CHAPTER 3

KEY ISSUES

3.1 This chapter discusses the key issues and concerns raised in submissions and evidence, first in relation to the video link and foreign evidence provisions of the Bill, and then other provisions of the Bill.

Video link and foreign evidence

3.2 Most evidence received by the committee focussed on the video link and foreign evidence provisions of the Bill.[1] Key issues and concerns raised in relation to these provisions are discussed below and include:

- the need for the new laws;
- the different tests for the prosecution and defence;
- the observer provisions;
- the integrity of video link and foreign evidence; and
- the potential for retrospective application of the provisions.

Need for the new laws

3.3 A representative of the Attorney-General's Department (the Department) stated that the purpose of the Bill is to increase 'certainty in terrorism cases when the DPP finds a need to proceed on the basis of video link evidence'.[2] The representative further explained that:

> There is an assumption that video link evidence is reliable and cogent and should be used in appropriate cases.[3]

3.4 Similarly, in support of the Bill, the DPP submitted that, in its experience in prosecuting terrorism and related offences:

> …it is likely that relevant evidence will need to be adduced from witnesses who themselves may have been involved in terrorist related conduct and who cannot for reasons of security or practical reality be brought before an Australian court to give evidence in person. Indeed because of the extra territorial operation of many of these provisions, overseas evidence is more likely to be required to prove the offences.[4]

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1 That is, the proposed new Part 1AE of the Crimes Act; and the amendments to the Foreign Evidence Act.

2 *Committee Hansard*, 21 October 2005, p. 20.

3 *Committee Hansard*, 21 October 2005, p. 20.

4 *Submission 5*, p. 1.

3.5 The DPP also expressed its belief that:

> There is a clear public interest and expectation that these cases will be brought before the courts promptly and efficiently notwithstanding the difficulties in adducing evidence from witnesses who are overseas or otherwise unavailable to give evidence before the courts in Australia.[5]

3.6 The Gilbert and Tobin Centre of Public Law acknowledged that the Bill would, on the whole:

> …improve the processes surrounding the prosecution of terrorist offences. In particular, the central aim of the Bill to better facilitate the hearing of evidence which might not otherwise be accessible to Australian courts is of great value.[6]

3.7 Dr Andrew Lynch of the Gilbert and Tobin Centre of Public Law reiterated this at the committee's hearing:

> …at the base of our submission is an understanding as to why the bill has been drafted and an appreciation as to its overall purpose. The difficulty of prosecuting terrorist offenders may well be compounded by the absence of persons from the jurisdiction who could act as key witnesses. This bill proposes a solution to that problem, so as to ensure that courts have access to necessary testimony.[7]

3.8 However, Dr Andrew Lynch of the Gilbert and Tobin Centre of Public Law nevertheless suggested some changes to certain provisions of the Bill to ensure that the use of video link and foreign evidence 'will not unacceptably risk the occurrence of a miscarriage of justice'.[8] As Dr Lynch explained:

> Our concern is not with the essence of the bill but rather with the processes which it presently favours. While it is important that courts have access to all relevant evidence, it is vital that that evidence is reliable and that the fairness of the trial process is beyond reproach so that the public can have confidence in the conviction of terrorists by the Australian court system. There is nothing to be gained by finding the innocent guilty, and much to be lost by doing so…[9]

3.9 Similarly, Australian Lawyers for Human Rights (ALHR) stated that, while it was not opposed to the use of video link evidence, it was concerned about specific aspects of the Bill, and suggested that certain provisions needed to be 'tweaked'.[10] These issues and concerns are discussed further below.

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5 *Submission 5*, p. 1.

6 *Submission 1*, p. 1.

7 *Committee Hansard*, 21 October 2005, p. 1.

8 *Committee Hansard*, 21 October 2005, p. 1.

9 *Committee Hansard*, 21 October 2005, p. 1.

10 Mr Simeon Beckett, *Committee Hansard*, 21 October 2005, p. 6; ALHR, *Submission 2*, p. 2.

Video link evidence - different tests for prosecution and defence

3.10 As outlined in Chapter 2, the video link provisions of the Bill apply a different test depending on whether the prosecution or defence has applied for a direction or order that a witness give evidence by video link. Under proposed section 15YV of the video link provisions, where the prosecutor applies for the direction or order, the court *must* direct or allow the witness to give evidence by video link unless satisfied that the direction or order would have a *substantial adverse effect* on the right of the defendant in the proceedings to receive a fair hearing. Where the defendant applies for the direction or order, the court *must* direct or allow the witness to give evidence by video link unless satisfied that it would be *inconsistent with the interests of justice* for the evidence to be given by video link.

3.11 The Gilbert and Tobin Centre of Public Law, ALHR and the Human Rights and Equal Opportunity Commission (HREOC) were all concerned by the application of a different standard depending on whether the prosecution or the defence wished to adduce video link evidence.[11]

3.12 A representative of the Department acknowledged that there are two different tests in the legislation, and explained that:

> The reason that there are two tests is not because we are seeking to set different standards for prosecution and defence but to reflect the different role that is played in the prosecution process by the prosecution and by the defence. The tests for both of them, in fact, raise the bar fairly high or fairly low, depending which way you look at it. The purpose of these provisions is to allow evidence to be called by video link. They go beyond the current test which is set in state laws, and they say that the court must allow video link evidence, except subject to the discretion of the court. When you start drafting provisions which pick up that test and apply it, you find that is very difficult not to have different tests for the prosecution and the defence.[12]

Arguments against the different tests

3.13 However, several submissions were concerned that the different tests would mean the court would have a narrower discretion to disallow prosecution evidence when compared to defence evidence. They concluded that this could favour the prosecution over the defence.[13]

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11 ALHR, *Submission 2*; Gilbert and Tobin Centre of Public Law, *Submission 1*; HREOC, *Submission 4*.

12 *Committee Hansard*, 21 October 2005, p. 20.

13 See, for example, Gilbert and Tobin Centre of Public Law, *Submission 1*, p. 2; HREOC, *Submission 4*, p. 6; ALHR, *Submission 2*, p. 3; Mr Simeon Beckett, ALHR, *Committee Hansard*, 21 October 2005, p. 6; Mr Craig Lenehan, HREOC, *Committee Hansard*, 21 October 2005, p. 13. See also Sue Harris Rimmer, Parliamentary Library, *Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill 2005*, Bills Digest No. 57 2005-06, 12 October 2005 (Bills Digest), p. 18.

3.14 For example, ALHR argued that the proposed provisions in the Bill would put the prosecution in a 'privileged position':

> There is a clear disparity between the test the defence must establish to oppose an application by the prosecution to adduce evidence by video link and that which applies to the prosecution seeking to oppose an application by the defence. The prosecution is undoubtedly in a privileged position. This offends the principle of fairness in criminal trials which is a well understood tenet of the Australian common law and is also protected by international human rights standards.[14]

3.15 In ALHR's opinion, the use of two different tests could have important implications:

> By using two different tests for video link evidence applications the legislation impliedly requires a court to allow in evidence which would not pass the 'interests of justice' test but would pass the 'substantial adverse effect' test. That is, there is a category of evidence which it would not be in the interests of justice to allow but with regard to which the defendant cannot show a substantial adverse effect on his or her right to receive a fair trial.[15]

3.16 ALHR explained why it felt that the 'substantial adverse effect' test is difficult for a defendant:

> First, the Court must be satisfied that the evidence *would* have such an effect not *may* have such an effect. To meet that test the defence will have to establish with great certainty the adverse nature of the evidence before the evidence has been given. Quite prematurely and unfairly a defendant may have to use evidence from his or her own case in order to challenge the application.[16] [*emphasis added*]

3.17 During the committee's hearing, Mr Simeon Beckett from ALHR further expressed the view that:

> That term 'inconsistent with the interests of justice' is about the weighing up of the rights of the prosecution, if you like, against the rights of the defendant, so it is a much more balanced test. It is a very even test that allows both the prosecution and the defence cases to be taken into account whether you apply it. Whereas the other [test] is set at a very high level with respect to defendants, but curiously does not take into account the prosecution's case.[17]

3.18 In the same vein, the Gilbert and Tobin Centre of Public Law was concerned that the different standards would mean that 'the Bill markedly favours the prosecution

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14 *Submission 2*, p. 3.

