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SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

Reference: Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill 2005

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SYDNEY

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SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

Friday, 21 October 2005

Members: Senator Payne *(Chair)*, Senator Crossin *(Deputy Chair)*, Senators Bartlett, Kirk, Mason and Scullion

Substitute members: Senator Stott Despoja for Senator Bartlett

Participating members: Senators Abetz, Barnett, Bartlett, Mark Bishop, Brandis, Bob Brown, George Campbell, Carr, Chapman, Colbeck, Conroy, Eggleston, Evans, Faulkner, Ferguson, Ferris, Fielding, Fierravanti-Wells, Hogg, Humphries, Joyce, Lightfoot, Ludwig, Lundy, McGuaran, McLucas, Milne, Nettle, Parry, Ray, Sherry, Siewert, Stephens, Stott Despoja, Trood and Watson

Senator Bartlett for matters relating to the Immigration and Multicultural Affairs portfolio

Senators in attendance: Senators Mason *(Acting Chair)*, Kirk, Ludwig and Stott Despoja

Terms of reference for the inquiry:

Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill 2005.

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LYNCH, Dr Andrew Nicholas, Director Terrorism and Law Project, Gilbert and Tobin Centre of Public Law, Faculty of Law, University of New South Wales

ACTING CHAIR (Senator Mason)—Good morning ladies and gentlemen. This is the hearing for the Senate Legal and Constitutional Legislation Committee inquiry into the provisions of the Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill 2005. The inquiry was referred to the committee by the Senate on 4 October 2005 for reporting by 1 November 2005. The bill proposes to amend the Crimes Act 1914 to create new video link evidence provisions that apply to proceedings for terrorism and related offences and the Foreign Evidence Act 1994 to facilitate the use of foreign material as evidence in proceedings for terrorism and related offences. The bill also amends other legislation, including to facilitate the sharing of DNA profiles between Australian law enforcement agencies over a national DNA database system.

The committee has received five submissions for this inquiry, which have been authorised for publication and are available on the committee's web site. Witnesses are reminded of the notes they have received relating to parliamentary privilege and the protection of official witnesses. Further copies are available from the secretariat. Witnesses are also reminded that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. The committee prefers all evidence to be given in public but, under the Senate's resolutions, witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera.

I now welcome Dr Andrew Lynch from the Gilbert and Tobin Centre of Public Law at the University of New South Wales. Good morning, Dr Lynch.

Dr Lynch—Good morning.

ACTING CHAIR—Your submission has been lodged with us. We have numbered it No. 1. Do you wish to make any amendments or alterations to your submission?

Dr Lynch—No, I do not.

ACTING CHAIR—I invite you to make a short opening statement, after which we will ask you some questions.

Dr Lynch—First, I would like to thank you for the opportunity to comment on the bill. I would reiterate that 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.

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. I do not think the changes suggested by my own or similar submissions are in any

way destructive of the Commonwealth's purpose in introducing the bill; they merely seek to ensure that it enables the use of video link and foreign evidence in circumstances where it will not unacceptably risk the occurrence of a miscarriage of justice.

To briefly address the conclusions I have made towards the end of my submission, the first is an observation about conferral of non-judicial power. I do not suggest that there is any problem with that provision. But, so far as the major amendments to the Crimes Act go, the improvements that I have identified are the use of a single standard governing the court's discretion to allow evidence, strengthening of the observer role and changes to the Foreign Evidence Act so as to be express about excluding the use of information gained through torture.

ACTING CHAIR—Thanks, Dr Lynch. Can you expand specifically on the use of a single standard for the acceptance of evidence into court? That is a principal point that you make.

Dr Lynch—Under the proposed section 15YV, an application which is made by the prosecutor for use of evidence via video link must be accepted by the court unless it is satisfied that making that order would have a substantial adverse effect upon the right of the defendant to receive a fair hearing, whereas when the defendant makes an application of that sort the court's discretion to refuse that application is based on the much wider principle that it would be inconsistent with the interests of justice for the evidence to be given by video link. That enables the court at that time to consider all sorts of factors which may go towards both the prosecution and the defence interests in the case. 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. If you take that as the starting point then the rest will follow as it does in the second reading speech. It is why you have chosen to go for that test.

ACTING CHAIR—Is the 'substantial adverse impact' test used in other contexts in this country or is it a new test?

Dr Lynch—It is in other pieces of legislation—that is my understanding. I think from the digest that it is in the National Security Information (Criminal and Civil Proceedings) Act 2004, but I may be wrong on that. It has appeared in more recent legislation but has not been applied under that. That is my understanding. The courts have addressed it as a test and noted that it is certainly a more stringent test. It is a harder onus for the defendant to overcome.

ACTING CHAIR—Than the interests of justice test?

Dr Lynch—Certainly.

ACTING CHAIR—And you say it should be a common test.

Dr Lynch—Yes.

Senator LUDWIG—In your inquiries, have you seen that test used anywhere else in the world? What do courts in the UK or the US do? Video link evidence is now used more.

Dr Lynch—I am not familiar, to be honest, with how that is dealt with overseas, but I note that even in the explanatory memorandum it is acknowledged that at the state and territory

level the test is the same whether the application for the use of that evidence is made by the prosecution or the defendant.

Senator LUDWIG—How would it operate, in your view, in terms of the fairness between the defendant and the prosecutor?

Dr Lynch—It ensures that, where the prosecution seeks to rely on that evidence, the defendant has to show that the use of that video link evidence would—not just might but would—have a substantial adverse impact upon his or her case. 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, I would think. But 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. As I said in my opening comments, it seems to be unmerited because 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.

Senator LUDWIG—Have you had an opportunity to look at the DPP's submission? They argue that it would not give the prosecution a greater advantage than the defendant in seeking to address video link evidence. That was on page 3 of their submission.

Dr Lynch—My comment to that would be that, if it does not confer a greater disadvantage or advantage, you would wonder why it is there in the first place.

ACTING CHAIR—You should have a common test?

Dr Lynch—Yes. 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?

Senator LUDWIG—You also say that the foreign evidence obtained should have some limitation for torture. Why do you say that?

Dr Lynch—I probably expressed that best when I said I think it is an excellent opportunity for the Commonwealth to be quite explicit about that. I did suggest that evidence which was tainted in that way may well fall foul of proposed section 25A(1)(d) in the new draft, so I do not think that this legislation suffers from the deficiency that it would prevent a court from excluding evidence on that basis. But, given the level of guidance which other parts of these amendments make towards the court and its discretion to admit particular kinds of evidence, relating to the video link stuff particularly, it would not be out of place for a heightened level of control of the discretion to be stipulated in the act by suggesting to the court that, if it is not satisfied that that evidence was not procured by torture, it should reject it.

Senator LUDWIG—Regarding the reach of this legislation, there does not seem to be any bar on which countries could be utilised for video link evidence—there may not even be a mutual assistance treaty in place. In other words, we have a regime where you have mutual assistance in criminal matters and you have treaties which also provide for video link

evidence to be obtained that way. This does not seem to couch it in those narrower terms; it seems to be broad. Are you concerned about the reach?

Dr Lynch—Even what is in the existing legislation is quite wide as far as the form that the evidence may take. It does not need to be a transcript from a court. It can be a video or anything of that sort that has simply been signed by a judge of one of those courts or taken under oath. So there is not any particular control or standard that is terribly determinative there, and that is of concern. That is perhaps why I did not attend to how you could bolster what you required and suggested instead an express statement of what you should certainly reject.

Senator LUDWIG—It is also narrow in its application in that it applies only to a particular field. Should there be more general or comprehensive provisions for video link evidence? We already know that there are parts in the child sex tourism legislation for that, and there are already parts in the mutual assistance and criminal matters video link evidence. The states have addressed this in part. Is it time for the Commonwealth to look more broadly at how to deal with emerging technologies? This is not so emerging anymore. It has been around for a while but there does not seem to be a comprehensive scheme put in place by the Commonwealth to deal with video link evidence outside of this narrow field.

Dr Lynch—That is a much broader question on which I am probably not terribly suited to comment, other than to say that, certainly given that it exists at the state and territory levels and that it is starting to develop at the Commonwealth level in response to particular offences, with its addition in respect of terrorist offences and to child sex tourism offences it might be that the Commonwealth should turn its mind to a standardised procedure. That might well be something that could be in the report.

Senator STOTT DESPOJA—I would like to turn to the issue of foreign evidence obtained through torture. You acknowledge, as has the DPP, that it probably may be ruled inadmissible anyway. I want to pick up your point where you say that this is an excellent opportunity for the Commonwealth to affirm its abhorrence of the use of torture in the procurement of evidence. Do you have any other suggestions as to how we could do that in law in this bill, or in any other way?

Dr Lynch—It is more a reactive one that the circumstances of this bill seemed to invite the inquiry, and that is why I made the comment here. I note in the antiterrorism bill that the officers of the Australian Federal Police commit an offence if they engage in treatment of people while they are under preventive detention which is inhumane or degrading. So I think that is a positive aspect of that bill also. In a similar comment that I made to Senator Ludwig, if those kinds of standards are to be applied increasingly on the basis of individual legislation, maybe there is some argument that the Commonwealth could seek to implement its obligations under the International Covenant of Civil and Political Rights in a more general way.

Senator STOTT DESPOJA—Thank you. My question was not intended as a tangent; I was curious to hear your views. In your submission you also talk about the worrying trend of the conferral of non-judicial powers on members of the federal judiciary. Can you expand on that for the committee and elaborate on some of your concerns in relation to that trend?

Dr Lynch—As I said the outset, that is simply a comment. 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. So a provision like this, which seeks to clarify the basis upon which that is conferred and certainly does so, cannot determine the outcome in any specific conferral, because it would be a question of asking whether those particular functions that the judge is being required to do as an independent person are in fact incompatible with their judicial function. I am sorry to talk about another bill but, under the Anti-terrorism Bill, whether the function of Federal Court judges in their non-judicial capacity to make the preventive detention orders for 48 hours is incompatible with the status of those judicial officers under chapter III needs to be addressed by looking at those particular provisions, not by some kind of generic out clause like this.

