The Law Society
of New South Wales

170 Phillip Street, Sydney NSW 2000
Australia; DX 362 Sydney
Tel (02) 9926 0333 Fax (02) 9231 5809
ACN 000 000 699 ABN 98 696 304 966
www.lawsociety.com.au

Our Ref: RBGMM1289800

Direct Line: 9926 0216

5 March 2009

Ms Penny Musgrave
Director
Criminal Law Review Division
Attorney General's Department
DX 1227 SYDNEY

Dear Ms Musgrave,

Re: Application of Foreign Evidence Amendment Bill 2008 (Cth) to New South Wales

Thank you for your correspondence. As you are aware, the Senate Standing Committee for Legal and Constitutional Affairs is currently holding an inquiry into the Bill.

The Law Society of NSW, the Law Council of Australia and the NSW Council for Civil Liberties have all filed submissions opposing the proposed amendments. A copy of the Law Society's submission is attached. Submissions opposing the amendments have also been received by the Senate Committee from David McLeod (the Australian lawyer for David Hicks) and Dick Smith. These submissions can be downloaded from the Committee's website:
http://www.aph.gov.au/Senate/committee/legcon_ctte/foreign_evidence/submissions.htm

The proposed amendments, if applied to New South Wales, would remove a number of important safeguards contained in the *Evidence Act 1995* (NSW), put there to ensure a defendant receives a fair trial and which minimise the risk of an accused being wrongly convicted.

A number of serious issues have been identified in the submissions opposing the Bill as follows:

1. It would no longer be necessary to show a document actually is a foreign business record. Provided the document *appears to consist* of a foreign business record that will be sufficient.

2. If the prosecution seeks to tender a foreign business record the onus will be on the defendant to show the record is unreliable. The law at present in NSW places the onus on the prosecution to show the document is reliable.

3. Section 69(2) of the *Evidence Act 1995* (NSW) requires that a Court be satisfied that a statement in a foreign business record was made by a

person who had or ought reasonably be supposed to have personal knowledge of the statement. The proposed amendments remove this requirement. This requirement is an important safeguard because the admission into evidence of a business record is a justifiable exception to the hearsay rule but only on the basis that s 69(2) is satisfied.

4. Section 69(3) of the *Evidence Act 1995* (NSW) provides that if a foreign business record contains a statement made in connection with an investigation relating or leading to a criminal prosecution, it is inadmissible. Under the proposed amendments this safeguard is also removed.

5. The proposed amendments displace the general exclusionary rules in the *Evidence Act 1995* (NSW) including s76 (opinion evidence), s 97 or s 101 (tendency evidence), s114 or 115 (identification evidence), s 84, s 85 or s 90 (an admission), and s138 (unlawfully or improperly obtained evidence).

6. The Law Council of Australia on page 11 of its submission makes the point that if a document that appears to be a foreign business record contains a confession obtained by torture and there is some reason to believe it is reliable, it will be admitted into evidence.

7. The Bill applies retrospectively.

8. There has been no explanation as to why it is thought necessary that these proposed new rules of evidence should apply only to foreign business records, but not domestic business records, and only apply in criminal proceedings and not civil proceedings. It is not clear to the Law Society why important safeguards would be removed for criminal proceedings but not civil proceedings.

9. The Law Society is not aware of any other State or Territory of Australia or any country having adopted similar rules of evidence to those being proposed. David McLeod in his submission refers to the proposed amendments as being worse than the rules of evidence he and his client had to face in the military commission for prosecuting Guantanamo Bay detainees.

10. There has been no consultation with non-government bodies in the formulation of the Bill.

The type of amendments proposed in the Bill have been the subject of examination by the International Commission of Jurists. In their Report on Terrorism, Counter-terrorism and Human Rights they state:

> "At the same time, countries have made efforts to *streamline* proceedings at the expense of both transparency and the rights of the defence. The evidence gathered in the Hearings shows that in a number of cases the basic principles of the rule of law were overturned." (p156)

The opening sentence in the submission on the Bill by the Attorney-General's Department states:

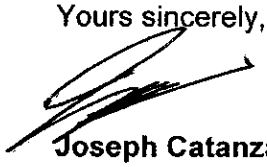
> "The Foreign Evidence Amendment Bill 2008 would amend Part 3 of the Foreign Evidence Act to *streamline* the process for adducing foreign business records."