15 *Submission 2*, p. 4.

16 *Submission 2*, p. 4; see also pp 5-6.

17 *Committee Hansard*, 21 October 2005, p. 9.

over the defendant in the ability to adduce video evidence'.[18] Dr Lynch further explained his view of the practical impact of requirement for the defendant to show 'substantial adverse effect':

> The effect of that in practice would be to require the defendant to explain to the court why he or she thinks that is so, which certainly affects the way in which they conduct their defence…it is also simply a much higher bar for objecting to the use of that evidence, whereas, when the defendant seeks to, the prosecution is able to appeal to the interests of justice test. There does not seem to be a convincing case as to why that test cannot apply to both...the consequence of denying the defence a fair ability to block evidence which may well be highly damaging to their case but which might be unreliable and result in a false conviction does not seem to be a policy worth pursuing.[19]

3.19 Dr Lynch concluded that the use of the different tests was 'unjustified':

> It poses the risk of that conviction of people using that kind of evidence is potentially open to error, and that is not in anybody's interest—certainly not those persons' interest. Also, for public confidence in the court system, it is important to be able to say that when we have convicted terrorists, it is because they have been given an entirely fair trial and not open up the Australian court system to the criticism that the odds have been stacked against those people.[20]

3.20 Finally, Dr Lynch responded to arguments put forward by the Attorney-General during the second reading debate in the House of Representatives:

> The Attorney-General says that we cannot apply the same standard when the defendant makes an application, because it would be nonsensical to apply the standard that applies when the prosecution makes an application that there is a substantial adverse effect upon the defendant's case. That has a superficial logic, but I would suggest that the problem is with starting with the 'substantial adverse impact' test in the first place.[21]

3.21 Similarly, HREOC discussed the differences between the two tests set out in the video link provisions. HREOC noted that the 'interests of justice' test reflects some of the existing state and territory provisions concerning evidence by video link. However, it differs because the onus, for example in the NSW legislation, is upon the party seeking to adduce evidence by video.[22] HREOC suggested that the 'interests of

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18 *Submission 1*, p. 2.

19 *Committee Hansard*, 21 October 2005, p. 2.

20 *Committee Hansard*, 21 October 2005, p. 4.

21 *Committee Hansard*, 21 October 2005, p. 2.

22 *Submission 4*, p. 3; referring to s5B(3) of the *Evidence (Audio and Audio Visual Links) Act 1998* (NSW); see also Gilbert and Tobin Centre of Public Law, *Submission 1*, p. 3; DPP, *Submission* 5, p. 2; ALHR, *Submission 2*, pp 2-3 and Mr Simeon Beckett, ALHR, *Committee Hansard*, 21 October 2005, p. 8.

justice test' is more flexible when contrasted with the test of 'substantial adverse effect'.[23]

3.22 In HREOC's view, the test of 'substantial adverse effect' would:

> …not be satisfied by the defence merely demonstrating some degree of disadvantage to the accused – any disadvantage must be of a sufficient degree to affect the fairness of the hearing itself.[24]

3.23 Further, HREOC argued that, in the absence of a more narrow definition, a court could find that it contemplates adverse effects which are 'considerable or big'.[25] However, HREOC cautioned that:

> It is particularly difficult to predict the manner in which the 'substantial adverse effect' test would be applied by a Court. This is because of the ambiguous nature of the word 'substantial' and the absence of a definition in the Bill.[26]

3.24 As Mr Craig Lenehan of HREOC stated, 'it is unclear to us why a definition has not been included in this bill'.[27] In particular, HREOC noted that the phrase 'substantial adverse effect' is used in other legislation, and in particular, the *National Security Information (Criminal and Civil Proceedings) Act 2004* (the National Security Information Act). Section 7 of the National Security Information Act defines 'substantial adverse effect' to mean:

> …an effect that is adverse and not insubstantial, insignificant or trivial.

3.25 In response to the committee's questioning on the meaning of 'substantial adverse effect', a representative of the Department told the committee that the drafters presumably took the view that it was not necessary to put a definition in this Bill because it 'is beyond doubt how a court will construe it'.[28] He further stated that it 'means more than minimal and that is how, in my opinion, a court would read it.'[29]

3.26 However, HREOC further submitted that regardless of how 'substantial' is construed, in its view:

> …it is important to recognise that the Bill contemplates that the defendant will be subjected to a degree of disadvantage which exceeds that [which] would be tolerated under existing Australian procedural safeguards. It

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23 *Submission 4*, p. 5.

24 *Submission 4*, p. 5.

25 *Submission 4*, p. 5.

26 *Submission 4*, p. 3.

27 *Committee Hansard*, 21 October 2005, p. 14.

28 *Committee Hansard*, 21 October 2005, p. 35.

29 *Committee Hansard*, 21 October 2005, p. 35; see also DPP, *Committee Hansard*, 21 October 2005, p. 37.

> specifically countenances that there will be some infringement of the defendant's right to a fair hearing…[T]his involves a significant step away from the safeguards which have until now been placed upon the use of video link evidence.[30]

3.27 HREOC, the Gilbert and Tobin Centre of Public Law and ALHR all suggested that the same standard should govern the courts' discretion to allow evidence via video link, regardless of which party makes the application. They all proposed that the 'interest of justice' test would be the appropriate standard.[31] Mr Craig Lenehan of HREOC argued that:

> …by imposing that same test on both defence and prosecution you are not going to be, in our view, knocking out a whole lot of evidence that should be before the court; you are going to be preventing the adducing of evidence that should not be before the court.[32]

3.28 In addition, HREOC suggested that, in deciding whether it will be inconsistent with the interests of justice for evidence to be given by video link, the court should be required to consider whether, having regard to the circumstances of the proceedings as a whole, the direction or order would violate the right of the accused to a fair hearing.[33]

Arguments in favour of the different tests

3.29 However, representatives of the Department and the DPP argued that the provisions of the Bill were appropriate. They disagreed with the suggestion that the same test – inconsistent with the 'interests of justice' – should be used for both the prosecution and defence.

3.30 The DPP acknowledged that the provisions reduce the discretion of the court to allow evidence by video link in prosecutions for terrorism related criminal proceedings.[34] However, the DPP argued that 'the proposed Bill would not give the prosecution a greater advantage than the defence in seeking to adduce video link evidence.'[35]

3.31 Dr Andrew Lynch of the Gilbert and Tobin Centre of Public Law responded to this argument:

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30 *Submission 4*, p. 4; see also Mr Craig Lenehan, *Committee Hansard*, 21 October 2005, p. 14.

31 Gilbert and Tobin Centre of Public Law, *Submission 1*, pp 3-4; HREOC, *Submission* 4, p. 8, para. 31; ALHR, *Submission 2*, pp 5-6; see also, for example, Dr Andrew Lynch, Gilbert and Tobin Centre of Public Law, *Committee Hansard*, 21 October 2005, p. 2; Mr Craig Lenehan, HREOC, *Committee Hansard*, 21 October 2005, pp 13 and 18.

32 *Committee Hansard*, 21 October 2005, p. 18.

33 *Submission 4*, p. 8.

34 *Submission 5*, p. 2; see also *Explanatory Memorandum*, p. 3.

35 *Submission 5*, p. 3.