Senator STOTT DESPOJA—It is not covered in your submission, but do you have any comments on the data-matching provisions in the legislation?

Dr Lynch—No, I do not have anything to say on that.

Senator KIRK—I was just thinking about what you were saying about section 4AAA and the conferral of non-judicial powers on members of the judiciary. You mentioned that the section will not guarantee the validity of specific conferrals, that it is going to depend on whether or not they are incompatible. How does that work in practice? Is it a case-by-case analysis? Is it something that a person would need to raise in a particular matter as an incompatible function? Or do you see it as something which might be the subject of broader challenge?

Dr Lynch—If someone is challenging an order that is made, for example against detention that has been authorised by a Federal Court judge acting in the private capacity—

Senator KIRK—Is this under the antiterrorism bill you refer to?

Dr Lynch—That is right; that is division 105 of the antiterrorism bill. If that is the case they are going to challenge it in that specific context. So while a provision like this—and I realise that those changes are made to the Criminal Code and not the Crimes Act—certainly clarifies the intention of parliament in making the conferral, that it is not to be in any way entangled with the individual's judicial role, whether that non-judicial function is fundamentally incompatible, whether you can actually wear those two hats at all, will be subject to the courts' test from Grollo v Palmer and then as applied to. I have mentioned there the case of Wilson, which I am sure you are familiar with. It is a good example of how it will occur on a case-by-case basis.

Senator KIRK—If an individual was to object to the matter then I would have thought it is not for the individual judge to make that determination. Would it be removed then to another court for determination of the constitutional issue?

Dr Lynch—Yes, that would be my understanding.

Senator KIRK—Yes, I thought so.

ACTING CHAIR—Dr Lynch, can we get back to where we started about the different evidential standards relating to the acceptance of evidence by the court. Senator Stott Despoja touched on this before. The fact that the bill proposes two different standards, do you think that is contrary to the International Covenant on Civil and Political Rights? I will ask this of Mr Beckett in a minute too, but do you think it is?

Dr Lynch—I am not an international lawyer, but I read Mr Beckett's submission and I can certainly see why that argument has been raised and I think it may well be. I have not addressed an international law stance; I just think it is unjustified. It poses the risk 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.

ACTING CHAIR—I do see your point. You commenced your opening submission this morning saying that. It is a sometimes interesting tack to say that it is not so much taking what people often regard as a civil liberties lie, but you are simply saying that it exposes the process to disrepute.

Dr Lynch—Certainly. There is a civil liberties aspect to it, and I think that is well covered by other groups—

ACTING CHAIR—It is a very good angle to take, Dr Lynch; it is always an angle in the Liberal Party we—

Dr Lynch—but it is the integrity level.

ACTING CHAIR—If one is to criticise government proposals, I have found it is better, in the Liberal Party, to do it from the side of integrity of the system rather than simply appearing to be soft on bad people. So thank you.

Dr Lynch—All right.

Senator LUDWIG—It makes it more onerous though when it is coupled with the way the evidence could be presented from an international perspective. You mentioned earlier the coupling of the operation of adverse substantial effect with the way the evidence may be obtained, for example, by statement or not necessarily by a court that we would recognise as having a similar judicial system to ours because it is not limited in any way. Do you want to comment on that?

Dr Lynch—I think your question highlights the problem that is in the legislation as drafted. There are two issues. Part of your question refers to evidence under the Foreign Evidence Act.

Senator LUDWIG—That is because the same test has been taken over. But also there is no limit to the place where video link evidence may be obtained and whether or not the judicial system in that country is similar. That might be picked up by the court using other powers but you have to keep going back to other areas to save what might be an overstretch in the first place.

Dr Lynch—Certainly. On the basis of the location where it is being beamed from, it was striking 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 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.

ACTING CHAIR—Free-form! And you are saying that should be tightened up?

Dr Lynch—I think the legislation could be certainly, so far as what is occurring at the place at which the evidence is given. There could be much more detail as to how that process is to work.

ACTING CHAIR—As you say it is a balance.

Dr Lynch—There are practical constraints certainly. I think that is the point that Senator Ludwig is driving at. Given the practical constraints under that it also seems worrying to have different evidential standards.

ACTING CHAIR—Thank you very much for your evidence.

[9.29 am]

BECKETT, Mr Simeon, President, Australian Lawyers for Human Rights

ACTING CHAIR—Good morning, Mr Beckett. Australian Lawyers for Human Rights have lodged a submission, which we have marked No. 2. Do you wish to make any amendments or alterations to that submission?

Mr Beckett—No. I hope to briefly skim through it as part of the opening statement.

ACTING CHAIR—Please do that now, and then I will invite my colleagues to ask questions.

Mr Beckett—As you have pointed out, we have put in a submission with respect to the Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill. The submission can be divided into three sections. The first relates to what we say is the prosecution's privileged position with respect to the calling of video link evidence, the second is the retrospective operation of the new provisions and the third is the use of observers. In summary, our position is that we do not oppose any of these three provisions, but we do say that they need to be tweaked. There are some concerns that might be addressed by this committee in terms of amending the bill so that it meets with Australia's obligations under international law, specifically with respect to the protection of human rights.

Turning first to the video link evidence, I have seen the submissions from Andrew Lynch and from the human rights commission. I think we cover the same ground with respect to the two tests. We are taking the same point on that. There seem to be two tests, one of which is higher for a defence, with respect to the use of video link evidence. I am referring specifically to section 15YV(1) and (2) and the comparison between those two. I understand there has been some discussion this morning about that. I will not go over it, but essentially our argument is that the test in section 15YV(1), which applies to prosecution applications to adduce video link evidence, is that, if the defence wants to oppose it, it must establish that the adducing of the evidence would have a substantial effect on the right of a defendant in the proceeding to receive a fair hearing.

Contrasting that with subsection (2) of the same section, where the defence seeks to adduce that evidence, all the prosecution need do is establish that it is inconsistent with the interests of justice for the evidence to be given by video link. Very simply, our conclusion is that there is a disparity between the two tests that the prosecution and the defence must establish with respect to video link evidence and that the disparity between those two tests puts the prosecution in a privileged position. I go on to ask where is the test in international law with respect to that and I point out article 14(3)(e), which says:

> ... everyone shall be entitled to the following minimum guarantees, in full equality:
>
> … … …
>
> (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

It is that phrase 'the same conditions' that is important. In other words, there should be equality of arms between the two parties who are undergoing the prosecution. I think the

human rights commission then goes into further detail in the general comments that are available about that and some of the recent UK jurisprudence. I refer the committee to that more detailed discussion.

There is some other detail with respect to video link evidence generally, especially the application of those two tests, which I have detailed in the submission. But I will skip ahead because I know time is short. The second point we make is with respect to retrospective effect. We say that this is a procedural amendment and that there is no doubt—and I think the committee is aware of a number of prosecutions that are occurring at the moment—that this specific legislation may have an effect on those proceedings. We do not say that there should not be a retrospective effect, but rather that the court should be given a discretion as to whether to allow video link evidence to be used in the manner which is proposed in this legislation.

I will clarify that. For example, you are halfway through the case and the worst-case scenario might be that the prosecution's case is closed, the defence is in the middle of its case and there might be an application by the prosecution to say: 'We now have these powers under the provisions that are in the bill. We want to utilise those. Can we please have leave of the court to do that?' Perhaps a more likely scenario is that you are in the middle of the prosecution case and the case has proceeded along a particular path, with the understanding that the new evidence that is proposed to be allowed by this bill will then be allowed in, when suddenly the defence has to adjust its case. It may have let in information or evidence that it would not have otherwise let in.

ACTING CHAIR—I am breaking into your opening statement here but I cannot resist.

Mr Beckett—Please do so.

ACTING CHAIR—Couldn't the discretion that the court may exercise be taken into account by virtue of the innately discretionary aspects of section 15YV? In other words, as to whether it is an application by the prosecutor and then you talk about substantial adverse effect, and where it is an application by the defendant, we are then talking about the need for justice. In a sense, couldn't your concerns be taken into account by the court relying simply on section 15YV in any case? In other words, is it about its inherent discretion?

Mr Beckett—Yes. We come back to the same problem.

ACTING CHAIR—So it is different tests again?

Mr Beckett—Yes, it is that the test is too high and therefore you fall foul of that. I will take up that point, because it sounds like it is fresh in your mind. The test under section 15YV(1) is pretty high and I make some observations in the submissions about how high that test actually is. For example, paragraph 12 of our submission states that the court must be satisfied that the evidence 'would have such an effect'—that is, a substantial adverse effect; not' may have such an effect'—so at that stage the defence has to readjust its case and then say, 'Okay, on the evidence that we have in support of the defence, we will have to now use it on the application to oppose the adducing of the video link evidence.' It is a very high test so obviously you are going to need more concrete, more solid evidence to oppose that particular application.

Senator LUDWIG—It may be that they may not have wanted to be led it at that time, if at all.

Mr Beckett—Indeed, and let me put a more benign interpretation on this. If, for example, 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. Do you see what I mean?

Senator LUDWIG—Yes.

ACTING CHAIR—Yes.

Mr Beckett—But it is important to safeguard and to allow flexibility—and I am not saying dump the whole thing; I am saying provide some flexibility—for the court so it can weigh up the various advantages and disadvantages to both sides on that specific issue. Can I touch on the observers issue before you would perhaps like to go to more questions?

ACTING CHAIR—Please do.

Mr Beckett—As for observers, we certainly see some positive aspects to that although the issue comes across a little negatively, I admit, in the submissions. But the implication there is that we like the idea of observers and that we support the idea but that you need to tweak it a bit in terms of their powers. We say that there are a number of other things that observers might do such as, for example, assist the court. One of the classic problems with video link evidence occurs where you are on the defence side, you have a stack of documents with inconsistent statements in them and you want to put them one by one to the relevant witness to see if there is any substantial inconsistency as appears to be reflected in the documents. How are you going to physically do that when the person is sitting in a jail in Pakistan and the observer does not have the power to handle those documents? It may be that you do not even get to that stage. In the operation of video link evidence applications in New South Wales, for example, that is one of the key aspects. I have pointed to one of the cases in that respect where the defence would be able to establish that it was unfair to have video link evidence. In other words, you cannot put the documents in the way that you would normally put them in a court to the witness because it is by video link evidence. So that is one issue and one of the powers.

