

CHAPTER 2

OVERVIEW OF THE BILL

2.1 This chapter briefly outlines the main provisions of the Bill.

Video link and foreign evidence provisions

2.2 The primary purpose of the Bill is to create new video link evidence provisions in a proposed new Part 1AE of the *Crimes Act 1914* (the Crimes Act). The proposed provisions would apply to proceedings for terrorism and other related offences. According to the Explanatory Memorandum:

These new provisions will facilitate the prosecution of terrorism offences by ensuring that, in the absence of compelling reasons to the contrary, important evidence from overseas witnesses that are unable to travel to Australia can be put before the court using video link technology.¹

2.3 The Bill also proposes to amend the *Foreign Evidence Act 1994* (the Foreign Evidence Act) to facilitate the use of foreign material as evidence in proceedings for terrorism and related offences. According to the Explanatory Memorandum, these changes complement the new video link evidence provisions, and 'will assist in circumstances where it is not possible for evidence to be given by video link.'²

Amendments to the Crimes Act

2.4 The application of the proposed video link evidence provisions in the new Part 1AE of the Crimes Act will be limited to proceedings for terrorist and related offences. The relevant 'designated offences' to which the Bill applies are listed in proposed section 15YU.³

2.5 Proposed section 15YV sets out the circumstances in which the court must direct or allow a witness to give evidence by video link. For example, the witness must be available to give evidence by video link and the appropriate facilities must be available (or reasonably capable of being made available). If these circumstances are met, this proposed section applies a different test depending on whether the

1 *Explanatory Memorandum*, p. 1.

2 *Explanatory Memorandum*, p. 1.

3 Under proposed s. 15YU, 'designated offences' include, for example, offences against: Part 5.3 of the Criminal Code (terrorism offences); Part 5.4 of the Criminal Code (harm against Australians); and subs. 34G(5) of the *Australian Security Intelligence Organisation Act 1979* (offence to give false and misleading answers when questioned by ASIO about terrorist matters). Proposed para. 15YU(2)(b) provides that the new Part 1AE will also apply to proceedings under the *Proceeds of Crimes Act 2002*.

prosecution or defence has applied for a direction or order that a witness give evidence by video link.⁴

2.6 Where the prosecutor has applied for the direction or order, the court must direct or allow the witness to give evidence by video link unless the court is satisfied that the direction or order would have a *substantial adverse effect* on the right of the defendant in the proceeding to receive a fair hearing (proposed subsection 15YV(1)).

2.7 On the other hand, where the defendant applies for the direction or order, the court must direct or allow the witness to give evidence by video link unless the court is satisfied that it would be *inconsistent with the interests of justice* for the evidence to be given by video link (proposed subsection 15YV(2)).

2.8 Proposed section 15YZD allows the prosecutor or defendant to appeal the court's decision to allow or refuse a witness to give evidence by video link.

2.9 Proposed section 15YW allows the court to make the provision of video link evidence conditional on the presence of an independent observer at the location where the video link is given. The observer may be an Australian diplomatic officer or consular officer, or any other person, provided they meet the criteria set out in proposed subsection 15YW(5). The court may direct or allow the observer to give the court a report about what they observed in relation to the giving of evidence by the witness. The court will be able to use the observer's report as it considers appropriate for deciding whether the video link evidence given by the witness should be admitted as evidence in the proceeding.

2.10 Under proposed subsection 15YU(3), the new Part 1AE will apply to proceedings initiated before the commencement of Part 1AE.

2.11 The proposed video link evidence provisions will be applicable to witnesses within Australia as well as overseas.⁵ The Bill also expressly preserves the operation of state and territory laws and other Federal laws relating to the taking of evidence from witnesses.⁶

Amendments to the Foreign Evidence Act 1994

2.12 The Bill also amends the Foreign Evidence Act, which deals with other types of 'foreign material', such as video tapes and transcripts of examinations. In particular, Part 3 of the Foreign Evidence Act deals with the use of evidence from overseas jurisdictions as evidence in Australian criminal and related civil proceedings. Currently, section 24 provides that foreign material may be adduced in a proceeding if the material would be admissible if the witness was giving evidence in person.

4 See also proposed s. 15YY: 'technical requirements for video link'.

5 *Explanatory Memorandum*, p. 3.

6 Proposed ss. 15YZE and 15YZF.

Subsection 25(1) provides that the court may direct that foreign material not be adduced as evidence if justice would be better served if the foreign material were not adduced as evidence. Subsection 25(2) sets out a number of matters that the court may take into account in deciding whether to give such a direction.⁷

2.13 The Bill proposes to insert a new section 25A into the Foreign Evidence Act. Proposed section 25A would apply to proceedings for terrorist and related offences. Subsection 3(1) will contain a definition of 'designated offences', and this will mirror the list of 'designated offences' in proposed Part 1AE of the Crimes Act.