> …if it [the difference] does not confer a greater disadvantage or advantage, you would wonder why it is there in the first place…I cannot see any reason for not having a common test and leaving it to the discretion of the judge in the individual case. If it does not disadvantage the defence relative to the prosecution then why isn't the test expressed in the same way?[36]

3.32 However, a representative of the Department told the committee that:

> …when you look at the two tests, they achieve the same basic result, the same policy outcome but with different wording to reflect the different roles.[37]

3.33 The representative explained further that the policy underlying the Bill was to 'encourage and promote the use of video link evidence.'[38] To achieve this, the policy approach was to:

> …apply the same approach to the prosecution and the defence, which is to put both bars as high as you can—to allow video evidence except in those cases where it would be inappropriate to allow it in terms of fairness and justice—you could put it higher for the prosecution than for the defence or at a different point for the prosecution than the defence because of the different roles that are played by the defence and prosecution in the criminal process...The difference between the two tests, we would say, is a matter of form and not of substance. The substance of the two tests is the same.[39]

3.34 At the same time, the representative rejected the use of the 'interests of justice' test for the prosecution, 'because the interests of justice test is lower than the test here', and it would conflict with the policy approach outlined above.[40]

3.35 The representative also disagreed with suggestions that 'substantial adverse effect' would be too difficult for the defence to prove, arguing that:

> …this is a provision designed to protect the rights of defendants in the criminal process. The courts are not going to read that provision as setting the bar particularly high.[41]

3.36 The representative continued:

> If that has the potential to affect the outcome of the trial then it has a substantial adverse effect on the rights of the defendant. The defendant does

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36 *Committee Hansard*, 21 October 2005, p. 3.

37 *Committee Hansard*, 21 October 2005, p. 20.

38 *Committee Hansard*, 21 October 2005, p. 35.

39 *Committee Hansard*, 21 October 2005, p. 27; see also DPP, *Committee Hansard*, 21 October 2005, p. 37.

40 *Committee Hansard*, 21 October 2005, pp 22-23.

41 *Committee Hansard*, 21 October 2005, p. 24.

> not have to show that they are actually going to be convicted when they might otherwise be acquitted. They are going to show that if that evidence comes in in that form there is a reasonable prospect that they might lose a reasonable chance of acquittal.[42]

3.37 A representative of the Department also suggested that the defence test was also a difficult test for the prosecution to meet 'because the court has to take the evidence unless it would be inconsistent with the interests of justice.'[43]

3.38 A representative of the DPP agreed:

> I do not see that in all situations the bar is necessarily higher for defendants than it is for the prosecution. I think it is more flexible. It would allow courts to take into account the importance of the defence being able to call evidence which was vital to their defence, even though we might have no notice of it. It might be called in circumstances where, if you looked at it strictly, you could say that it was unfair to the prosecution. That is the first issue. The second issue about the test for the prosecution is that courts jealously guard the right to a fair trial.[44]

3.39 Indeed, the DPP submitted that:

> The requirement that the adverse effect be substantial is appropriate in light of the argument that may be available that there is an adverse effect by the mere fact that the witness is not physically present in the courtroom. To lessen this test would run the real risk of not providing for the necessary level of assurance in these cases that the evidence may be called by video link.[45]

3.40 However, HREOC responded to this, noting that:

> That is exactly the argument that, in the context of a requirement for fairness in the New South Wales legislation, the Court of Criminal Appeal rejected in Ngo…The court said there that, by virtue of parliament having enacted legislation to take video link evidence, you have to accept that there is going to be some disadvantage to a defendant. The distinction that the court made between that sort of disadvantage and an unfair hearing was a large one. That is the distinction that we also seek to make. So what is actually contemplated here… [goes] into the actual fairness of the trial rather than simply disadvantaging litigants.[46]

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42 *Committee Hansard*, 21 October 2005, p. 24.

43 *Committee Hansard*, 21 October 2005, p. 26.

44 *Committee Hansard*, 21 October 2005, p. 37.

45 *Submission 5*, p. 2.

46 *Committee Hansard*, 21 October 2005, p. 17.

3.41 The DPP also argued that, under current state legislation which requires a court to be satisfied that it is in the interests of justice that the evidence be adduced by video link:

> Some courts have in the past been reluctant to make such orders in the trial of serious offences in the light of the common law's traditional approach to a defendant being entitled to face his or her accusers in person…there is a need for greater certainty than currently exists to ensure that evidence can be called by video link in these prosecutions…[47]

3.42 The DPP argued that the provisions would therefore provide a 'greater degree of certainty for both the prosecution and defence as to what evidence may be relied on in court in these important prosecutions'.[48] However, Mr Lenehan of HREOC argued that the uncertainty would in any case be resolved by use of the word 'must' in the relevant provisions of the Bill:

> That then confines the discretion of the court, so the court 'must' allow the evidence to be adduced, save in these circumstances…Judges to date have had very broad discretion to allow this evidence to be adduced. It is true that some of them have started from the point of view that the best evidence is in-person evidence and that there need to be good grounds shown for video link evidence to be allowed. Other judges have started from the point of view that this is a good and useful technology and compelling circumstances need to be shown for it not being used. You solve that apparent impasse by creating, as in our submission, a section which uses the word 'must'. It does not require a bifurcated test for the prosecution and defence.[49]

3.43 However, to further support their arguments in favour of the different tests proposed by the Bill, the DPP submitted that:

> …the tests, although framed in different terms, are appropriate in light of the different considerations that would be present when assessing the issue of admitting evidence by video link during the prosecution and defence cases.[50]

3.44 Similarly, a representative of the Department explained that:

> The prosecution have duties and obligations that the defence do not have. The prosecution have duties of disclosure; they have to put on their case through a committal proceeding. The defence do not have to present their

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47 *Submission 5*, p. 1.

48 *Submission 5*, p. 2; see also Attorney-General's Department, *Committee Hansard*, 21 October 2005, p. 23.

49 *Committee Hansard*, 21 October 2005, pp 18-19.

50 *Submission 5*, p. 2.

> case or call or identify their witnesses until the matter comes before the court. The difference in the tests flows from that difference in role.[51]

3.45 In particular, the DPP pointed to the disclosure requirement on prosecutors:

> The prosecutor is required to disclose to the defence not only all the evidence that the prosecutor intends to adduce during the hearing of the case but also any unused material that may be relevant to the credibility of prosecution witnesses…[52]

3.46 In response to this, HREOC submitted that:

> …the more onerous disclosure duties imposed on the prosecution are designed to create equality of arms between the parties and ensure a defendant has a fair trial.[53]

3.47 HREOC remarked that:

> …it is a surprising suggestion that the defence should be effectively 'penalised' by reason of a feature which is recognised, in international and domestic law, as an important component of a fair hearing. That is particularly so when the 'penalty' involves the application of a more onerous test for resisting the adducing of video link evidence, thus violating the principle of equality of arms which is another key feature of a fair hearing.[54]

3.48 HREOC also pointed out that full disclosure by the prosecution may not necessarily occur under the National Security Information Act.[55] Indeed, HREOC argued that the cumulative effect of orders made under the provisions of the Bill and the National Security Information Act could result in an unfair hearing.[56] HREOC explained:

> For example, the inability of defence Counsel to closely observe a witness' demeanour in a matter where the witness' credibility is a central issue may not be sufficient to conclude that the use of video link evidence will lead to an unfair hearing. However, if defence counsel is also denied access to security sensitive documents which impeach credibility (following the making of an order under the National Security Information Act), the cumulative obstacles placed upon the defence may result in the hearing being unfair.[57]

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51 *Committee Hansard*, 21 October 2005, p. 20.

52 *Submission 5*, pp 2-3; see also *Committee Hansard*, 21 October 2005, p. 21.

53 *Submission 4A*, p. 3.

54 *Submission 4A*, p. 4.

55 *Submission 4*, pp 8-9; see also Mr Craig Lenehan, *Committee Hansard*, 21 October 2005, p. 18.

56 *Submission 4*, pp 8-9.

57 *Submission 4*, p. 9.