The other power concerns what the observer is able to report on. It is limited to the giving of evidence by the witness. 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 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.

ACTING CHAIR—When you say 'see something,' do you mean intimidation or something like that?

Mr Beckett—Intimidation. If that is what the observer is for, let us boost the powers a little bit and allow them to report on more than they currently can. In terms of what can be

done with the report, I make the point in the final paragraph of the submission that the report is available only on the issue of whether or not the evidence concerned should be admitted. But there is another issue there. 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.

ACTING CHAIR—Dr Lynch was too modest to answer this directly, but you have appended article 14 of the International Covenant on Civil and Political Rights to your submission. Do you think that that is breached by the proposed section 15YV of the bill in relation to the different burdens that must be borne by the prosecutor and the defendant on whether courts may take evidence by video link?

Mr Beckett—At the risk of immodesty, the answer is yes.

ACTING CHAIR—That is very direct. Thank you.

Senator STOTT DESPOJA—You pretty much covered, both in your submission and in your comments today, the retrospective application. As you probably would be aware, the Attorney-General has argued that the bill, because of its procedural nature, is not retrospective. He said:

> … 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.

I wonder what your response is to his particular comment.

Mr Beckett—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. That is why I say the defence can mount its case and say: 'This is the defence we were going to run. We were given all this evidence. This was the prosecution's case. This is the basis upon which we have prepared and cross-examined witnesses, allowed evidence in and the way in which we have prepared our case. We now have to adjust our case to deal with this extra evidence.' One of the ways that might occur is, even if the evidence is allowed in you then stop the trial and the defence goes off—if it has not been prejudiced to date—and seeks other witnesses to rebut the evidence given in the video link evidence, so there is an adjustment there. What I am saying is that there may be substantive prejudice. In other words, the trial becomes unfair because the defence has already committed itself to that road.

Senator STOTT DESPOJA—Can I clarify that again. In your submission you refer to the use of any new video link evidence in cases that are under way. You refer to the fact that there should perhaps be leave of the court. How does that differ from what is already in the section—that is, the requirement to apply to the court? Can you specify the difference?

Mr Beckett—The application under section 15YV(1) or 15YV(2) is quite different from the way it works, say, in New South Wales under the New South Wales legislation, which is the Evidence (Audio and Audio Visual Links) Act 1998. You have a situation where, in New South Wales, the person wanting to adduce that evidence makes an application to the court. The court then decides—especially if it is opposed—whether it is in the interest of the

administration of justice to do that. This bill does not do it that way. It effectively says that the evidence goes in unless the tests that are at the bottom of YV(1) or YV(2) are met, so it is a slightly different application there. The first thing is that the applications are reversed—that is, the person wanting to put the evidence on does not have to meet a particular standard to adduce that evidence. It is different. It is more restrictive on a court than the New South Wales position. That is the first stage.

The second stage raises the question: what are the tests that the other side has to meet to oppose that evidence? We say that YV(1) sets the standard at a higher level than it is for the defence. I will say a couple of things about that, looking specifically at the terms of YV(1) and YV(2). First of all, with regard to YV(I), it is only the rights of the defendant that are taken into account whereas, in YV(2), it is inconsistent with the interests of justice. 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 one is set at a very high level with respect to defendants, but curiously does not take into account the prosecution's case. This is referred to in one of the Cabramatta trials, the trial of Phuong Canh Ngo. In the decision McKinney v the Queen (1991) 171 CLR 468, they talk about a fair trial involving fairness to the Crown as well as to the accused. Curiously, it does not seem to say that. Does that answer your question?

Senator STOTT DESPOJA—That is great, thank you. Looking at part 15 of your submission, you talk about the inability or difficulty in applying Australian laws on perjury and contempt to a witness in another jurisdiction. Can you elaborate on that for the benefit of the committee? How do you resolve those concerns?

Mr Beckett—It is a good question. The first thing is that you do not automatically assume whether a witness is going to perjure themselves or be in contempt of court. There are a number of applications in the video link evidence act in New South Wales where evidence has been obtained from London, for example. But, where you have an issue about credibility, obviously the issues about whether that should go into perjury or contempt arise. 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 when they might be sitting somewhere else. They are not in a court setting. They are not having the judge arguable yelling at them, saying: 'I just don't believe that. Be very careful, you are getting close to perjury or getting very close to contempt of this court.' The weight of the court, if you like, and the whole structure that goes with court proceedings is absent. I have been involved in cases—even in Australia, where we would use video link evidence—where somebody has been taken into a bare courtroom. They set up a video camera and they sit in front of the camera. Even though the judge might be in New South Wales, these people concerned were in Victoria. You get a very casual attitude from witnesses as to the importance of the evidence that they are giving.

It is a completely different situation to when you march a person into court, they swear on the Bible or the Koran or whatever it might be, and then you have the judge there with his or her eagle eye on the witness. It is a very different situation. Obviously the perjury and

contempt laws which a judge would be able to threaten a witness with in Australia are going to be absent because the witness would appear by video.

ACTING CHAIR—Absent as a matter of law or as a matter of practicality?

Mr Beckett—I think it is more a practical thing. I would have to look at a specific issue. There is the issue of whether the perjury is uttered in a foreign country—

ACTING CHAIR—Such as Pakistan.

Mr Beckett—Yes. But it is broadcast here—

ACTING CHAIR—Wouldn't it still be—

Mr Beckett—It is an interesting issue. This is one of the arguments about section 80 of the Constitution. There is a requirement that trial by jury be in the state in which the offence occurred, but in a recent case in the Court of Appeal, which is unreported so far, they looked at that specific issue and whether the evidence, which had been given in London, was pursuant to section 80. They said that it was broadcast from Australia and it was received in an Australian court; therefore it met section 80—that is, it was in the state in which the offence occurred. So if you apply the same logic—

ACTING CHAIR—Wouldn't you still be subject to laws of contempt and perjury?

Mr Beckett—I have not had a look at the specific issues.

ACTING CHAIR—You said it was more practical than legal. Perhaps the problem—

Mr Beckett—That is what I said, yes. It is more practical and I have not had a close look at the legal elements and niceties. I have not gone into them.

Senator LUDWIG—In terms of the retrospectivity of the legislation, I think the Attorney-General said in a statement that it does not operate retrospectively. I am trying to grapple with this difference, as you say it is retrospective and the Attorney-General seems to indicate that it is not. Is it because it is procedural in effect?

Mr Beckett—Yes.

Senator LUDWIG—Therefore, is it or is it not retrospective in effect, and will it affect the substantive rights of parties?

Mr Beckett—This is why I talk about there being some discretion for the judge to have a look at that issue. I think it is very difficult for legislators to take a cut and dried position on that specific issue. I think the bill is deficient because it does not give a way in which, if there is prejudice, the court can deal with that prejudice. At the same time, procedural changes occur all the time.

Senator LUDWIG—Yes, rules of court—

Mr Beckett—The Civil Procedure Act has just come into force in New South Wales, for example. That affects a whole lot of proceedings that are afoot at the moment. You would expect there to be an ability to apply to the court to say: 'This particular procedure prejudices the case in this respect; therefore the evidence should not be adduced or the evidence should be dealt with in another way.' There is the possibility that it might be substantive. You just do not know on the basis of this legislative provision. The answer is not to throw the baby out

with the bathwater but to provide a mechanism in the act for the court to weigh up those particular issues.

Senator LUDWIG—Can courts presently do that?

Mr Beckett—Arguably there is a general discretion, of the Supreme Court, for example, to control its own proceedings. If a particular provision—say, the uniform civil procedure rules—has that effect then I think the Supreme Court would have the power to adjust the operation of that particular provision.

Senator LUDWIG—As I understand from your submission, you are saying that the bill is effectively retrospective in the way it could potentially operate regarding existing court proceedings and trials that are afoot. Those trials are in varying stages: some could be nearing their end, some could be right at the beginning, and it is difficult to ascertain what substantive effect the bill may have because of that. There is no clear power—nor is there one under the UCPR—of the court to intervene, take a discretionary role and say it may have an unfair operation in this instance. You say that the bill should have some sort of provision or it should have a belt-and-braces approach to allow the court to have that discretion. Have I encapsulated that reasonably well?

Mr Beckett—Yes. These are procedural changes, and it is difficult for legislators to envisage everything that might occur. Where that is the case—where there might be prejudice or there might not be prejudice—why not give it to the judge? In fact, the time-honoured tradition in these sorts of cases is to give it to the judge concerned to make a decision about that.

Senator LUDWIG—And you say that could be done in the way that you have expressed it in your submission, by giving leave for those cases that are currently on foot?

Mr Beckett—Yes, they are required to seek leave of the judge.

Senator LUDWIG—What test would the judge apply in that instance?

Mr Beckett—We are back to something similar to the one in proposed section 15YV(2)—in other words, the administration of justice.

Senator LUDWIG—Yes. There is a substantive role for the court to play in ensuring that there is an observer who is independent, as I read the legislation. Who could not be an observer? I understand who may be an observer, because the bill talks about an Australian consul and then it says ‘any other person’. That might be limited to proceeding—I guess that is for you guys to have an argument over one day, should this bill come forward. But who could not be one?

Mr Beckett—Who could not be one?

Senator LUDWIG—Yes. You could have an ASIO officer; you could have an ASIS officer—could you have the Pakistan jailer?

Mr Beckett—I think that there are real problems with all of those examples. We had specifically referred to the prospect of a security officer—say, for example, somebody from the relevant agency. I am not sure what it is, but I presume it is ASIS, DSD or something. It might have an officer stationed at the particular embassy, and it is suggested that they go

along as the independent observer. There start to be problems. I am not talking about actual problems, but there are perceptions about the independence of that person.

