for foreign business records. It also creates a distinction between foreign business records and domestic business records.

3.12 At present, all business records must comply with the rules of evidence that apply in the jurisdiction in which the proceedings are being heard. For the Commonwealth, ACT, NSW and Tasmania, the provisions of the *Evidence Act 1995* apply. For other states/territories, there are varying rules of evidence. According to the Attorney-General, the multitude of evidentiary rules has created considerable difficulties in obtaining business records from foreign countries in a form that complies with Australian admissibility requirements.[6]

3.13 However, the NSW Law Society condemned the Bill's creation of a 'special rule' for the admissibility of foreign business records,[7] and neither the NSW Council for Civil Liberties, nor the Law Council of Australia agreed that the Bill should distinguish foreign business records from domestic business records.

3.14 The NSW Council for Civil Liberties described problems associated with the evidentiary use of foreign business records, suggesting that these problems actually militate against the objectives of the Bill:

> It is understandable why foreign business records should be treated with greater caution in admitting them as evidence in a criminal prosecution than Australian business records, but the Bill does the opposite; it makes it easier to get them into evidence and thereby gives them greater reliability and probity than Australian business records.[8]

3.15 The Law Council of Australia voiced an equally powerful concern, that is, the effect of the amendment is to render foreign material that appears to consist of a business record *prima facie* admissible in Australian proceedings. The Council told the committee this burdens the party against whom the records are tendered with the responsibility for proving inadmissibility, a reversal of onus contrary to established legal principles:

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5 Attorney-General's Department, *Submission 4*, p. 3. Also, see Attorney-General's Department, Answers to Questions on Notice, p. 1 & pp 8-9 (received 24 February 2009)

6 The Hon Robert McClelland MP, Attorney-General, *House Hansard*, 3 December 2008, p. 12298. Also, see Attorney-General's Department, *Submission 4*, p. 1.

7 NSW Law Society, *Submission 5*, p. 2.

8 NSW Council for Civil Liberties, *Submission 1*, p. 8.

> The Law Council's major concern about the bill is that it will remove the requirement that foreign business records comply with normal rules of evidence…instead, there is imposed, essentially, an obligation on the party opposing the introduction of foreign business records to demonstrate that what appears to be a business record is not reliable, probative or privileged…we see no justification whatsoever for not imposing an obligation on the prosecution to persuade the court that the record is reliable, rather than putting it in these negative terms.[9]

3.16 The department's view of subclause 24(4) contrasted with the views of the legal representatives appearing before the committee. It argued that the Bill proposes a 'four-pronged' test to govern the admissibility of foreign business records, two components of which are a requirement for the adducing party to satisfy the court that the foreign material is a 'business record', and the court to then consider whether the material is to be adduced and the weight to be given to that evidence:

> The amendments to Part 3 of the Foreign Evidence Act relate to a threshold question of whether evidence is to be admitted into proceedings. Should the court determine that evidence is admissible, it would separately need to consider the weight to be given to that evidence.[10]

3.17 The Commonwealth Director of Public Prosecutions agreed that the Bill places the onus upon the adducing party, but described that onus as different to the one which would apply to domestic business records.[11]

Discretions of the court

3.18 The third issue identified by submitters and witnesses was the amount of judicial discretion proposed in the Bill.

3.19 At present, section 25 of the Act provides:

> **Discretion to prevent foreign material being adduced--general**
>
> (1) The court may direct that foreign material not be adduced as evidence if it appears to the court's satisfaction that, having regard to the interests of the parties to the proceeding, justice would be better served if the foreign material were not adduced as evidence.
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> Note: See also subsection 25A(1) (proceedings for designated offences).

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9 Mr Stephen Odgers SC, Law Council of Australia, *Committee Hansard*, Canberra, 20 February 2009, p. 1 & p. 6. The Law Council of Australia also condemned the grounds which must be established by the non-adducing party challenging admissibility, arguing that these too contravene established principles regarding the use of business records: see Law Council of Australia, *Submission 3*, p. 9. Also, see NSW Council for Civil Liberties, *Submission 1*, p. 1 & pp 4-6; and CDPP, *Submission 6*, p. 3.