3.49 HREOC therefore suggested that the courts should be specifically directed in proposed section 15YV to take those possibilities into account in deciding whether to permit the use of video evidence by the prosecution – that is, the courts should be required to have regard to the circumstances of the proceedings as a whole.[58]

3.50 However, in response to concerns about limitations on prosecution disclosure under the National Security Information Act, a representative of the DPP told the committee that:

> If it gets to the point where we think there is material that would impact on a witness we wanted to call and we were precluded from disclosing that material because of security requirements, in all probability in the end we would not call that witness.[59]

Obligations under international law

3.51 Some submissions also discussed whether the different standards proposed by the Bill could breach Australia's obligations under international law. For example, HREOC raised concerns about the Bill's provisions in the context of Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR):

> …the Court should have a flexible discretion to avoid the violation of the right of an accused to a fair hearing. Regrettably, the Bill contemplates at least some infringement of that right and may (depending upon the interpretation given to 'substantial') envisage violations which are characterised as considerable or large.[60]

3.52 Mr Lenehan of HREOC considered that video evidence in itself would not give rise to an issue under Article 14(1) of the ICCPR.[61] However, HREOC argued that the Bill's provisions are 'objectionable' because of 'the imbalance created between the ability of the prosecution and defence to call video evidence.' HREOC concluded that the current provisions of proposed section 15YV favour the prosecution, and therefore violate the principle of 'equality of arms', which is fundamental to Articles 14(1) and (3)(e) of the ICCPR.[62]

3.53 Similarly, ALHR expressed the view that 'the privileged position in which the prosecution is put by virtue of s.15YV(1) clearly offends Article 14(3)(e) of the ICCPR.'[63] The ALHR further emphasised that:

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58 *Submission 4*, p. 9; see also p. 8, para 31; and Appendix 3 of this report.

59 *Committee Hansard*, 21 October 2005, p. 21.

60 *Submission 4*, pp 6-7.

61 *Committee Hansard*, 21 October 2005, p. 16.

62 *Submission 4*, p. 7; see also Mr Craig Lenehan, HREOC, *Committee Hansard*, 21 October 2005, p. 13.

63 *Submission 2*, p. 3.

> No specific justification is made by the government for overriding this human right other than it will allow 'important evidence from overseas witnesses [to] be put before the court using video link technology'. This facility already exists and is referred to above.[64]

3.54 However, a representative of the Department took the position that the two tests do not breach the ICCPR, on the basis of their argument, as outlined above, that the two different tests proposed by the Bill achieve the same basic result and the same policy outcome but with different wording to reflect the different roles.[65]

Observers

3.55 Submissions also raised issues in relation to the appointment of observers under proposed section 15YW of the video link provisions.[66]

3.56 ALHR supported the provision for the court to appoint observers, but was nevertheless concerned that this proposed safeguard was 'weak'[67] and should therefore be 'tweaked'.[68] ALHR suggested that the role of the observer is too limited, because the observer is only empowered to 'observe' the giving of evidence by the witness.[69] In particular, ALHR highlighted that the observer will not be empowered:

- to provide documents to a witness as they are cross-examined; nor
- to report on intimidation applied to the witness outside of the giving of evidence, even if they become aware of acts outside of the giving of evidence which would be relevant, such as intimidation of the witness outside the room where the evidence is given.[70]

3.57 Mr Beckett from ALHR gave an example in relation to this last point:

> There is a degree of ambiguity about that. Let us take an extreme example: evidence that is being taken in a cell or in a room in a jail overseas. If the observer, when arriving, sees something [such as intimidation] that occurs just prior to the giving of evidence, I think it is strongly arguable that it does not fall within the power of the observer to report that to the court.[71]

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64 *Submission 2*, p. 3; also Mr Simeon Beckett, ALHR, *Committee Hansard*, 21 October 2005, pp 6 and 8.

65 *Committee Hansard*, 21 October 2005, p. 20.

66 Note that there is no similar provision contained in the amendments to the Foreign Evidence Act: this is discussed further below.

67 *Submission 2*, p. 7.

68 Mr Simeon Beckett, ALHR, *Committee Hansard*, 21 October 2005, p. 7.

69 See proposed subs. 15YW(7).

70 *Submission 2*, pp 7-8; see also Mr Simeon Beckett, ALHR, *Committee Hansard*, 21 October 2005, p. 7.

71 *Committee Hansard*, 21 October 2005, p. 7; see also p. 11.

3.58 However, a representative of the Department suggested that, while the provision is expressed in terms of 'what is observed in relation to the giving of evidence', it was arguable that the giving of evidence could be influenced by matters that are observed prior to the taking of evidence. For example:

> …if, during the course of performing their role as an observer, they see anything that is relevant to the way the witness has given evidence, they can report it to the court. The other point is that there is no prohibition on what the observer can tell the court or the defence. So if the observer hears something while they are chatting or talking to someone that might be relevant for the defence to know, nothing in here says they cannot get on the telephone or tell the judge…[72]

3.59 ALHR also queried whether the observer would be truly independent, particularly if a diplomatic or consular officer were appointed as an observer:[73]

> That means that a member of one arm of the executive may be taken to be 'independent' of another arm of the executive, namely the prosecution. Accordingly, there appears to be no prohibition on members of Australia's security agencies filling the role of observer as long as they are 'independent of the prosecutor'. That is clearly an unsatisfactory situation because it affects the independence of the proceedings. A preferable form of independence for an observer may be achieved through use of the local legal profession or an Australian legal officer agreed upon between the parties.[74]

3.60 Similarly, Mr Lenehan of HREOC pointed out:

> …there is a requirement under section 15YW(5), which is the observer's provision, that the observer must be independent of the prosecutor. However, it is made equally clear in subsection (6) that the observer does not need to be independent of the Australian executive government. Potentially, you are getting into a realm where you could be splitting hairs as to whether, say, an ASIO agent is independent of the prosecution. Arguably they are if they are not directly involved in the bringing of criminal proceedings—or maybe not. It is left unclear; it should perhaps be better specified.[75]

3.61 In response to these concerns, a representative of the Department suggested that a court would not find an ASIO officer or police officer to be independent of the prosecutor or the prosecution, but that, on the other hand, a consular official may be entirely appropriate.[76] The representative further emphasised that the observer

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72 *Committee Hansard*, 21 October 2005, p. 34.

73 See proposed subs. 15YW(4)-(6).

74 *Submission 2*, p. 8; also Mr Simeon Beckett, ALHR, *Committee Hansard*, 21 October 2005, pp 10-11.

75 *Committee Hansard*, 21 October 2005, p. 15.

76 *Committee Hansard*, 21 October 2005, pp 28-29.

provisions are a matter for the court: the court will specify who the person is, and it is the court that 'must be satisfied that the person is independent of the prosecutor and independent of the defendant.'[77]

3.62 ALHR also noted that the use of the observer's report would be limited to whether the evidence concerned should be admitted. ALHR pointed out that:

> One can conceive of a case where the observer's report does not cause the court to refuse the admission of the evidence but instead the report affects the weight which may be placed on the evidence. The legislation as drafted does not allow for the judicial member to take weight into account or to instruct the jury on the issue of the evidence's weight.[78]

3.63 Mr Beckett of ALHR elaborated on this for the committee:

> Even if it is admitted, if it is a judge alone trial then perhaps the judge should be able to give differential weight to that report in terms of how the evidence that is allowed by video link and has been admitted goes to the issues in contention. Obviously, if it is a trial then the judicial member should be able to instruct the jury about the weight perhaps to be given to the evidence on the basis of the expert's report.[79]

3.64 The Gilbert and Tobin Centre of Public Law supported the observer provision 'as an important safeguard by which the integrity of the video evidence may be assured'.[80] However, the Gilbert and Tobin Centre of Public Law argued that:

> …the safeguard could be strengthened by removing the discretionary aspects of section 15YW. At present, the Court need neither appoint an observer (subsection 1) [nor] require a report if one is appointed (subsection 7). Although we suspect reasons of convenience and practicality underlie the present approach, it would be preferable for the legislation to require an observer in respect of all section 15YV directions or orders and for that person to make a report to the court as a matter of course.[81]

3.65 Dr Lynch from the Gilbert and Tobin Centre of Public Law further observed during the committee's hearing that:

> …other than suggesting that there be some Australian diplomat on hand to observe the process, there is no other provision in the bill for what is required. It says that there is the technology available to do it. But there is no provision, as one of the other submissions raises, for someone to hand documents to the witness. I think there is the appointment of someone to

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77 *Committee Hansard*, 21 October 2005, p. 28.