Senator LUDWIG—Yes, where you might have the AFP or the law enforcement officer.

Mr Beckett—Yes.

Senator LUDWIG—Can they be ruled out?

Mr Beckett—They have to be independent of the prosecution. If the AFP officer, for example, prepared the brief of evidence that went to the prosecutor, I do not think you could say that they were independent of the prosecution. So that would be a concern. But you get a sort of chinese wall situation. If it is one person in the AFP, as opposed to the prosecutors and the people who are preparing the brief for the prosecution in Australia, for example, I think that is unsatisfactory. The principle here is that the observer is really an extension of the court. They are not an extension of the prosecution or the defence; they are supposed to be there assisting the court with the video link evidence. Therefore, you need to ensure their independence.

Senator LUDWIG—Even if they were aware that a person had been rendered to that other country, it is not relevant to their being an observer at the time. So even if they had prior knowledge about how the person had been treated or dealt with or whether rendition had been involved or any of those issues—

Mr Beckett—That is very unsatisfactory.

Senator LUDWIG—But the observer cannot bring that to bear if they have been appointed to deal with the court process. They might have all that knowledge, but they cannot be questioned about it.

Mr Beckett—Certainly not.

Senator LUDWIG—And they do not necessarily have to volunteer it. And, in the observer role, it is only for that narrow role of—

Mr Beckett—The giving of evidence.

Senator LUDWIG—Yes.

Mr Beckett—Yes. The whole thing is—

Senator LUDWIG—What do they do then?

Mr Beckett—What do they do?

Senator LUDWIG—I am trying to understand. They cannot hand up a court document either.

Mr Beckett—What we propose is that there be somebody else: a member of the local legal profession or perhaps the local judiciary, or I think the best option would be an Australian legal officer who is agreed on between the parties. It involves some expense.

ACTING CHAIR—Mr Beckett, the use of observers is not mandatory. Can you conjure a situation where you would not need to have an observer—where the court would accept evidence without there being an observer?

Mr Beckett—Yes. Where there is no issue between the parties about the particular evidence—for example, the prosecution and the defence say, 'Look, this evidence is really uncontentious,' but it fills a crucial hole in the prosecution's case.

ACTING CHAIR—Okay. But if it were contentious you would say that there would always have to be an observer?

Mr Beckett—I have not looked at whether the observer is required in each case.

ACTING CHAIR—I do not think it is, is it?

Mr Beckett—It is at the discretion of the court.

Senator LUDWIG—That is what I was trying to ascertain—the role that they might play. From a defence point of view, why would you have one? What role do they play?

Mr Beckett—I presume it is the—

Senator LUDWIG—But that is the point, isn't it: we are presuming.

Mr Beckett—It is not clear. This is an extreme example, but if somebody is standing outside the camera shot with a rifle—

Senator LUDWIG—You may not want to volunteer that either if you are the observer! That is the problem, isn't it: the observer is in the same frame, to use a terrible analogy, because they are there with the person. Whatever is subject to the person giving evidence can also be subject to the observer, so it cannot be for that reason. That is what I was trying to discover: what possible reason could there be for an observer where there is discretion? They also cannot take any evidence or information outside that frame. I am not clear, but I gather it is so it can be presumed that there is fairness in how the witness is treated when they are giving evidence, but the observer is there at the same time, so whatever might be subject to the witness could also be subject to the observer. If you were the observer, would you say anything?

Mr Beckett—This is why we say that there needs to be some extension of the powers of the observer to report on those things outside 'the giving of evidence'.

Senator LUDWIG—That could always be found out later and dealt with. It is a question of why the provision is there and how it would operate.

Mr Beckett—I do not think it was clear in the second reading speech. That is why we say that, if you are going to have observers, you have to expand their powers, increase their independence and provide more flexibility to the court to use the reports that are received from the observer.

Senator LUDWIG—Thank you.

Senator KIRK—I want to go back to the matter that you were discussing with Senator Stott Despoja—namely, the application of Australian laws in relation to perjury, contempt and the like. You outlined what the problem is, and I can see that, but how do you overcome it? Is it, as you say, something that can apply in any situation whether the evidence is being given interstate or overseas? I can see why you say it undermines the integrity of the process, but how do you overcome those concerns?

Mr Beckett—The reason I referred to that specific example is that you are making a decision before you get the evidence. Obviously, 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.

Senator KIRK—You are saying it is a matter of the standard or the onus. Is that what needs to be addressed?

Mr Beckett—It goes to the YV(1) test, yes. In short, it should not be as high as it is.

Senator KIRK—And if it were to be lowered, then would some of these issues be overcome?

Mr Beckett—Yes, I think so, because that issue, credibility, is the key issue in video link evidence. With the documents I referred to yesterday or if you want to see the demeanour of 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 not a small thing; it is a big thing—it is one of the key things upon which a judge might make a decision about the credibility of a particular witness's evidence.

Senator KIRK—You are right: that is the reason that witnesses give oral testimony, isn't it—so that the court can assess those non-verbal reactions to things.

Mr Beckett—Yes.

ACTING CHAIR—Thank you for your time this morning.

Mr Beckett—My pleasure.

[10.05 am]

LENEHAN, Mr Craig, Deputy Director, Legal Services, Human Rights and Equal Opportunity Commission

HEMINGWAY, Ms Joanna Maire, Lawyer, Human Rights and Equal Opportunity Commission

ACTING CHAIR—Welcome. The Human Rights and Equal Opportunity Commission has lodged submission No. 4 with the committee. Do you wish to make any amendments or alterations to that submission?

Mr Lenehan—No.

ACTING CHAIR—I invite you to make a short opening statement, after which the committee will ask you some questions.

Mr Lenehan—The commission has asked me to read a written statement.

ACTING CHAIR—Sure.

Mr Lenehan—The Human Rights and Equal Opportunity Commission thanks the committee for inviting us to appear before this inquiry and welcomes you to sunny Sydney. As will be apparent from the commission's submission, the commission has three primary concerns about the bill. First, the commission is concerned that the amendments to the Crimes Act potentially put Australia in breach of its obligations under article 14(1) of the International Covenant on Civil and Political Rights, which guarantees an accused the right to a fair trial. The use of different tests for the making of an order allowing a witness to give evidence by video linking terrorism trials, in our view, favours the prosecution. The resulting imbalance created by the ability of the prosecution and the defence to call video evidence violates the principle of what is referred to as equality of arms, which is fundamental to article 14(1). To remedy that deficiency in the bill, the commission has suggested amending the bill to impose the same test upon the defence and the prosecution alike.

Second, the commission is concerned 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—and you have already heard similar concerns expressed this morning. The bill potentially allows the adducing of evidence via video link from witnesses testifying in foreign states who may have been tortured while in detention in connection with actual or suspected terrorist activities. If that evidence were admitted, Australia would be in breach of its obligations under article 7 of the International Covenant on Civil and Political Rights and also under article 15 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Both of those provisions prohibit the use of evidence obtained through torture or other cruel, inhuman or degrading treatment. Given the uncertainty as to whether such evidence would be excluded under existing statutory discretions or the general common law, the commission suggests that the bill specifically prescribe its admission, at least where it is proposed to adduce evidence via video link. This would more clearly satisfy Australia's obligations under those articles to which I have referred.

Even were such an exclusionary provision to be adopted, there remains the difficulty of how parties and the court can determine whether any such treatment has taken place where the witness is located outside Australia. As you have heard, the bill attempts to deal with this through the use of observers. As will be apparent from the commission's submission, the commission considers that the observer provisions in relation to evidence via video link do not provide adequate safeguards against the admission of evidence tainted by torture. This is for the reason that those provisions do not facilitate scrutiny of the treatment of the witness away from the location where the evidence is being given. In the commission's view, this is inconsistent with Australia's positive obligation under article 7 of the ICCPR to ascertain whether evidence is made as a result of torture or other cruel or inhuman treatment. The commission has therefore suggested that the observer provisions be expanded to at least allow the observer to investigate matters such as conditions of detention.

Finally, the commission considers that the proposed amendments to the Foreign Evidence Act raise many of the same issues already raised in relation to video evidence provisions. Further, the Foreign Evidence Act contains no safeguards against the possible admission of evidence given as the result of torture. To address that issue, the commission has suggested that an expanded form of the observer provisions and an absolute rule against the admission of evidence obtained by torture also be included in that act. The commission also notes that Australian Lawyers for Human Rights have raised, in paragraph 24 of their submission, a point about transitional provisions and, in paragraph 29 of their submission, the use of observer's reports for matters such as weight. The commission specifically endorses those two proposals. I have some comments on the DPP submission, but I take it from Senator Ludwig's questioning of Dr Lynch this morning that that question might come in the course of things.

ACTING CHAIR—If it does not, then let us know and you will be able to give that evidence later on. Have you finished your opening statement?

Mr Lenehan—I have.

ACTING CHAIR—You mention that you believe that the different standards applying to the reception of evidence by the courts is potentially a breach of the International Covenant on Civil and Political Rights. Is there any law on that? Is there any international law or is it simply your interpretation of the relevant article? Is there any international case law on this?

Mr Lenehan—There is. Equality of arms is something that has come up again and again in the committee's jurisprudence. I am not sure that this specific issue has come up in that context, but the essential thrust of that jurisprudence is that both sides should have equal access to such things as means of adducing evidence. I am happy to take on notice a request to give you more details of the jurisprudence if that will assist the committee.

ACTING CHAIR—It is fine. In short, your concern is that it is a breach of the international covenant.

Mr Lenehan—Yes. We say that in two respects. The first—and I am not sure that this point has come out clearly in the inquiry yet—is that the bill specifically contemplates a substantial, at least some, adverse effect on the right to a fair hearing. As we have pointed out in our submission, exactly what is meant by 'substantial adverse impact' is entirely unclear, and you are not assisted by the presence of a definition in this bill.

ACTING CHAIR—But the phrase ‘substantial adverse effect’ is used elsewhere, isn’t it?