2.14 If the prosecution seeks to adduce foreign material as evidence in these proceedings, then subsection 25(1) of the Foreign Evidence Act does not apply. Instead, proposed paragraph 25A(1)(d) provides that the court may direct that foreign material not be adduced as evidence if the court is satisfied that adducing that material would have a *substantial adverse effect* on the right of a defendant in the proceeding to receive a fair hearing. As the Explanatory Memorandum states:

This will provide a narrower test than the one that still applies if the defendant is seeking to adduce the foreign material under subsection 25(1). Proposed subsection 25A(3) stipulates that it is immaterial whether the proceedings...in relation to the designated offence were instituted before or after the commencement of this section.⁸

2.15 According to the Explanatory Memorandum, the proposed amendments to the Foreign Evidence Act will assist in treating foreign evidence in a similar manner to the new video link evidence rules in proposed Part 1AE of the Crimes Act in proceedings for terrorism and related offences.⁹

Other provisions of the Bill

2.16 The Bill also make a number of other amendments, including to:

- Part 1D of the Crimes Act in relation to DNA matching;
- section 4AAA of the Crimes Act in relation to non-judicial powers and functions; and
- other legislation.

DNA matching

2.17 The Bill also seeks to amend Part 1D of the Crimes Act, which regulates forensic procedures, including the obtaining, use and destruction of DNA samples. According to the Explanatory Memorandum, these amendments will 'facilitate inter-jurisdictional matching of DNA profiles between Australian law enforcement

7 *Explanatory Memorandum*, p. 12.

8 p. 12.

9 p. 12.

agencies over the National Criminal Investigation DNA Database.¹⁰ The Explanatory Memorandum explains that:

A DNA profile is generated for each DNA sample taken, and these profiles can be stored on a DNA database system and compared, or 'matched', with other profiles on the database in accordance with matching rules. The matching rules for DNA profiles are set out in the matching table in section 23YDAF. The matching table regulates which types of DNA profiles (eg. profiles from convicted serious offenders, suspects, missing persons or their relatives, crimes scenes, or volunteers) can be matched against other types of DNA profiles.¹¹

2.18 The Explanatory Memorandum further states that the purpose of the proposed amendments to Part 1D is to streamline the rules governing the matching of DNA profiles by:

- ensuring that where a volunteer has stipulated a limited purpose for the use of their DNA profile, their profile can be matched with other profiles on the DNA database so long as the match is conducted for that limited purpose and only used for that limited purpose; and
- remov[ing] the requirement that inter-jurisdictional matching be confined to a specific investigation.¹²

Non-judicial functions and powers

2.19 The Bill also proposes to amend section 4AAA of the Crimes Act, which sets out the rules that apply if a non-judicial function or power is conferred under Commonwealth law relating to criminal matters. Currently, section 4AAA only applies to state or territory judges or magistrates.¹³ The Bill proposes to amend section 4AAA to clarify that Judges of the Federal Court and Federal Magistrates, who exercise a conferred non-judicial function or power under a Commonwealth law relating to criminal matters, exercise the function or power in their personal capacity.

2.20 The Explanatory Memorandum explains that:

It is necessary to make this clear for constitutional reasons. Conferring non-judicial functions or powers on a Judge or Magistrate in their capacity as the court or a member of the court to which they belong would be contrary to the independence of the judiciary under the separation of powers doctrine enshrined in Chapter III of the Commonwealth Constitution. A Judge of the Federal Court or Federal Magistrate may agree to exercise a non-judicial function if the power is vested in the Judge's or Magistrate's

10 p. 1.

11 p. 9.

12 pp 9-10.

13 Or a Justice of the Peace or other person employed in a state or territory court and authorised to issue search warrants or warrants of arrest: see s.4AAA(1).

personal capacity, separate from the court they constitute (see, for example, *Grollo v Palmer* (1995) 184 CLR 548).¹⁴

Other legislation

- 2.21 The Bill also proposes to amend other legislation, including amendments to:
- subsection 23B(1) of the Crimes Act to expand the definition of 'tape recording';
 - the *Financial Transaction Reports Act 1988* to rectify an oversight in the *Proceeds of Crime (Consequential Amendments and Transitional Provisions) Act 2002*;
 - the *Proceeds of Crime Act 2002* to enable the Commonwealth Director of Public Prosecutions (DPP) to seek payments out of the Confiscated Assets Account to reimburse third parties who conduct future examinations;
 - the *Proceeds of Crime Act 2002* to rectify the unintended consequence of a change to the Proceeds of Crime Regulations that inadvertently changed the status of some examiners; and
 - section 22 of the *Surveillance Devices Act 2004* so that a warrant can be obtained to retrieve a tracking device installed under an authorisation.¹⁵

14 p. 7.

15 *Explanatory Memorandum*, p. 1.