78 *Submission 2*, p. 8; and see also HREOC, *Submission 4A*, p. 2.

79 *Committee Hansard*, 21 October 2005, p. 8; see also Mr Craig Lenehan, HREOC, *Committee Hansard*, 21 October 2005, p. 14.

80 *Submission 1*, p. 3.

81 *Submission 1*, p. 3; see also Bills Digest, p. 12.

> administer the oath but it does not specify that that is not to be the observer either. The circumstances under which the evidence is given locally are quite free-form.[82]

3.66 Similarly, HREOC also suggested some improvements to the observer provisions proposed by the Bill. In particular, HREOC submitted that:

> 15YW does not specify the matters a Court must consider when determining whether to make the presence of an observer a condition of receiving video evidence. This will make a refusal to exercise that widely drafted discretion more difficult to challenge.[83]

3.67 HREOC further proposed that the defence should be able to insist upon the use of an observer, at least in certain circumstances.[84]

3.68 However, a representative of the Department responded that the provisions deliberately left the discretion with the court in order to be 'flexible' and 'facilitative', particularly 'because of the range of situations in which you might want to take video link evidence.'[85] The representative further pointed out that, in practice, if the defence wanted an observer to be appointed, it was likely that the court would take that into account.[86] However, the representative also observed that:

> The point is that, under this legislation, the role of observers is limited. They are there as the eyes and ears of the judge. They are there to observe the proceedings as they occur and report to the judge. They are there to protect the integrity of the court proceedings so that the judge in Australia can be confident that nothing is happening off camera that they cannot see. That person is not there to protect the rights of the defendants or to regulate the activities of the foreign investigators or the foreign authorities.[87]

3.69 Finally, HREOC was concerned that the provisions for appointment of observers 'do not provide adequate safeguards against the admission of evidence tainted by torture'.[88] In particular, HREOC argued that the provisions:

> …will not facilitate scrutiny of the treatment of the witness away from the location where evidence is being given (which may be of particular concern where the witness is being detained)…Australia is under a positive obligation to ascertain whether any evidence given under the Bill is made as a result of torture or other cruel or inhuman treatment. The Commission

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82 *Committee Hansard*, 21 October 2005, p. 4.

83 *Submission 4*, p. 11; see also Mr Craig Lenehan, HREOC, *Committee Hansard*, 21 October 2005, p. 16; and see further *Submission 4A*, p. 2.

84 *Submission 4*, p. 11; Mr Craig Lenehan, HREOC, *Committee Hansard*, 21 October 2005, p. 17.

85 *Committee Hansard*, 21 October 2005, pp 21 and 28.

86 *Committee Hansard*, 21 October 2005, p. 29.

87 *Committee Hansard*, 21 October 2005, p. 21.

88 Mr Craig Lenehan, HREOC, *Committee Hansard*, 21 October 2005, p. 13.

> would recommend that proposed s15YW be expanded to allow the Court to seek information on a wider range of matters including, where relevant, conditions of detention.[89]

3.70 The issue of evidence tainted by torture is discussed further later in this chapter.

Foreign evidence

3.71 Submissions and evidence received by the committee generally concentrated on the video link provisions in Part 1AE of the Crimes Act. However, the concerns raised in relation to the different tests for the prosecution and defence also extended to the proposed amendments to the Foreign Evidence Act.[90]

3.72 Indeed, for some submitters, the lack of provisions for the appointment of an independent observer in the amendments to the Foreign Evidence Act exacerbated their concerns in some contexts, such as situations where evidence may have been procured through torture or inhuman treatment. This issue is discussed in more detail below.

3.73 The committee also notes that there are differences between the Foreign Evidence Act provisions and the proposed video link provisions. In particular, under the video link provisions, as noted earlier, the court *must* allow video link evidence *unless* the court is satisfied that it is inconsistent with the interests of justice or would have a substantial adverse effect on the right to receive a fair hearing. In contrast, under the Foreign Evidence Act, the court *may* direct the foreign material not be adduced *if* the court is satisfied that, having regard to the interest of the parties, justice would be better served if the foreign material were not adduced as evidence.[91] The Bill does not propose to change the wording currently used under the Foreign Evidence Act, but would simply change the test for the prosecution in the case of 'designated offences' to the standard of 'substantial adverse effect'.[92]

3.74 In response to the committee's questions as to why this approach was taken, a representative of the Department suggested that the changes would 'achieve the same result'. [93] That is:

> We felt that it was the same as the interests of justice test in the video link bill. So we felt that we did not need to change it but that we did need to narrow the test for the prosecution to make it the same as the video link test.

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89 *Submission 4*, pp 11-12; also Mr Craig Lenehan, *Committee Hansard*, 21 October 2005, p. 13.

90 See, for example, ALHR, *Submission 2*, p. 6; Gilbert and Tobin Centre of Public Law, *Submission 1*, p. 4; HREOC, *Submission 4*, pp 12-13.

91 See s.25 of the Foreign Evidence Act.

92 See proposed section 25A of the Foreign Evidence Act.

93 *Committee Hansard*, 21 October 2005, p. 27.

> Thus we have added in the prosecution test for the foreign video link provisions.[94]

3.75 Another representative further explained that:

> The Foreign Evidence Act is part of the suite of legislation which hangs on the [*Mutual Assistance in Criminal Matters Act 1987*], as you know, and also interacts with state evidence laws. It is a complicated and difficult piece of legislation to work with…[I]t was just felt that it would be better to make minimal changes if there was a need to do so.[95]

Integrity of evidence

3.76 Submissions also raised issues as to the integrity of video link and other foreign evidence, such as evidence tainted by torture or inhumane treatment. These issues are discussed below.

Evidence tainted by torture

3.77 Several submissions were particularly concerned about situations where there was a possibility that foreign evidence may have been procured through torture or inhuman treatment.[96]

3.78 The Gilbert and Tobin Centre of Public Law submitted that, while this could also be an issue of concern in relation to the proposed video link provisions in the Crimes Act, the use of an observer would reduce that possibility somewhat. However, the Gilbert and Tobin Centre of Public Law highlighted that, in relation to the Foreign Evidence Act:

> …in the context of use of foreign material already existing that safeguard is not an option. Thus the danger of evidence having been produced in violation of fundamental human rights is more pronounced. Although it might be argued that any evidence tainted by torture would still fall foul of the standard in section 25A(1)(d) or the existing requirements for testimony under section 22 of the Act, some more express safeguard is in order.[97]

3.79 Dr Lynch from the Gilbert and Tobin Centre of Public Law acknowledged during the hearing that the legislation would not prevent a court from excluding evidence on the basis that it was tainted by torture. Nevertheless, the Centre declared that:

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94 *Committee Hansard*, 21 October 2005, p. 28.

95 *Committee Hansard*, 21 October 2005, p. 28.

96 See, for example, Gilbert and Tobin Centre of Public Law, *Submission 1*, p. 4; HREOC, *Submission 4*, pp 9-12; see also Bills Digest, p. 18.

97 *Submission 1*, p. 4.