Mr Lenehan—It has been used in the context of the Freedom of Information Act. It has come up for consideration in the Trade Practices Act. It is also in the new National Security Information (Criminal and Civil Proceedings) Act, although in that act you are assisted by a definition. It is unclear to us why a definition has not been included in this bill, but if you look at the more general jurisprudence there are two lines of authority. On the one hand, you have people such as former Justice Beaumont saying that substantial adverse impact means an impact that is considerable or large. That would be an extremely disturbing development if that is the test being imposed by this bill. On the other hand, you have other judges saying that it is something more than nominal and you look at it in that context. Regardless of what interpretation is taken, you are getting into an area which traditionally—and this emerges from the decision of the Court of Criminal Appeal—the courts have not been prepared to contemplate; that is, going beyond something which is said to be merely disadvantageous to a party and moving into something which affects the fairness of the trial as a whole. That is the first respect in which we say that this raises concerns. The concerns there in terms of article 14(1) are self-evident because you are having an impact on the fairness of the trial, which is what article 14(1) guarantees. The second respect in which we raise that article is the point that we have discussed, which is the inequality between the two tests. We have set out in some detail in our submission how we see that inequality arising.

ACTING CHAIR—Thank you for that comprehensive answer.

Senator KIRK—Thank you very much for your submission. I wonder whether you could comment on the possible retrospective application of part IAE in particular. I do not have it here, but I think the DPP is of the view that it does not effectively have a retrospective application. Could you give us your opinion on that?

Mr Lenehan—I am going to fudge the answer somewhat and give you an international lawyer’s argument. Under international law, article 15 of the ICCPR refers to a prohibition on retroactive criminal laws. In the committee’s jurisprudence to date, that has been primarily concerned with retroactively increasing penalties and altering offences so that somebody is punished for an offence that was not an offence at the time they committed the crime. It has not specifically considered what we are faced with today, which is a procedural amendment. However, in the opening statement I referred to the point made by Mr Beckett regarding transitional provisions. His arguments seem to us to have some force—that is, 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. That is something that really should be addressed through a discretion in our view, as Mr Beckett suggested.

Senator KIRK—So leave it to the court’s discretion?

Mr Lenehan—That is what I understand Mr Beckett to have suggested, yes.

Senator KIRK—I will have another look at that then in the transcript. In relation to the observers, you made some comments about the fact that observers ought to have the power to investigate conditions of detention and the like. The question was asked earlier by Senator

Ludwig as to who observers may be—I think Senator Ludwig put it as who observers may not be. Do you have any views in relation to that?

Mr Lenehan—It is an interesting question. As Mr Beckett 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.

Senator KIRK—That was my next question. Do you think that ought to be clarified so as to perhaps list persons who are considered to be independent—in other words, a bit more detail in the legislation rather than leaving it open?

Mr Lenehan—I think that is an imminently sensible suggestion. You would have gathered from the commission's submission that we support the strengthening generally of the observer provisions. We think they are an extremely important safeguard. The corollary of that is that they need to be strong protections.

Senator STOTT DESPOJA—Touching on the issue of the strengthening of the observer provisions—and this relates again to evidence obtained under torture—in your submission you talk about allowing the court to seek information about, for example, detention conditions. I went back to the DPP's submission which essentially argues—and I do not mean to paraphrase or to misrepresent—that if the prosecution is in possession of material that suggests a witness has been tortured or ill treated then obviously they are required to disclose that information and, if they do, it can be ruled inadmissible, cannot be used or it is unreliable or whatever. But it does not really go to the issue, does it, of the treatment of witnesses and conditions? I am more and more worried about it as we go through the evidence today.

Mr Lenehan—I think that is right. I should preface my answer by saying that it would be fairly readily accepted that officers of the Australian DPP would not be engaged in the suppressing of information regarding the torturing of a witness. There are prosecutor's duties that apply to that sort of situation. The first difficulty that arises, though, is whether they are aware of that. Potentially, in a lot of situations the answer to that is going to be no. Even if they do become aware of that sort of material and, they say, become aware of it through some kind of clandestine, sensitive channel, you will see that I am heading straight towards the national security information act and potentially something which is said to have a prejudicial effect on Australia's relations with a foreign country—so potentially something that brings into play the Attorney-General's ability to cause otherwise relevant evidence to be less available than it would in the normal course of things in a criminal trial. It may even be completely unavailable to the defence. Those sorts of concerns are legitimate.

Senator STOTT DESPOJA—I am wondering how you extend the role of the court or the role of the observers to look at the issues of witnesses' rights more broadly. I do not know how or if you can, but it might be something that we talk about with the department. I can see them nodding in the background.

Mr Lenehan—I hope I can clarify things. We would see that as a two-pronged process. First, you make it conditional upon the court's power to prescribe a range of conditions which have to be satisfied in the taking of this evidence. So not only is there an observer but there is an observer that is specifically empowered to do X, Y and Z. The consequence of not being able to meet that sort of condition—to satisfy the court of something that has caused a concern in the specific circumstances—would be that the evidence does not get adduced. That is something that we have acknowledged in our submission is getting into the area of sensitive discussions with government. In our view, that is something that we as good human rights citizens need to take on the chin, because the obligation not to admit evidence obtained through torture is so fundamental.

Senator STOTT DESPOJA—Absolutely.

Senator LUDWIG—I want to focus on the onus shifting from the defendant to the prosecutor and the different tests that apply. Is the way the onus shifts to the defendant or to the prosecutor in these instances the usually accepted practice?

Mr Lenehan—Mr Beckett, who has a better idea than I about these things, indicated to you that in the normal course of things in taking video link evidence in Australia the onus, if you like, is on the person bringing the application. So it is a shift away from that.

Senator LUDWIG—Do you have a view about that from your perspective?

Mr Lenehan—We have gone as far as to endorse in our submission a suggested amendment which contemplates the use of the word 'must' in the operative provision. That is cutting down the court's discretion. The way in which we put it adequately balances the rights and interests of both parties. As a matter of more general principle, the commission has gone on record before as saying that judicial discretion is a very important protection of human rights and that cutting down judicial discretion can have unexpected effects which in unforseen circumstances might lead to negative impacts on human rights.

Senator LUDWIG—If the shifting of the onus was amended to accord with your view, you would not cavil at it. That seems to be implicit in the suggestion you have made. Provided the amendment that you have proposed is put forward, the shifting of the onus does not overly concern you?

Mr Lenehan—Not as such. We arrive at that view by considering the very little humans rights jurisprudence on video evidence, which notably includes a decision of the House of Lords. That jurisprudence is to the effect that video evidence in itself does not give rise to an issue under the equivalent of article 14(1). The point we make is that it is the way that has been done in this case.

Senator LUDWIG—You also suggest a widening of the observer mechanism into the Foreign Evidence Act. You indicated the rationale for that in your submission, but could you expand on that a little bit in the sense that it will be transcripts that may not have been taken at the actual time—they might be telecommunication interception transcripts available from other jurisdictions—and those sorts of things? How would that mechanism work in those instances? Would you expect the observer to be able to have some role in ascertaining the veracity or the type or its nature?

Mr Lenehan—To understand that suggestion, it is necessary to give you a little bit of detail on the Foreign Evidence Act, and fortunately I have just managed to find it in my bundle of papers. The amendments relate to a specific part of the Foreign Evidence Act which empowers the Attorney-General in a criminal hearing to request that a foreign country obtain the testimony of a person. There are a number of definitions in that part of the act and there are requirements that are to be taken on oath or affirmation. The procedure is similar to an evidence on commission procedure, although it is a little bit different from that general procedure which exists under the rules and acts of state supreme courts. It is quite a similar procedure to what is being envisaged with the video evidence link, except that you do not have a link to the court. So you are taking oral evidence and you are potentially allowing that evidence to be adduced in an Australian court. We do not see why there should not be safeguards there to similar effect to the ones that we propose for the video evidence link provisions.

Senator LUDWIG—I understand that. That is helpful.

ACTING CHAIR—In response to Senator Ludwig's question, I think you said that, by inhibiting the discretion of the judge, sometimes human rights may be compromised or inhibited. Is that what you were arguing?

Mr Lenehan—That has consistently been the commission's submission before this committee in relation to a number of similar bills, yes.

ACTING CHAIR—With respect to the issues relating to observer status, and following those thoughts through to their logical conclusion, rather than making those provisions more prescriptive—which has generally been the evidence from this morning's witnesses—would it be better to simply leave the entire issue of observer status and the reception of evidence by a video link to the court's discretion? Am I drawing a bit of a long bow from your statement?

Mr Lenehan—I am not sure that you would extrapolate from our general preference a support for expansive discretion in all circumstances and particularly not when you are talking about that kind of safeguard. This is not an answer to your question, but a related concern that we have raised in the submission is that there is very little guidance in the bill as it stands for when a judge is to make these sorts of orders for an observer, which would make it difficult for the defence to challenge a decision not to order—

ACTING CHAIR—That is a good point. Senator Ludwig said to me as an aside earlier that it seems as though the Commonwealth needs to develop a more full procedure with respect to issues like this—the use of new technology—and it would seem, just by looking at the proposed bill, that it is still quite loose. I have forgotten the term that Dr Lynch used this morning.

Ms Hemingway—Free form.

ACTING CHAIR—Thank you, Ms Hemingway—free form. It seems that it is not sufficiently prescriptive and that really we need further rules of procedure to govern the use of observers. Obviously you agree with that—that it is so critical to the veracity and the utility of the evidence that there has to be far greater prescription as to the use of observers and the circumstances in which the evidence is taken.

Mr Lenehan—We do. Just picking up on your point about the manner in which this bill has come forward, it occurs to me that if this bill had been developed in the context of the broader criminal law some of the imperatives that are driving us towards the solution that is being proposed in the bill might have been given closer consideration. So we may be missing things from the broader range of considerations that perhaps should affect the way in which we consider how video evidence is adduced, which might lead us to a different result from the bill.