10 Attorney-General's Department, *Submission 4*, p. 3. Also, see Mr Graeme Davidson, CDPP, *Committee Hansard*, Canberra, 20 February 2009, pp 10-11; and Attorney-General's Department, Answers to Questions on Notice, pp 1, 3 & 6-7 (received 24 February 2009)

11 CDPP, *Submission 6*, p. 3.

> (2) Without limiting the matters that the court may take into account in deciding whether to give such a direction, it must take into account:
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> (a) the extent to which the foreign material provides evidence that would not otherwise be available; and
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> (b) the probative value of the foreign material with respect to any issue that is likely to be determined in the proceeding; and
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> (c) the extent to which statements contained in the foreign material could, at the time they were made, be challenged by questioning the persons who made them; and
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> (d) whether exclusion of the foreign material would cause undue expense or delay; and
>
> (e) whether exclusion of the foreign material would unfairly prejudice any party to the proceeding.

3.20 Clause 24A of the Bill proposes an additional judicial discretion as follows:

> **24A Discretion to limit use of foreign material**
>
> 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.[12]

3.21 These two judicial discretions comprise the remaining two components of the 'four-pronged' test referred to by the department. However, the Law Council of Australia was not convinced that the rules of admissibility for foreign business records were appropriate. The Council told the committee that Australian law has always divided the rules of admissibility between rules and discretion, a division eliminated by the Bill:

> Discretion is inevitably uncertain, subjective and it depends on the judicial officer involved. I think a term that has been used for judicial discretion is that it imports palm tree justice: you do not know what the outcome will be. That is why there is a large number of rules of evidence which do not have a large discretionary component. We would say it is simply a major change of approach to get rid of rules of admissibility and replace them with a broad judicial discretion.[13]

3.22 In response, the department stated that the appropriate balance between rules and discretions is a matter of policy, and in relation to foreign business records, the rules have proven problematic.[14] The department emphasised the breadth of the

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12 This provision is similar to section 136 of the *Evidence Act 1995*

13 Mr Stephen Odgers SC, Law Council of Australia, *Committee Hansard*, Canberra, 20 February 2009, pp 1-2, 3 & 6.

14 Mr Graeme Davidson, CDPP, *Committee Hansard*, Canberra, 20 February 2009, p. 11.

discretion in clause 24A and section 25, arguing that these provisions enable the court to consider all relevant issues on a case-by-case basis:[15]

> [Section 25] 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 [the states/territories' various exclusionary evidence rules].[16]

Displacement of general exclusionary rules

3.23 Submitters and witnesses' fourth, and possibly most contentious, concern regarding the displacement of established legal principles was the concurrent displacement of general exclusionary rules.

3.24 Subclauses 24(5) & (6) of the Bill affect the adducing into evidence of foreign material which appears to consist of business records. These provisions read:

> (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.

3.25 These two provisions operate to ensure that, where foreign material has been properly adduced, the evidence will be admissible, despite any other Commonwealth, state or territory rules of evidence. For foreign business records, this means compliance with subclauses 24(1), (2) and (4):

> **Foreign material may be adduced as evidence**
>
> (1) Subject to [this section], foreign material may be adduced in a proceeding to which this Part applies.
>
> (2) The foreign material is not to be adduced as evidence if it appears to the court's satisfaction at the hearing of the proceeding that the person who gave the testimony concerned is in Australia and is able to attend the hearing.
>
> [(4) see preceding paragraphs]

3.26 The department considered that the 'four-pronged' test, including this clause as its third component, will act as a safeguard for individual rights while providing the court with flexibility to admit foreign business records as evidence.[17] However, on

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15 Attorney-General's Department, *Submission 4*, p. 5.