On 20 February 2009 the Senate Committee held a public hearing as part of its inquiry into the Bill. In response to oral submissions by the Attorney-General's Department and the CDPP the Chair of the Committee, Senator Crossin (Labor) said:

> "To be honest with you, Mr Marshall, I am not actually convinced about the need for this legislation. I am going to give you an opportunity now to try and convince me as chair, why the haste and why we need this. If you are now saying to us that one of the reasons why the rules of admissibility of evidence need to be tossed out or overridden is because many foreign countries are unwilling or sometimes unable to provide the necessary documentation, why should we come down to the lowest common denominator? Why are we changing our laws simply because we cannot get documents that other countries are able to provide for us, when we maintain a very high standard of prosecution and a very high standard of protection for witnesses?" (transcript p11)
>
> and
>
> "I am having a little difficulty. In my mind you seem to keep linking what you can locate and obtain from another country versus what you can admit in a court of law as evidence. Correct me if I am wrong, but are you simply saying that it is difficult to obtain from some countries what is needed to satisfy our laws so therefore we will change our laws to make the whole system easier? I am saying to you that if that is the case then I do not think that is fair on the person being prosecuted." (transcript p12)

The Law Society of NSW and the Law Council of Australia recommended to the Senate Committee that the Bill be referred to the Australian Law Reform Commission for evaluation and report prior to its consideration by the Senate. The ALRC was heavily involved in the initial drafting of the *Evidence Act 1995* (NSW) and in every amendment made to the Act since then. If the Bill is passed by the Senate without reference to the ALRC it is the Law Society's recommendation to the Attorney General that the amendments be referred to the NSW Law Reform Commission for evaluation and report so he can properly consider the effect of the proposed amendments prior to making his decision. In the meantime the amendments proposed by the Bill should not apply to New South Wales criminal proceedings.

Yours sincerely,



Joseph Catanzariti
President

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170 Phillip Street, Sydney NSW 2000
Australia; DX 362 Sydney
Tel (02) 9926 0333 Fax (02) 9231 5809
ACN 000 000 699 ABN 98 696 304 966
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Our Ref: RBGMM1289269

COPY

Direct Line: 9926 0200

18 February 2009

Mr Peter Hallahan
Committee Secretary
Senate Standing Committee on Legal & Constitutional Affairs
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Mr Hallahan,

Re: Foreign Evidence Amendment Bill 2008

The Law Society represents over 22,000 solicitors across New South Wales. Our members work in both private practice and at all levels of Government.

The *Foreign Evidence Amendment Bill 2008* has been reviewed by the Law Society's Criminal Law Committee and its Business Law Committee (Committees).

The Committees' primary concern is proposed s 24 which substantially alters the law on admissibility of foreign business records in Commonwealth criminal proceedings and related civil proceedings. Further, as you have recorded in the information you released about your Inquiry, the amendment could also apply through regulation to State and Territory criminal proceedings and related civil proceedings. The amendment is significant in its application and its effect.

The Committees wish to bring to the Standing Committee's attention the following:

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

   What is proposed by the new s 24 is a special rule which will allow for far more foreign business records to be admitted into evidence than would otherwise be admissible under the current rules, but only in Commonwealth criminal and related civil proceedings. The rules of evidence for admissibility of domestic business records in any type of Commonwealth proceedings criminal or civil is unchanged by the Bill.

Further, proposed s 24 does not alter the rules of evidence on admissibility of foreign business records in Commonwealth civil proceedings generally (other than those related to a criminal proceeding).

No satisfactory explanation has been made for these distinctions and why a special rule is needed only for foreign business records and only in Commonwealth criminal proceedings. No State or Territory of Australia has adopted these distinctions and nor are the Committees aware of any other country having done so.

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

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

   (b) the relevant statement in the business record was made:
   - by a person who had or might reasonably be supposed to have had personal knowledge of the statement; or
   - on the basis of information directly or indirectly supplied by a person who had or might reasonably be supposed to have had personal knowledge of the statement (s69(2) *Evidence Act 1995* (Cth)); and

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

   Proposed s 24 removes each of these important safeguards. Section 24(3) and (4) provides that a document need only to *appear* to *consist* of a business record.

   There is no requirement in proposed s 24 or anywhere else in the Bill that a Court has to be satisfied that a statement in the business record was made by a person who had or might reasonably be supposed to have personal knowledge of the statement.

   Section 25(4) places the onus on the party who is *not* seeking to tender the foreign business record to somehow show that the record is not reliable or probative, a task that will be difficult.

3. No substantial amendment to the laws of admissibility of evidence in Commonwealth criminal proceedings should be made without very careful and proper consideration and consultation. The *Evidence Act 1995* was adopted by the Commonwealth and New South Wales in 1995 (and has since been adopted by Tasmania) after considerable review and consultation including substantial reports by the Australian Law Reform Commission. The 2008 amendments to the *Evidence Act 1995*, which commenced on 1 January 2009, were the subject of a substantial report by the Law Reform Commission which commenced following a ten year review of the Act in 2005.

The Committees understand the *Foreign Evidence Amendment Bill 2008* has been prepared and put forward at the instigation of the Commonwealth Department of Public Prosecutions. There needs to be a balanced and objective consideration of the proposed amendments and that can only be done by the Australian Law Reform Commission under the guidance of Professor Les McCrimmon. The Senate's consideration of the Bill should be deferred until that report has been prepared and considered.

Yours sincerely,

Joe Catanzariti
President