ACTING CHAIR—Can you think of any prescriptions that you would like to see written into the legislation with respect to the use of observers? You mentioned before making sure that the executive is not involved in being the neutral observer, just as a matter of principle.

Mr Lenehan—Yes. We have suggested that at least in some circumstances there should be a capacity for the defence to insist on the presence of an observer. We have suggested that perhaps there should be better specified criteria for the use of an observer. We have suggested that the court's powers to ascertain what is going on with respect to the specific witness be broadened so that the court can get a feel for what is happening at the remote location where it is taking evidence.

ACTING CHAIR—If you think of any other points, Mr Lenehan, let us know. You can take that on notice. If you can think of any further prescriptions for the committee's benefit, we would appreciate it.

Mr Lenehan—I had a few points with the Director of Public Prosecutions.

ACTING CHAIR—You did flag that. Please go ahead.

Mr Lenehan—If you are running out of time I can take that on notice.

ACTING CHAIR—How long will it take, Mr Lenehan?

Mr Lenehan—I have five points.

ACTING CHAIR—Please go through them.

Mr Lenehan—It might be helpful to have the DPP's submission with you. Look at page 2 of that submission, the fourth paragraph from the bottom. The last sentence of that paragraph says:

> The requirement that the adverse effect be substantial—

and we are talking about the substantial adverse effect tests that apply to the defendant—

> is appropriate in light of the argument that may be available that there is an adverse effect by the mere fact that a witness is not physically present in the courtroom.

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. That passage of the Court of Criminal Appeal decision is referred to in our submission. 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 is, as I said

before, going places where courts previously have not considered going—that is, into the actual fairness of the trial rather than simply disadvantaging litigants.

Senator LUDWIG—That is underpinned by the fact that it is an adversarial system and the prosecutor can lead the case as they do. It is not an inquisitorial system to ascertain whether or not the judge seeks to garner information for a prosecution, because the prosecutor controls what they are going to provide, how they are going to run their case and what evidence they will lead. The defence then has to meet that.

Mr Lenehan—Yes. The second of my five points is over the page, on page 3. The DPP rightly says that there is an obligation on prosecutors, which is reinforced in things like the bar rules, to disclose relevant information to the defence. The DPP says that this is an important part of the overall context that the committee should have regard to. We agree that the committee should have regard to the overall context, but a piece of the context that needs to be emphasised there again is the National Security Information (Criminal and Civil Proceedings) Act and the fact that in some circumstances you are not going to be getting, as a defence counsel, the full picture.

The next of my five points is in the paragraph below. It is said there:

> In considering a defendant's application to adduce evidence by video link it would not be appropriate to apply a test of whether the adducing of video evidence would be likely to adversely affect the right of the prosecution to fairly present its case as, by definition, the prosecution will have already presented its case.

I am not sure what the DPP is responding to there. The shadow test, if you like, that it appears to be responding to is that the DPP is deprived of the opportunity to fairly present its case. It is correct to say that at the time at which this application comes to be considered that will have gone. However, another possible test would be a more general fairness test, and that is something that is in the other acts. It is something that, as Mr Beckett mentioned this morning, has been considered to be an element of a fair criminal trial by the High Court in the case of, I think, McKinney. So it is not correct to say that fairness to the prosecution is a completely alien concept in an Australian criminal trial.

More fundamentally, both we and the other people who have made submissions to you this morning are not suggesting the kind of test that I think the DPP has in mind. What we have all been suggesting is an interests of justice test, which is a broader, in our view, more appropriate test that should be applied to both defence and prosecution. If you need convincing that that test would work, I think you get it from the next paragraph in the DPP's submission, which says:

> Further, given the emphasis of the Bill on making video link evidence available it is difficult to conceive of normal situations where a court would be satisfied that it was not in the interests of justice to allow a defendant to adduce evidence by way of video link if the evidence was otherwise admissible.

We agree with that point, and it has to be understood that what we are talking about here is really the exceptional case, where the court will decide it is not in the interests of justice. But 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.

ACTING CHAIR—If I could interrupt, that could be for two reasons: firstly, because, under the general rules of evidence, the evidence may not be admissible—

Mr Lenehan—Yes.

ACTING CHAIR—and, secondly, because the conditions under which the evidence may be taken may be inappropriate or—

Senator LUDWIG—Or prejudice the witness.

ACTING CHAIR—Yes—prejudicial.

Mr Lenehan—Yes. To clarify: you get to admissibility after this question; this is just whether or not the evidence comes.

ACTING CHAIR—Yes.

Mr Lenehan—The only other point we would like to make is in relation to page 4 of the DPP's submission, where the DPP has prepared quite a helpful summary of some recent authority on the taking of video evidence. At the foot of that page it said, reflecting the fact that some of those authorities are in disagreement:

In light of these judicial comments and having regard to the existence of differing views that are less inclined to allow video evidence, the CDPP submits that it is appropriate in the case ...

And it goes on to make the amendments in the bill. A couple of things need to be understood there. As has been made clear to the committee this morning, the current video link evidence provisions in state legislation and in the Federal Court of Australia Act are open discretions—they all start with the use of the word 'may'. You solve the problem that has been referred to by the DPP here through the use of the word 'must'. That then confines the discretion of the court, so the court 'must' allow the evidence to be adduced, save in these circumstances.

The committee might also have regard to the fact that the difference in authority that is referred to here reflects the fact that at least some judges have been uncomfortable with the use of video evidence to date. I am not sure what the committee's view of that will be—

ACTING CHAIR—'Must' as opposed to 'may'—cutting down the judge's discretion.

Mr Lenehan—Yes. 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. I do not think that the DPP is saying that it does require that, but if that is being said then we would say no.

ACTING CHAIR—Are they the five points?

Mr Lenehan—They are.

ACTING CHAIR—Thank you very much for your assistance this morning.

Proceedings suspended from 10.41 am to 10.56 am

COCKSHUTT, Ms Melinda, Principal Legal Officer, Criminal Law Reform, Criminal Justice Division, Attorney-General's Department

GRAY, Mr Geoffrey, Assistant Director, Criminal Law Branch, Attorney-General's Department

GRAY, Federal Agent Warren, Australian Federal Police

WHOWELL, Mr Peter Jon, Manager, Legislation Program, Australian Federal Police

DAVIDSON, Mr Graeme Scott, Acting Deputy Director, Commercial, International and Counter Terrorism Branch, Commonwealth Director of Public Prosecutions

THORNTON, Mr John Edward, First Deputy Director, Commonwealth Director of Public Prosecutions

ACTING CHAIR—Welcome. The Australian Federal Police has lodged submission No. 3 with the committee, and the Commonwealth Director of Public Prosecutions has lodged submission No. 5. Do either of those agencies wish to make any amendments or alteration to their submissions?

Mr Whowell—No, the AFP does not.

Mr Thornton—No.

ACTING CHAIR—Before we commence, I remind senators that, under the Senate's procedures for the protection of witnesses, departmental representatives should not be asked to give opinions on matters of public policy. If necessary, they must also be given the opportunity to refer those matters to the appropriate minister. I now invite you to make a short opening statement, at the conclusion of which I will invite my colleagues to ask questions.

Mr G Gray—The department has not put in a submission. We hope that the bill, the explanatory memorandum and the other material speak for themselves. We are essentially here to answer questions today. There have been some issues that have been raised, and we are more than happy to address all of those. I thought, though, it may assist if I make some general comments about the purpose of the bill and respond to just some of the issues which are being raised, but not at any great length. The purpose of this bill is to increase or bring about a greater level of certainty in terrorism cases when the DPP finds a need to proceed on the basis of video link evidence. These are important cases, as we all know. The witnesses are often overseas or not readily available. It is not always easy to bring them before the court, and those reasons are not always reasons which it is easy to explain in an open court. So the provisions cut through to the heart of the matter. There is an assumption that video link evidence is reliable and cogent and should be used in appropriate cases. Therefore, the tests have been drawn on the basis that the court is required to allow video link evidence, even provided that the preconditions are met, and subject to the qualifications in the two tests which have been referred to.

There are two tests: one test for the prosecution and one for the defence, and that has been referred to in all the submissions and all of the evidence we have heard here today. 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.

One of the things that I think is interesting so far today is that the criticisms of the two tests have all talked about the prosecution test being wound back to the defence test; nobody has suggested that the defence should be wound forward. If you look at the provisions—I will take you to them or invite you to go to them—you will see why that is. 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 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. We say 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. That is why we say that these tests do not breach the International Covenant on Human and Political Rights. I am quite happy to go into greater detail on those.

It is worth noting that 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. A lot of the submissions have talked about the problems in finding out how you control whether there has been torture and the rest of it. Those issues apply if you have a witness before the court. How do you discover the context in which they have come to give evidence? It is the same concept if they are on the end of a video camera. This act does not change the powers of the court in those situations.

There has been a lot of talk about the way the provisions have been drafted. They are meant to be facilitative. There is a lot of talk about them being a bit ambiguous and a bit vague and not having rigid guidelines. That is deliberate because of the range of situations in which you might want to take video link evidence. It is very difficult the minute you start putting in tests and qualifications and limiting the capacity of the court, prosecution or defence. That is when you start running into problems because of technical obstacles. We have had that experience with other legislation over the years.

I think there was a question about how the rest of the world is travelling on this sort of legislation. We think we are at the forefront. As far as we are aware, no other country has legislation quite like this to deal with video link evidence in terrorism cases. We certainly did not copy this legislation from any other jurisdiction. We think it is an appropriate way of approaching the issues that arise in relation to video link evidence.

One last point I might make relates to observers. There is much talk about the role of observers. 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. It would be very difficult—I am quite happy to talk this issue through as well—to draft provisions that give an observer that role or function. Somehow you would have to give them resources and powers to exercise in a foreign country. We see that as a completely different issue, which is not addressed in this legislation.

A range of other parts of the schedule amends other acts. I am quite happy to answer questions in relation to those as well. I make these comments just by way of preliminary comment, just to set the scene of where we see this legislation going.

ACTING CHAIR—Thank you. Does the DPP or the AFP want to go next?