16 Attorney-General's Department, Answers to Questions on Notice, p. 3 & 6 (received 24 February 2009). Also, see CDPP, *Submission 6*, p. 4.

17 The Law Council of Australia disputed whether 'probative' is a real safeguard: see Mr Stephen Odgers SC, Law Council of Australia, *Committee Hansard*, Canberra, 20 February 2009, p. 2.

account of subclause 24(6), the court may or may not consider state/territory laws of evidence in making its determinations under subclause 24(4):

> 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.[18]

3.27 Nonetheless, it was this very point which most concerned legal practitioners participating in the inquiry with most questioning whether the safeguards said to be contained in the Bill are sufficient compared to those in established exclusionary evidence rules.

3.28 The Law Council of Australia argued against the displacement of the exclusionary evidence rules, citing an important hearsay exclusionary rule by way of example – section 69 of the *Evidence Act 1995*:

> (2) The hearsay rule does not apply to the document (so far as it contains the representation) if the representation was made:
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> (a) by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact; or
>
> (b) 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.
>
> (3) Subsection (2) does not apply 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.

3.29 Representatives told the committee that the Bill contains no equivalent provision, which serves the important function of preventing the admission of evidence which might be either unreliable or fabricated.[19] The NSW Council for Civil Liberties concurred, adding that the problem extends to 'important safeguards' across a wide range of exclusionary evidence rules.[20]

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18 Attorney-General's Department, Answers to Questions on Notice, p. 5 (received 24 February 2009).

19 Mr Stephen Odgers SC, Law Council of Australia, *Committee Hansard*, Canberra, 20 February 2009, p. 2.

20 NSW Council for Civil Liberties, *Submission 1*, p. 6.

3.30 According to evidence received by the committee, the Bill will not apply the major exclusionary evidence rules currently operating in Australian law to foreign business records obtained under the mutual assistance regime. The Law Council of Australia decried the effect that this displacement will have in criminal and related civil proceedings:

> This means that even if the foreign material contains:
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> - 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).[21]

3.31 The committee notes that submissions and evidence particularly commented on the admissions' exclusionary evidence rule, for example, the Law Council of Australia:

> …there are in all Australian jurisdictions obligations for the prosecution to establish that any confession or admission was voluntarily made. That is the common law requirement. In uniform evidence legislation the requirement is that it be shown that it was not obtained by violence or other extreme misconduct like that, including torture obviously, quite apart from any considerations of reliability. I want to emphasise that: under Australian law, even if there are good reasons to believe that an admission or a confession is reliable, it will be excluded and must be excluded if it was obtained involuntarily or by extreme misconduct which significantly impinges on the person's freedom of choice, like, obviously, torture. Again, that rule will not apply to evidence of foreign business records.[22]

3.32 It was submitted that this significant departure from established principles of evidence law cannot be justified, noting that evidence law:

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21 Law Council of Australian, *Submission 3*, p. 11.

22 Mr Stephen Odgers SC, Law Council of Australia, *Committee Hansard*, Canberra, 20 February 2009, p. 2. Also, see Mr David McLeod, *Submission 2*, p. 3; NSW Council for Civil Liberties, *Submission 1*, p. 1 & p. 12; and Mr Dick Smith, *Submission 7*, p. 1.

> …endeavour[s] to strike an appropriate balance between ensuring that reliable, relevant and probative evidence is adduced and protecting the rights of defendant to test evidence against them.[23]

3.33 For this reason, and others, the Law Council of Australia unequivocally opposed the objectives of the Bill, demanding nothing less than 'a demonstration of the clearest necessity' to compel a 'radical' change from the rules of admissibility established in the *Evidence Act 1995*.[24] The NSW Law Society and the NSW Council for Civil Liberties concurred, indicating legislative uniformity as an additional basis for their support.[25]

3.34 The department agreed that most Australian jurisdictions have exclusionary hearsay rules for business records, provided certain conditions are met. However, the department reiterated that foreign countries are unfamiliar with these requirements, and often have difficulty understanding their context, particularly when the evidence is required for use in more than one Australian jurisdiction. Consequently, it is onerous and sometimes impossible for foreign countries to strictly comply with a mutual assistance request. The department provided the following useful illustration:

> …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.[26]

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23 Law Council of Australia, *Submission 3*, pp 10-12.