> This Bill is an excellent opportunity for the Commonwealth Parliament to affirm its abhorrence of the use of torture in the procurement of evidence.[98]

3.80 The Gilbert and Tobin Centre of Public Law therefore suggested that:

> The changes to the Foreign Evidence Act should include an express ground for the court to refuse an application for use of foreign evidence where the court is not satisfied that the evidence in question was not obtained through the use of torture or inhuman and degrading treatment or extraordinary rendition (effectively torture by proxy).[99]

3.81 Mr Lenehan of HREOC also raised concerns that:

> … the video evidence link amendments do not provide sufficient safeguards to ensure that Australian courts exclude evidence obtained as a result of torture or other cruel, inhuman or degrading treatment.[100]

3.82 HREOC acknowledged that it would expect that evidence obtained through torture and similar means would, as a practical matter, be excluded. Nevertheless, HREOC considered that:

> …the possibility remains that it may be admitted as a matter of discretion. Given that there appears to be grounds for concern about video link evidence which may be adduced under the Bill from witnesses testifying in foreign states, the Commission considers that it would be desirable to remove any such discretion and simply proscribe the admission of such evidence, at least where it is adduced via video link.[101]

3.83 More specifically, in relation to the amendments to the Foreign Evidence Act, HREOC submitted that:

> …unlike the amendments to the Crimes Act, there has been no attempt to provide for that possibility through the mechanism of an observer…the Court should be able to impose such conditions on the receipt of evidence under the FEA [Foreign Evidence Act]. The inclusion of that power is particularly important if limitations are to be placed upon the Court's power to refuse to allow such evidence to be adduced.[102]

3.84 In particular, Mr Lenehan observed that 'we do not see why there should not be safeguards there to similar effect to the ones we propose for the video evidence link provisions'.[103] Mr Lenehan therefore suggested that 'an expanded form of the observer

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98 *Submission 1*, p. 4; see also Dr Andrew Lynch, Gilbert and Tobin Centre of Public Law, *Committee Hansard*, 21 October 2005, pp 2-3.

99 *Submission 1*, p. 4.

100 *Committee Hansard*, 21 October 2005, p. 13.

101 *Submission 4*, p. 11; also Mr Craig Lenehan, HREOC, *Committee Hansard*, 21 October 2005, pp 13 and 15.

102 *Submission 4*, p. 13.

103 *Committee Hansard*, 21 October 2005, p. 16.

provisions and an absolute rule against the admission of evidence obtained by torture' should also be included in the Foreign Evidence Act.[104]

3.85 The DPP acknowledged that, even with the observer provisions in proposed Part 1AE of the Crimes Act, 'instances of torture or ill treatment prior to the giving of evidence by video link may not necessarily be revealed by the presence of the observer at the time of giving evidence.'[105] However, the DPP submitted that:

> If the prosecution was in possession of any material that suggested a witness had been tortured or ill treated it would be required to disclose that material to the defence. If such material emerged either prior to the court proceedings or during the course of the proceedings the evidence may be ruled in admissible or unreliable. The video link provisions only relate to the method of giving evidence not its ultimate admission or reliability and issues relating to the treatment of witnesses and the conditions under which they are held are often the subject of cross examination and defence counsel can quite properly explore these issues.[106]

3.86 A representative of the DPP explained further during the committee's hearing:

> Not only does the prosecution have to disclose at a very early stage the evidence upon which it intends to rely but also it has a positive duty to disclose any other material of which it is aware that may have an impact on the evidence it is going to introduce or on the witnesses it will call. So any pieces of information that we have that might go to a person's credibility or the way they have been treated and their background et cetera that might have an impact on the reliability of their evidence are matters that we have to disclose to the defence. We obviously take that very seriously and it does pose some difficulties in this context.[107]

3.87 Similarly, a representative of the Department told the committee that 'this is not an act about the admissibility of evidence; this is an act about the process' and that:

> Those protections come in under the normal rules, protections and powers of the court under the Evidence Act and the normal ability to control proceedings…if it appears that the evidence is not reliable, for example, suppose the observer was to report to the judge that there was somebody standing there with a gun pointed at the witness's head…You do not then need a provision in here to say that that evidence is not admissible. It would not be admitted through the exercise of the normal discretions and powers of the court.[108]

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104 *Committee Hansard*, 21 October 2005, p. 13.

105 *Submission 5*, p. 3.

106 *Submission 5*, pp 3-4.

107 *Committee Hansard*, 21 October 2005, p. 21.

108 *Committee Hansard*, 21 October 2005, p. 23.

Other integrity issues

3.88 ALHR also raised a number of matters which constrain a court in assessing the credibility of a witness by video link. For example, one difficulty mentioned by ALHR was in applying Australian laws on perjury or contempt to a witness in another jurisdiction.[109] Mr Beckett from ALHR elaborated on this in response to the committee's questioning:

> Because the person is sitting on the other side of the world, there is difficulty in the court being able to immediately hold the person in contempt and effectively threaten the witness with perjury…The weight of the court, if you like, and the whole structure that goes with court proceedings is absent.[110]

3.89 Mr Beckett was of the opinion that the proposed tests in relation to video link evidence would compound the problem:

> …in any video link evidence if there is contempt or perjury you are going to have those difficulties, but the issue is that where you have a high hurdle, as we have in proposed section 15YV(1), if there is some issue about credibility but it does not reach the height of that test, these are the sorts of problems that are likely to arise. If it is more likely that there are going to be lies told or contempt committed via the use of video link evidence, and you have let it in, then you may have blown your opportunity to put pressure on that witness through the use of contempt and perjury laws.[111]

3.90 Mr Beckett observed that there may also be other difficulties in assessing the credibility of the witness when using video link:

> …if you want to see the demeanour if the witness in the witness box, there is a difficulty when they are at the other end of a video link. If they are sweating or fidgeting in the box, you can see the demeanour of the witness, but there are difficulties in reading the demeanour of the witness during video link evidence even though you might have a camera planted in their face. And demeanour…is one of the key things upon which a judge might make a decision about the credibility of a particular witness's evidence.[112]

3.91 However, a representative of the Department disagreed, arguing that it is possible to assess the demeanour of a witness through video link.[113] The representative again observed that the courts would still have powers under the normal rules of evidence to deal with admissibility and credibility issues:

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109 *Submission 2*, p. 5.

110 *Committee Hansard*, 21 October 2005, p. 9.

111 *Committee Hansard*, 21 October 2005, p. 12.

112 *Committee Hansard*, 21 October 2005, p. 12.

113 *Committee Hansard*, 21 October 2005, p. 23.

> …these provisions deal with the mode in which evidence is given. They do not talk about or deal with the admissibility of evidence. All the traditions rules of admissibility will apply; they will not be affected… This [Bill] does not change the powers of the court in those situations.[114]

3.92 Similarly, a representative of the DPP again pointed out that the Bill:

> …deals with the method in which evidence is given. It really does not go to many of the other issues that have been raised about reliability, admissibility and credibility—all those sorts of things. They are still issues that the court faces, whether this evidence is given overseas or in person.[115]

Retrospective application

3.93 The new video link rules in Part 1AE of the Crimes Act will apply to proceedings initiated before the commencement of Part 1AE.[116] Similarly, the amendments to the Foreign Evidence Act would also apply to proceedings instituted before the commencement of the amendments.[117]

3.94 The Parliamentary Library's Bills Digest concluded that 'therefore, these provisions would have a retrospective effect.'[118] In particular, the Bills Digest observed that, if passed, the provisions may be in effect for the trial of Mr Fadheem Lodhi, which will apparently take place in February 2006. Committal hearings for this trial involved video evidence, and were held between December 2004 and February 2005.[119]

3.95 ALHR was concerned at the retrospective effect of the provisions relating to video link evidence:

> Depending on the stage of the proceedings this may have an adverse effect on the case especially where the prosecution has been unable to adduce the evidence under the current provisions for video link evidence. The defence may have committed itself to a particular course in the proceedings on the assumption that this new evidence will not be called. For example, prosecution witnesses may have been cross-examined on the understanding that no such evidence would be called. Further, documentary evidence may have been let in by the defence with its consent when such evidence would have been opposed if the new evidence (by video link) was expected.[120]

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114 *Committee Hansard*, 21 October 2005, p. 21 and see also p. 36.

115 *Committee Hansard*, 21 October 2005, p. 21; see also DPP, *Committee Hansard*, 21 October 2005, p. 24.

116 See proposed subsection 15YU(3).

117 See proposed subsection 25A(3).

118 Bills Digest, pp 10 and 16.

119 See further Bills Digest, pp. 5-6.

120 *Submission 2*, p. 6; also Mr Simeon Beckett, ALHR, *Committee Hansard*, 21 October 2005, pp 6-7.