Mr Whowell—We do not want to make an opening statement; thank you.

ACTING CHAIR—DPP?

Mr Thornton—I will say just a few brief words and I will try not to cover the same ground as my colleague did. We obviously support the legislation. We have sought to provide certainty in relation to the evidence that we anticipate will be required in these sorts of cases—and our experience to date has confirmed that is the case. As my colleague has said, it is important to keep in mind that this deals with the method in which the 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.

My colleague has referred to the different roles of the prosecution and defence. I will just mention one of those, which is the disclosure requirement that we as prosecutors have. We have a policy that sets out that requirement. 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. Reference was made this morning to the NSI legislation and certain material that we may not be able to disclose under it.

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. That is the extent that it goes to. There is no real issue of presenting to a court witnesses who may appear to have a greater cloak of credibility than certainly we would be aware of. I think that is important in terms of the committee's consideration of this legislation.

In addition, with the way the process works, because there are committal procedures in almost all jurisdictions in Australia, the defence are not taken by surprise by any of this. In the cases we have had to date where there have been issues about video evidence, the defence get an opportunity to have this evidence called and tested, so they have some idea about the witness. They learn a lot about the witness, as do we. It would not be as though these

witnesses were appearing for the first time before a jury, with the defence having no idea of their background or anything like that. I think that is an important point.

I will mention retrospectivity, which in some ways relates to this. We say that this is procedural legislation and it does not apply retrospectively. Examples were given this morning about this legislation coming into effect midway through a case that is already running and then suddenly our wanting to call further evidence relying on this legislation. 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.

So there are protections there that apply not only with these sorts of things but in any event when we try to introduce evidence at a late stage. 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 the court. I think it is important to see this legislation in the context of how the criminal prosecution process works. When you look at that, I think many of the things that have been referred to, as I have said, are issues that courts face on a daily basis in terms of the way they deal with witnesses.

The other sorts of things we get involved in are witnesses who may have been given some sort of benefit with sentencing in a foreign jurisdiction or something like that. As it goes to the credibility of witnesses, that sort of thing obviously would be disclosable to the defence. They are the only comments I wish to make at this stage. I can deal with other issues in answer to questions.

ACTING CHAIR—Mr Gray and Mr Thornton, with respect to the different standard by which the court may take evidence by video link, with applications being made by prosecutors and by defendants, you argue that the different standard is justified by virtue of the prosecution having duties to the court that, in a sense, justify this different standard. Is that your argument, in a nutshell?

Mr G Gray—That is correct.

ACTING CHAIR—Could you expand on that again? This is a critical issue for the committee.

Mr G Gray—Perhaps if I could take you to the provisions once more. 15YV(1) is where the prosecution wants to call video link evidence. The court must allow evidence to be declared by video link, leaving aside the qualifications:

> unless the court is satisfied that giving the direction or making the order would have a substantial adverse effect on the right of a defendant in the proceeding to receive a fair hearing.

This is, in many ways, the key provision in this bill. That is the reason this bill is here. The purpose is to raise levels of certainty, to go from a situation under state law where the court has a discretion about whether to receive video link evidence, and actually raise the bar to basically say, ‘You have to, subject to the qualification to protect the defendant.’

In relation to that, orders are going to be made at a point where, if it is made at trial, there has already been a committal proceeding and the witness's evidence in one way or another has gone before the court at committal, the committal court, and where there has been disclosure of the material. What this is saying is that, if you get to that stage and the prosecutor applies to call evidence by video link, then the legislation assumes that the prosecution has complied with its duties and obligations, that it is acting for good reason and there is good reason why that witness should be called. So it is basically saying, when you come to look at the interests of justice—bearing in mind you cannot require a court to do something which would be contrary to the interests of justice whatever you might put in legislation—

ACTING CHAIR—Why can't the test be the interests of justice?

Mr G Gray—Because the interests of justice test is lower than the test here. This test quite deliberately raises the bar to the point as high as the drafters and the legal advisers think it can be taken without going beyond that which is constitutionally permissible. It is quite deliberate and we do not run away from that. That is what this provision does. All of the submissions and suggestions that it be wound back to an interests of justice test fly in the face of that policy approach, if I can use that word. I am obviously not here to defend government policy, but I think I can outline that that is the policy which is behind this provision. That is what it is designed to achieve: a level of certainty that when the prosecution wants to call video link evidence then the judge does not say, 'Is this appropriate from the point of view of the prosecution?' We assume the prosecution is complying with its duties and obligations. The interests of justice come down to one question: does this have a substantial adverse effect on the rights of the defendant? That provision is there. Looking at the two provisions separately, which is how I would invite the committee to look at it—

ACTING CHAIR—They are separate provisions but can we look at them separately? Your argument is that this is to make the whole process more certain and to facilitate the use by the court of video link evidence—I understand that. But, if that is correct, surely it is absolutely critical that the evidence be taken in conditions where the court can be certain that the evidence is good evidence, that there has not been torture or an intimidated witness and so forth. Therefore, surely there would be an argument that the observer provision should perhaps be buttressed by virtue of the fact that we are trying to facilitate the use of video link evidence. In other words, if the court and the prosecution are keen to use video link evidence, surely the court and indeed the committal court would have to be satisfied that that evidence is taken in conditions where the evidence given is good, appropriate and free from any intimidation. Are you certain that that those provisions in section YV are good enough?

Mr G Gray—Yes. That is a leading question, but I will answer it yes. 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. But if there is any suggestion, or more than a suggestion—I suppose it would have to have some sort of substance—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, which was the example given before. 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.

This is not an act about the admissibility of evidence; this is an act about the process, the formal mechanism for getting that evidence before the court. It is like looking at the provisions in the Australian Evidence Act or the Supreme Court Act—wherever they may be—which say that you can summons a witness and saying there are not provisions in there which say that the judge has to be satisfied that the witness is attending and there is going to be credible evidence when they arrive.

ACTING CHAIR—This was flagged this morning. I do not want to take up too much of the committee's time but this worries me, Mr Gray. Someone could be dragged out of prison in Iraq to give their evidence by video link. What certainty can the court and indeed the community have that that person is being treated appropriately? It is video link evidence, you cannot see the demeanour of the person giving evidence. It is not like a prisoner being dragged before the court here. It is quite a different scenario. If we want to facilitate the use of video link evidence—and all the evidence this morning has been that that is a good thing—surely we have to be certain that the conditions under which that evidence is taken is appropriate. Do you think this is enough?

Mr G Gray—I do not agree that you cannot assess the demeanour of a witness through video link. We get use to watching television all the time. Interviews are done by television. It is the technology. I do not accept that it is not possible.

ACTING CHAIR—It is more difficult.

Mr G Gray—I accept and agree that there are situations were it is inappropriate. My personal view, based on the experience I have had and my exposure to those cases relying on video link evidence, is that I do not accept that it is not possible to assess the demeanour of the witness. There will be situations where it cannot be done, and I agree with that. The short answer is that this legislation does not address that issue. You have somebody giving evidence and you have concerns about the position in which they are giving it. The same problems arise if you bring them to Australia to give evidence. The suggestion has been made that because it is within the jurisdiction of an Australian court you can have more confidence in their evidence. The authorities of the foreign country will still have control if the person is going to return after they have evidence, and their family might be there. I do not think there is a significant difference between the position of the witness giving evidence by video link and the position of the witness coming to Australia. In both cases there will be very real questions, particularly if somebody who has attended a terrorist training camp is giving the evidence. There will always be questions about their motives and their reliability.

ACTING CHAIR—Particularly if that witness is giving evidence in a foreign country and the evidence being led by that witness is contrary to the interests of the government of that particular nation. Not all countries are democracies like ours, Mr Gray.

Mr G Gray—Not all are democracies but not all are totally outside the rule of law, either.

ACTING CHAIR—Quite a few are. This is something the committee is worried about.

Mr G Gray—I understand that entirely.

Senator LUDWIG—The countries you talk about that are outside the rule of law are not ruled out.

Mr G Gray—No, they are not.

Senator LUDWIG—So they can be included. Are you comfortable with that?

Mr G Gray—I am in this sense: we keep coming back—as we have to—to the integrity and reliability of evidence and the ability of the trial judge to run the process. There is a range of situations. You can have a witness in a foreign country coming to give evidence to identify bank records—totally formal evidence—through to a co-accused who is a fellow terrorist giving evidence about something they did and implicating themselves in terrorist acts. There is that huge potential range. We have drafted a piece of legislation which is designed to cover that entire range and we have deliberately left it at the discretion of the trial judge.

The test for the prosecution that has been put in there—I have not come to the test for the defence—says 'substantial adverse effect on the right of a defendant in the proceedings to receive a fair trial'. There has been talk about what 'substantial adverse effect' means and how high the bar is raised. I say it is not raised very high because 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.

It has also been suggested that it would have a substantial adverse effect on the rights of a defendant—that it somehow raises the bar. It does not. If there is a potential for taking the evidence by video link, as opposed to calling the person viva voce, that is the test. 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 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. That is the sort of test, in my opinion, that the courts are going to apply to this. It is there to protect the defendant. They are not going to read this in any other way or take an approach other than that. I have heard people's comments about that term, but I do not agree that it is problematic.

ACTING CHAIR—Mr Thornton, do you want to jump in?

Mr Thornton—Yes. It is interesting that the expression 'evidence taken by torture' is used. I am not sure exactly what that means. If, say, you had someone who was incarcerated in a foreign jurisdiction and the evidence was that a defendant here trained in a particular camp, and it became an issue of calling this person to say, 'Yes, I can identify that that is a person who trained in a particular camp at a particular time,' the process would be that the Australian Federal Police would take a statement from this witness and go through an identification procedure which would satisfy Australian law. If there were other statements taken for other purposes from that witness—for example, if that witness had identified the defendant prior to the AFP taking the statement and going through the formal identification process by use of photo boards or whatever process would satisfy the Australian court—that would be an issue in terms of the Federal Police evidence being admissible in an Australian Court. In other words, if you establish that the witness has been shown one photo and has said, 'That is the

person,' or has been told, 'You will identify that person,' that would probably make that evidence inadmissible at the end of the day.