24 Law Council of Australian, *Submission 3*, p. 12.

25 NSW Law Society NSW, *Submission 5*, p. 2; and NSW Council for Civil Liberties, *Submission 1*, p. 2.

26 Attorney-General's Department, Answers to Questions on Notice, p. 4. (received 24 February 2009). A further complication for importing section 69 of the *Evidence Act 1995* into the Bill is the requirement for the calling of a witness before the court. Also, see Attorney-General's Department, *Submission 4*, pp 2-3.

3.35 Representatives indicated that the 'four-pronged' test, and in particular the discretions available to the court, would ensure that the rights of individuals are safeguarded,[27] and the Commonwealth Director of Public Prosecutions agreed:

> …we would anticipate that we would be presenting as much material from that foreign country that goes to the provenance of the documents and the reliability that we have…there will be documents from their very nature and from their very appearance that a court, or even the prosecutor, would not be convinced as to the reliability or probative value of that document…the protection that we feel is proposed under the bill that is currently under consideration is that contained in sections 25 and 24A.[28]

Introduction of a new presumption

3.36 The second key issue raised during the inquiry was the introduction of a new presumption regarding testimony requirements. At present, section 22 of the Act provides for testimony to be taken in one of two ways: either under oath or affirmation; or 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.[29]

3.37 Subclause 22(3) proposes to insert into the Act:

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

3.38 The Law Council of Australia criticised this provision, arguing that it is an unjustifiable departure from and contrary to established principles of evidence law:

> …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…
>
> 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

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27 Mr Steven Marshall, Attorney-General's Department, *Committee Hansard*, Canberra, 20 February 2009, pp 9 & 13. This was notwithstanding that the amendments to the Act will make it easier for the prosecution to adduce evidence against the Accused. Also, see Attorney-General's Department, Answers to Questions on Notice, p. 3 (received 24 February 2009).

28 Mr Graeme Davidson, CDPP, *Committee Hansard*, Canberra, 20 February 2009, p. 14.

29 Subsections 22(1) & (2) of the *Foreign Evidence Act 1994.*

> fall far short of Australian requirements, including the requirement that testimony be taken under some legal obligation to tell the truth.[30]

3.39 The Law Council of Australia queried the necessity for subclause 22(3) in light of the flexibility afforded by paragraph (1)(b) and proposed paragraph (1)(aa), which allows for foreign testimony to be admitted if taken under a legal obligation to tell the truth, even if that obligation was only implied, a requirement, which the Council remarked, is unlikely to prove overly onerous for Australian authorities.

3.40 In submissions to the committee, the department denied that subclause 22(3) effects a reversal of onus, arguing it is intended to ensure that:

> …the adducing party need only produce proof that these requirements [subclauses (1) & (2)] have been met where another party to the proceedings has adduced evidence to raise doubt to the contrary.[31]

3.41 The department stated that section 22 of the Act can confuse officials in foreign countries as many of Australia's mutual assistance partners are neither familiar with common law requirements for testimony, nor do they require that evidence be taken on oath, affirmation or under caution or admonition. However, the department noted that some countries – such as Switzerland, the Netherlands and Belgium – have other means of imposing a legal obligation to tell the truth:

> …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.[32]

Retrospective operation of certain provisions

3.42 The third key issue raised by legal representatives participating in the inquiry concerned items 15 – 16 of the Bill. Item 15, for example, reads:

> **Application of amendments made by items 7 and 8**
>
> The amendments made by items 7 and 8 of this Schedule apply in relation to testimony taken before or after the commencement of this item that is adduced on or after the commencement of this item.