3.96 ALHR concluded that if evidence is allowed after proceedings have commenced, the defendant may be 'unfairly prejudiced by the introduction of new evidence at this late stage of proceedings.'[121] Mr Beckett of ALHR gave a number of examples of this during the committee's hearing. He did, however, indicate that evidence introduced early in the proceedings would not be problematic:

> …the proceedings of the actual trial have commenced in the sense that a charge has been laid and the brief of evidence has not been served on the defence and the prosecution wants to lead this sort of video link evidence, then I cannot see—at least prima facie—why there would be a problem with that. In other words, it could be included as part of the police brief and then it is dealt with on its merits during the trial.[122]

3.97 However, Mr Beckett argued that it is important to provide some flexibility for the court so it can weigh up the various advantages and disadvantages to both sides on that specific issue.[123] ALHR therefore suggested that any use of the new video link provisions in proceedings which have already commenced should be by leave of the court.[124]

3.98 In response to the committee's questioning on this issue, Mr Beckett acknowledged the court already has discretion under the Bill as to whether to allow video link evidence, but argued that the different test proposed by the Bill (as discussed earlier in this chapter) would make it difficult for the defence in proceedings which have already commenced.[125] ALHR therefore proposed that, in situations where proceedings have already commenced:

> …the test to be applied by the court should be whether it is in the interests of justice to have the new evidence adduced and the onus of doing so should be with the applicant.[126]

3.99 However, in its submission, the DPP stated that the provisions will 'operate prospectively in relation to these proceedings'.[127] Similarly, the committee notes that the Attorney-General has argued that the Bill is not retrospective and that:

> …the provisions of this bill are procedural and they apply to proceedings that are to take place after the provisions come into force, thus they do not affect the substantive rights of either party.[128]

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121 *Submission 2*, p. 6.

122 *Committee Hansard*, 21 October 2005, p. 7.

123 *Committee Hansard*, 21 October 2005, p. 7.

124 *Submission 2*, p. 7; see also Mr Craig Lenehan, HREOC, *Committee Hansard*, 21 October 2005, p. 14.

125 *Committee Hansard*, 21 October 2005, p. 7.

126 *Submission 2*, p. 7; and see also Mr Simeon Beckett, ALHR, *Committee Hansard*, 21 October 2005, pp 7 and 9-10.

127 *Submission 5*, p. 2.

3.100 Mr Beckett of ALHR responded to this argument as follows:

> My concern is not so much whether it is substantive or procedural; the issue is whether there is prejudice to the defence case. Having gone down one particular road and perhaps prejudiced oneself, the defence then has to roll itself back and may have to go down another road…there may be substantive prejudice. In other words, the trial becomes unfair because the defence has already committed itself to that road.[129]

3.101 Mr Lenehan of HREOC supported ALHR's arguments in this regard:

> …it is not necessarily objectionable in itself that this has that retrospective effect on procedural issues; what is potentially objectionable is that it could affect the fairness of existing trials.[130]

3.102 During the committee's hearing, a representative of the DPP reiterated the position that 'this is procedural legislation and it does not apply retrospectively.'[131] In answers to questions on notice, the DPP noted that there are three counter terrorism cases currently on foot in which it is proposed to call video link evidence and where the proposed provisions could potentially be used, if the Bill is passed.[132] The DPP also stated that 'those cases are at different stages of advancement.'[133]

3.103 The representative also responded to the examples given by ALHR where the prosecution may wish to call further evidence relying on this legislation in a pre-existing proceeding:

> The fact is that the prosecution is in a very difficult position to try to introduce new evidence at a late stage in any event, wherever it comes from. At the very least, depending on the nature of the evidence, there would be adjournments to allow the defence to consider the evidence et cetera. If it were important enough, it would have the probable effect of aborting the trial; you would have to come back and do it again.[134]

3.104 The representative continued:

> There is no issue of defence being taken by surprise. If it were such that, for example, they thought they were prejudiced about the way they had presented their case up until then, whether that evidence were allowed in obviously would go to the discretion [of] the court. I think it is important to see this legislation in the context of how the criminal prosecution process

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128 The Hon Philip Ruddock MP, Attorney-General, *House of Representatives Hansard*, 13 October 2005, p. 25.

129 *Committee Hansard*, 21 October 2005, p. 8; and see also pp 9-10.

130 *Committee Hansard*, 21 October 2005, p. 14.

131 *Committee Hansard*, 21 October 2005, p. 22.

132 *Submission 5A*, p. 1.

133 *Submission 5A*, p. 1.

134 *Committee Hansard*, 21 October 2005, p. 22.

> works…[M]any of the things that have been referred to…are issues that courts face on a daily basis in terms of the way they deal with witnesses.[135]

Other provisions of the Bill

Non-judicial functions and powers

3.105 In relation to the proposed amendments to section 4AAA of the Crimes Act,[136] the Bills Digest observed that 'it is not clear why the Commonwealth is seeking to widen the non-judicial functions categories to the Federal level at this juncture.'[137] The Bills Digest also suggested that 'the proposed amendments may not withstand Constitutional challenge depending on exactly what the judicial officer is required to do.'[138] However, a representative of the Department expressed confidence that the provisions would survive any constitutional challenge.[139]

3.106 The Gilbert and Tobin Centre of Public Law felt that there is 'nothing objectionable' about the text of these proposed amendments to section 4AAA. However, it was concerned about the reasons given by the Explanatory Memorandum as to the need for the amendments — that is, 'members of the Federal judiciary are increasingly being conferred non-judicial powers in criminal matters under Commonwealth law'.[140] The Gilbert and Tobin Centre of Public Law described this as a 'worrying trend' and suggested that 'there are strong arguments for restraint in the allocation of such duties upon judicial officers.'[141]

3.107 Dr Lynch from the Gilbert and Tobin Centre of Public Law explained further during the committee's hearing that:

> There is no problem with what is being done in the bill as a legal matter. But it is a trend, particularly so in relation to the terrorism legislation that has been introduced, that Federal Court judges are being given non-judicial roles, which I think presents the danger of an incompatibility arising with their judicial function.[142]

3.108 The Gilbert and Tobin Centre of Public Law further submitted that:

> …even once amended, section 4AAA will not guarantee the validity of each and every conferral. Ultimately, that must depend upon the specific nature of the function conferred in each case. The amendments to section

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135 *Committee Hansard*, 21 October 2005, p. 22.

136 See items 1-4 of Schedule 1 of the Bill.

137 Bills Digest, p. 8.

138 Bills Digest, p. 8.

139 *Committee Hansard*, 21 October 2005, pp 29-30.

140 *Submission 1*, p. 1.

141 *Submission 1*, p. 2.

142 *Committee Hansard*, 21 October 2004, p. 3.

> 4AAA will not save a conferral if it is found to be simply incompatible with the Judge's judicial role.[143]

3.109 A representative of the Department acknowledged this, but pointed out that this would be a problem in relation to specific conferrals of power, which are contained in other legislation, rather than the provisions of the Bill.[144] The representative further noted that the amendment was the result of 'a request from the Federal Court to give greater certainty of protection to their officers.'[145]

DNA matching

3.110 As outlined in Chapter 2, the Bill also proposes to amend Part 1D of the Crimes Act to streamline the rules governing the matching of DNA profiles. In relation to these amendments, the Parliamentary Library's Bills Digest suggested that the committee 'may wish to seek briefings from the relevant agencies to examine the full ramifications of these amendments.'[146]

3.111 The Law Society of New South Wales submitted its opposition to the amendments to remove the limitation on inter-jurisdictional matching of DNA profiles to circumstances where there is a specific identifiable investigation. The Law Society of New South Wales could not see any justification for:

> …why DNA that is provided for a specific purpose by a volunteer should then be made available for investigations of any offence…DNA information transmitted between the jurisdictions should only relate to the investigation of specific matters.[147]

3.112 In response to the committee's questions on this issue, a representative of the Department emphasised that:

> …these provisions do not, and are not designed to, expand the use that can be made of DNA evidence beyond what was intended in the legislation.[148]

3.113 The representative explained that there have been two major developments since the Commonwealth legislation relating to the national criminal intelligence DNA database was enacted in 2001. First, states and territories have enacted their own legislation. Second, the DNA database has actually been developed and has become

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143 *Submission 1*, p. 2, referring to *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1; also Dr Andrew Lynch, Gilbert and Tobin Centre of Public Law, *Committee Hansard*, 21 October 2005, p. 4.