3.43 Item 16 similarly relates to foreign material, and both these items drew the attention of the Law Council of Australia who on principle opposes the enactment of all retrospective provisions:

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30 Law Council of Australia, *Submission 3*, pp 12-13. Also, see Mr Stephen Odgers SC, Law Council of Australia, *Committee Hansard*, Canberra, 20 February 2009, p. 6.

31 Attorney-General's Department, Answers to Questions on Notice, p. 9 (received 24 February 2009).

32 Attorney-General's Department, Answers to Questions on Notice, p. 7 (received 24 February 2009). Also, see Attorney-General's Department, *Submission 4*, p. 5.

> …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.[33]

3.44 In both submissions and evidence, the department agreed that 'the amendments in the Bill would only apply to evidence that is adduced after commencement of the amendments', but rejected that items 15–16 have retrospective effect:

> They will not validate evidence which might have been…sought to have been produced in past cases and have been thrown out, but what it means is if the evidence has already been obtained overseas then it would be admissible.[34]

Consultation and review

3.45 A recurring theme in Senate inquiries is the extent of public consultation undertaken by government departments in the development of legislation. The consultation undertaken in respect of this bill was an unfortunate departure from the department's normal practices, with most submissions and witnesses querying the lack of consultation and the haste with which the Bill was introduced and passed in the House of Representatives.

3.46 The Law Council of Australia, for example, expressed concern that a bill with such significant changes to Australian rules of evidence was not referred for review to the Australian Law Reform Commission (ALRC), particularly when the ALRC has jointly undertaken an extensive review of the *Evidence Act 1995* with the NSW Law Reform Commission and Victorian Law Reform Commission as recently as 2004-05.[35]

3.47 The committee notes that the Law Council of Australia, the NSW Law Society and the NSW Council for Civil Liberties all considered a reference of the Bill

33 Law Council of Australia, *Submission 3*, pp 13-14. Also, see NSW Council for Civil Liberties, *Submission 1*, p. 2.

34 Mr Steven Marshall, Attorney-General's Department, *Committee Hansard*, Canberra, 20 February 2009, p. 16. Also, see Attorney-General's Department, *Submission 4*, p. 5; and Attorney-General's Department, Answers to Questions on Notice, p. 9 (received 24 February 2009).

35 Law Council of Australia, *Submission 3*, p. 7. Section 69 of the *Evidence Act 1995* – the exclusionary evidence rule (for business records) – was examined during the review, and it was concluded that there was no particular problem with that provision: a case could not be made for its amendment: see ALRC Report 102 *Uniform Evidence Law* (December 2005), para 8.157: http://www.austlii.edu.au/au/other/alrc/publications/reports/102/ (accessed 23 February 2009).

to the ALRC appropriate, and in the case of the Law Council of Australia, notwithstanding that the *Evidence Act 1995* could be extended to cover foreign business records in all Australian courts.[36]

3.48 The committee also notes that the Attorney-General has previously conducted extensive stakeholder consultations regarding the *Evidence Act 1995*, beside which the lack of consultation regarding the Bill is glaring.[37]

3.49 In response to questions on this issue, the department advised that, in light of the increasing reliance on foreign business records and their reliable and accurate nature, the department considered it appropriate to expedite presentation of the Bill. Officers indicated that as much as 45 per cent of all cases are currently jeopardised due to foreign material obtained through mutual assistance requests being in inadmissible form. The department refused to be drawn on any one case, and emphasised that the Bill proposes to address these problems without eliminating individual safeguards:

> 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.
>
> 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.[38]

Committee view

3.50 The committee acknowledges that law enforcement agencies increasingly rely on foreign material obtained under the mutual assistance regime. The committee understands that such material does not always comply with domestic law and is difficult to adduce as evidence in Australian court proceedings.

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36 Mr Stephen Odgers SC, Law Council of Australia, *Committee Hansard*, Canberra, 20 February 2009, pp 3–4.

37 NSW Council for Civil Liberties, *Submission 1*, p. 2 & pp 13–24; and Ms Sarah Moulds, Law Council of Australia, *Committee Hansard*, Canberra, 20 February 2009, pp 5-6 where the Council advised some discussions had taken place between it and the department, subsequent to the introduction of the Bill.

38 Attorney-General's Department, Answers to Questions on Notice, p. 5 & pp 7–8 (received 24 February 2009). Also, see Mr Steven Marshall, Attorney-General's Department, *Committee Hansard*, Canberra, 20 February 2009, pp 12 & 14.

3.51 The Bill proposes to modify the process for adducing into evidence one of the most commonly sought categories of foreign material – business records. The provisions effecting this modification are predicated on foreign business records being an accurate and reliable form of evidence.

3.52 Throughout the inquiry, the committee heard from a range of respected, independent legal experts, including the Law Council of Australia and the NSW Law Society, none of whom supported either the objects or the provisions of the Bill. The fundamental concern was the Bill's departure from established legal principles, as evidenced partly by the reversal of onus in subclause 24(4) and the displacement of exclusionary evidence rules.

3.53 The committee accepts that there are difficulties associated with gathering evidence overseas, and in some instances, the accuracy and reliability of foreign material might be questionable. However, the committee considers that the Bill provides a mechanism for adducing foreign material into evidence which incorporates safeguards.

3.54 Evidence supplied by the department stated that subclause 24(4) is a threshold provision, and the Commonwealth Director of Public Prosecution affirmed that the adducing party is required to satisfy evidential requirements. Both these witnesses described a 'four-pronged' test embodied in the Bill, namely:

- the need to establish that the foreign material is a 'business record';
- the requirement to prove that the foreign material is reliable, probative and not privileged;
- the court's discretion to exclude foreign business records if that exclusion would better serve justice; and
- the court's discretion to exclude foreign business records if there is a danger that a particular use might unfairly prejudice a party.

3.55 The committee notes that the court is required to consider each of these factors, and acknowledges that the two discretions might be uncertain and subjective. However, the 'four-pronged' test serves to protect the rights of individuals, and the committee does not underestimate the ability of the prosecutor and courts to fulfil their function.

3.56 The committee acknowledges the valid concerns of the legal representatives participating in this inquiry but is conscious that a pragmatic approach is required in the circumstances. While the committee has some reservations about the Bill, it concludes that the Bill contains safeguards, which while not identical to current Australian laws, should achieve the same objectives.

3.57 In relation to the reversal of onus, the committee considers the legal representatives' concerns well founded. The committee agrees that it is possible to construe subclause 24(4) as requiring the non-adducing party to challenge admissibility of contested foreign business records. This was clearly not intended, and

given the source of such material, it is doubly incumbent upon the adducing party to satisfy the court that foreign business records meet evidentiary standards. This should be clear in the Bill not only in relation to subclause 24(4) but subclause 22(3) as well.

3.58 As regards the issue of retrospectivity, the committee understands how items 15-16 of the Bill might be construed as retrospective provisions. However, the committee is of the view that the collection of evidence is quite distinct from actual prosecutions. Furthermore, the Bill does not seek to penalise or criminalise past actions or behaviour, nor does it seek to validate foreign business documents previously excluded from proceedings. The committee does not consider that items 15–16 of the Bill are retrospective.

Recommendation 1

3.59 The committee recommends that subclauses 22(3) and 24(4) of the Bill be amended to clarify that the adducing party is required to satisfy the court that foreign business records to be adduced in accordance with Part 3 of the *Foreign Evidence Act 1994* meet evidentiary requirements.

Recommendation 2

3.60 Subject to the above recommendation, the committee recommends that the Senate pass the Bill.

Senator Trish Crossin

Chair