144 *Committee Hansard*, 21 October 2005, p. 30.

145 *Committee Hansard*, 21 October 2005, p. 30.

146 p. 15.

147 *Submission 7*, p. 1.

148 *Committee Hansard*, 21 October 2005, p. 30.

operational. The representative told the committee that, as a result of these developments:

> …we are discovering that there are areas where Commonwealth law or state law do not quite match and where the law and the way the database operates do not quite match. These provisions are designed to cut away a couple of the problems...[149]

3.114 The representative commented that one of the problems relates to the sharing of information between states and the Commonwealth. The legislation's wording:

> …has now turned out to be too restrictive because an investigation on foot is required before you can share data. It just does not work in the way in which it was intended.[150]

3.115 Another departmental representative explained in more detail:

> The way you read that is that each time the DNA profile goes up onto the national criminal database there be a request to say we are investigating this matter. We are changing it to say that they put it up on the database and then it comes back saying there is a match and then we do the request saying we need some further information about this particular match. We have just separated the transmission out, but we are still saying it must only be for the use of the investigation of the matter. That is still in the legislation. We have not expanded the use.[151]

3.116 The representative further noted that the other proposed amendment to the DNA provisions will deal only with volunteers (limited purposes). The representative explained that:

> Volunteers (limited purposes) is when a DNA sample is taken from a volunteer for a purpose which is specified by the volunteer and can only be used for that purpose.[152]

3.117 Another representative of the Department explained the problem:

> For example, the volunteers (limited purposes) cannot be matched according to the matching table that currently exists in the legislation with crime scenes. We are making an amendment to say that if the volunteer has given their DNA for the purpose of matching it against crime scenes…or a specific crime scene, it will allow the match. But under the current legislation we would not be able to even though the volunteer had said that it is okay.[153]

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149 *Committee Hansard*, 21 October 2005, p. 31.

150 *Committee Hansard*, 21 October 2005, p. 31.

151 *Committee Hansard*, 21 October 2005, p. 31.

152 *Committee Hansard*, 21 October 2005, p. 31; see also *Submission 6*.

153 *Committee Hansard*, 21 October 2005, pp 32-33; see also *Submission 6*.

3.118 Finally, the departmental representatives noted that the DNA matching regime has a range of measures designed to protect privacy. Further, they stated that consultation was undertaken with government privacy experts and 'they were happy with the amendments in the current form.'[154] The representatives concluded that:

> …we are satisfied that the system protects privacy and that it gives effect to the way this legislation is drafted and the principles behind it.[155]

The committee's view

3.119 The committee supports and acknowledges the aims and need for the Bill, particularly in ensuring that important evidence from overseas witnesses can be put before the court using video link technology. Indeed, the committee is somewhat disappointed that the Bill provides for a regime for video link evidence only in relation to 'designated offences'. The committee encourages the government to consider the introduction of a more comprehensive national legislative scheme for video link evidence.

3.120 However, the committee acknowledges the concerns raised in relation to the differing tests proposed by the Bill, depending on whether the prosecution or defence wishes to adduce video link or foreign evidence. The committee also queries the wisdom of using different wording in the amendments to the Crimes Act and the Foreign Evidence Act, rather than making uniform provisions across both pieces of legislation.

3.121 The committee recognises that conflicting evidence was received about whether the use of different tests (in proposed sections 15YV of the Crimes Act, and 25A of the Foreign Evidence Act) would be advantageous to the prosecution and prejudicial to the defendant. Nevertheless, the committee is concerned that there was a distinct lack of support for the narrower prosecution test in evidence received by the committee, other than from the Department and the DPP. The committee is persuaded by concerns about the potential impact of the provisions on the defendant's right to a fair trial, particularly when the proposed provisions are used in conjunction with the National Security Information Act. Further, the committee notes the evidence of the need to maintain public confidence in the court system, especially in relation to the trial of terrorist offences. The committee believes it is important to ensure that persons convicted of such offences receive — and are seen to receive — a fair trial, and that the Australian court system is not left open to criticism in relation to such convictions.

3.122 The committee considers that the court should retain a wide and flexible discretion in these matters. The committee therefore recommends that the proposed sections 15YV of the Crimes Act and 25A of the Foreign Evidence Act be amended to ensure that the same standard governs the court's discretion to allow evidence via video link or foreign evidence, regardless of which party makes the application. The

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154 *Committee Hansard*, 21 October 2005, p. 33.

155 *Committee Hansard*, 21 October 2005, p. 31.

committee considers that the appropriate standard is whether allowing the evidence would be inconsistent with the interests of justice. The committee further recommends that, in line with the suggestion by HREOC, the court should be required to consider the circumstances of the proceedings as a whole for the purposes of determining whether it will be inconsistent with the interests of justice.[156]

Recommendation 1

3.123 The committee recommends that the proposed sections 15YV of the *Crimes Act 1914* and 25A of the *Foreign Evidence Act 1994* be amended to ensure that the same standard governs the court's discretion to allow video link evidence or foreign evidence, regardless of which party makes the application. The committee recommends that the appropriate standard is whether allowing video link or foreign evidence would be inconsistent with the interests of justice.

Recommendation 2

3.124 The committee recommends that, for the purposes of determining whether it will be inconsistent with the interests of justice to allow video link or foreign evidence under proposed sections 15YV of the *Crimes Act 1914* and 25A of the *Foreign Evidence Act 1994*, the court should be required to consider the circumstances of the proceedings as a whole.

3.125 In relation to the provisions for the appointment of observers in proposed section 15YW of the Crimes Act, the committee supports this provision and considers that it is important for the court to retain a discretion in relation to the appointment of observers. The committee notes concerns about whether observers would be truly independent, but considers that the court has sufficient discretion in this matter under the proposed provisions. However, the committee recognises concerns that proposed section 15YW has the potential to unnecessarily limit the observer's role. The committee therefore recommends that proposed subsection 15YW(7) be amended to expressly authorise the court to request an observer to report on a wider range of circumstances relating to a witness's evidence, not just the giving of video link evidence.

Recommendation 3

3.126 The committee recommends that proposed subsection 15YW(7) of the *Crimes Act 1914* be amended to allow the court to request an observer to report on a wider range of circumstances relating to the witness's evidence, not just in relation to the giving of video link evidence.

3.127 The committee also notes concerns about the lack of observer provisions in the Foreign Evidence Act, but is unclear how such a provision might work in practice.

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156 See HREOC, *Submission 4*, p. 8, para 31. The amended s.15YV proposed by HREOC is set out in Appendix 3.

However, the committee suggests that the government consider including a provision in the Foreign Evidence Act to allow for the appointment of an independent observer.

3.128 In relation to situations where video link or foreign evidence may be tainted by torture or inhuman treatment, the committee is satisfied that the court would still have the discretion to rule such evidence as admissible or unreliable under the normal rules of evidence.

3.129 The committee notes concerns about the potential retrospective application of the video link and foreign evidence provisions. However, the committee accepts that any retrospective application will be limited to proceedings that have already commenced, and that the impact will be procedural only. The committee is of the view that any impact on these existing proceedings is a matter best left to the court in its discretion in deciding whether to allow video link or foreign evidence to be adduced.

3.130 Finally, the committee received little evidence on other aspects of the Bill outside the video link and foreign evidence provisions, but considers that the other provisions are appropriate and any concerns raised are not sufficient to prevent passage of the Bill.

Recommendation 4

3.131 Subject to the preceding recommendation, the committee recommends that the Senate pass the Bill.

Senator Nigel Scullion
Acting Chair