So, if that person has been forced to do that, what is the next step? They are then forced to make a statement to the AFP. They are then forced to make the identification in a proper process. They are then examined in a committal, where they can be asked questions about all these sorts of things. I guess you could postulate that they might be intimidated about actually telling the truth about what has happened to them beforehand. But, when you look at all those processes, there are a whole lot of processes. Is it then the concern that, at the end of the day, when this person is called at the trial, they are still under duress—that they have to tell a story which is not true?

I do not know how you overcome that. Even if we then said that we need to bring this witness to Australia because we are not satisfied with them giving evidence on video—and we could do that—we would still face that problem. I understand that it is an issue, but we can only put before the court material that is the best that we can get it and which has been tested as well as possible. That would happen through that whole process, so it is not just about one person sitting in front of a video camera for 10 minutes saying, 'This person did X, Y or Z.' There is a whole process that you go through whereby that statement is tested and whereby these issues can come to light. Sending an observer to make inquiries in a foreign jurisdiction has its own problems in terms of the authority of the Australian authority to do that. These are very real issues but these are the sorts of cases we are dealing with. This is the difficulty.

ACTING CHAIR—This concerns us. Senator Ludwig was not just being rhetorical when he was talking about countries that do not have the same respect for the rule of law as Australia does. This bill may well apply in respect of countries that have little respect for the rule of law. It is in the hard cases—and you gentlemen are lawyers—that the law is made, and that is what we are worried about. It is harder to test people's demeanour and everything else in the context of a video link from a country where threats have been made, particularly if it is not in the interests of the government of that nation to—

Mr Thornton—Do you then postulate that those threats have been made so that this person has to give particular evidence about a particular person and construct the statement?

ACTING CHAIR—I do not find that that is such a way-out thing at all. I went to Cambodia and, believe me, nothing would surprise me anymore. When you are dealing with countries that do not have a history of rule of law and dealing with witnesses, intimidation is common. In fact, it is unusual if there is not intimidation.

Mr Thornton—I accept that, but I am just wondering about the process. It is totally unlikely to come out through the whole process that I have talked about that there would be some issue about this particular witness in those circumstances.

Senator LUDWIG—What happens if it does come out—in the sense that you may not have an extradition treaty or a mutual assistance in criminal matters treaty or another way of having the witness fly to Australia to give evidence in person, so the only way that evidence can be admitted is by video link? That is the purpose of it more generally. It is not only convenience; it is also for where they may not be able to be transported. That is the general understanding that I have of this. You can disabuse me of that if you want to.

It seems to me that that is also part of the underlying policy directive of the legislation. You have a test that says that the judge must use it where he cannot get them otherwise, and then you have also got a substantial adversity test which sets the bar very high to allow the evidence to be admitted. Yet you do not have that test for defendants under the Foreign Evidence Act or for child sex tourism. Are these crimes relating to terrorism and terrorism financing more heinous than those? You do not have that test on state jurisdictions or on the mutual assistance in criminal matters. If you were to introduce a broader scheme, would you have this test?

Mr G Gray—That is an interesting question. This bill, of course, only deals with terrorism. The child sex tourism provisions were from 1994. I know that one of the things asked is why it is for terrorism and not expanded more generally. Terrorism is the driver for this bill. The law on video link evidence is not settled or fixed. This morning there was a question about why, if we have this provision in New South Wales, we do not have it in this bill. If you look at the age of the legislation, when you are dealing with technology like video link technology, 10 or 11 years is just ancient history to some extent—or it is history, not so much ancient history.

Senator LUDWIG—Probably in the IT community it is ancient history.

Mr G Gray—Yes. You cannot be tied down by the precedents from 10 or 15 years ago. I cannot tell you what we would do now if we were doing the child sex tourism provisions. I do not know. They will be reviewed at some stage. I cannot predict what the result might be, but this sort of model would be looked at. There is a possible application there. This is part of the driver for allowing greater use of video link evidence. The comments that people make are that video link evidence is great, but then they spend a significant part of the rest of the submission going through the problems, such as how you prosecute for perjury.

Senator LUDWIG—There are only so many ways they can say ‘great’, I guess.

Mr G Gray—Yes. But if you support the concept of video link evidence, you have to accept that there will be cases where you cannot use it and cases where it is less than ideal. That is the criminal process. Nothing ever works in an ideal way. It is not an ideal world. I think we have to use the technology.

Senator LUDWIG—In that instance, why wouldn’t you leave the discretion to the judge, rather than giving it the high bar that you have given it?

Mr G Gray—The discretion is left with the judge, in the sense that the discretion is limited to looking at the impact on the defendant. The judge does not look at things such as whether it is ideologically sound or at the sorts of issues we are talking about here—that is, whether you should allow video link evidence in these cases. That sort of concept disappears. As to saying, ‘You explain to me, Mr Prosecutor, why you cannot produce this witness here today in my court,’ we say that the judge does not ask those questions. A policy decision has been made that the legislation proceeds on the assumption that the prosecution is acting properly and in a bona fide manner.

Senator LUDWIG—But isn’t there a two-step process? The first step is that process and the second is the test that you use. They are not hand in glove. You can have a requirement for video link evidence, which is more than simply a discretion to the court as to whether to use it

or not. You can have a test which does not have the same high bar that this one has. Are they mutually exclusively or do you say that they come hand in glove?

Mr G Gray—You could set the test wherever you wanted, obviously. There is state legislation, there is this 15YV(2) and there is 15YV(1). You can put the bar where you want. But the policy reflected in this bill is to put it as high as it can be put for the prosecution and the defence.

Senator LUDWIG—We understand the driver in that, but I was trying to decouple your view. There are two policy initiatives—policy drivers. The first is greater use of video link evidence. The second is the admissibility—or the bar, if we use it more broadly, at which it is set. That is the second policy driver in terrorist cases. We do not know where you would set it in other proceedings, more generally. You might in all other proceedings still have the first driver: that is, a greater emphasis on the availability of video link evidence—or on courts to pick up video link evidence. I think everybody can at least see the sense in that, but it is the test that is the issue.

You have also got a test in the Foreign Evidence Act and you have also gambled with that one and changed it for the defendant as well. It is the same as the Foreign Evidence Act, so that test for the defendant has not changed, but you have changed the test for the defendant in the criminal proceedings for video link evidence. So there are now three tests, effectively. There is not a great deal of difference in the wording for the defendant between the Foreign Evidence Act and the video proceedings legislation, but there is a difference.

Mr G Gray—I might come to that in just a second. The question that you have asked is very difficult for me to answer. Should this be the test that applies across the board? There has just been no decision by government in relation to that. I can express a personal view.

Senator LUDWIG—I am not asking you to.

Mr G Gray—I do not even know that I hold one at this point. Even if I were prepared to do so, I do not know what it would be. Can I take the committee just for the moment to the test for the defence. I will come back to the prime evidence act. The test for the defence is that the court must allow evidence to be given 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. People have glossed over that to some extent. That is a very high bar for these provisions, because the court has to take the evidence unless it would be inconsistent with the interests of justice.

Legislation, as I mentioned before, cannot require a court to do something which would be inconsistent with the interests of justice. So really those words just state the constitutional limitations which are required under this legislation. You could not push that bar any higher other than by doing essentially what we have done for the prosecution, which is saying words along the lines that in determining whether it would be in the interests of justice you would disregard the following. We have done that by omission in the prosecution test. In the defence test we have not done that; we have left the test open.

That reflects the fact that you come back to the different roles of the prosecution and the defence. If the prosecution, or the DPP, is seeking an order allowing it to call video link evidence, that evidence would have been included in the committal brief, it would have been

disclosed to the defence, and there would have been testing of that at the committal stage. The defence can call a witness without notice—without an indication of what that witness is going to say—to the prosecution or the court. Obviously these provisions will require that they give notice of the intent to call evidence by video link, but that is going to be the only notice that will be required. I just do not see how we could say to the court, ‘When you receive an application for the defence you’re entitled to assume that the witness can give cogent, credible evidence. You’re not allowed to look into whether or not the issues of justice would be served by calling that witness.’ It is just very difficult to see how you would draft these provisions as going any higher for the defence.

That is why you end up with the two different tests—not because of deliberate intention. The whole point of putting this test in was to make this balanced legislation. We could have had a bill which just said, ‘The court must receive evidence when the prosecution call it,’ and not anything about the defence. The bill does not. It has provisions for the defence as a matter of fairness, as a matter of equity, as a matter of giving the defendant ‘equality of arms’—I cannot remember the phrase that was used, but it was along those lines. It is very difficult to see, as I mentioned, how you would raise it. So, if we assume for the moment that we are not going to lower the prosecution test—and you cannot raise the defence test—you end up with two different tests. That is the position. That is the reason—the justification, if you like—for there being two different tests.

Senator LUDWIG—The justification is that you want a hard test. Therefore you will have one for the prosecution but you do not have to have one for the defendant, so you will not. That is not really a justification in my mind—but anyway.

Mr G Gray—I do not think I put it quite that way. Maybe I did. If so, it was not the way I meant to put it.

Senator LUDWIG—Maybe I heard it wrong.

Mr G Gray—What I was trying to express was that, if you 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. That is what I was trying to express. 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. That is why we say there is no problem. I think I referred to the convention by the wrong name before, but I am sure people knew which one I was referring to.

The Foreign Evidence Act as it is currently drafted allows for evidence which has been obtained in response to a mutual assistance request to be tendered in Australia. There is a test which is in there which gives the court wide discretion. That test will be changed. It will be limited to terrorism as a consequential amendment if this bill goes through and that change will be limited to terrorism and the other related offences. The same test that will be in the video link provisions will apply in the Foreign Evidence Act. That is a fairly limited amendment to the Foreign Evidence Act. Whether that foreshadows a wider amendment down

the track is something I just cannot say. You are right: there are now three tests in the Foreign Evidence Act, but I do not think that is something that is beyond the capacity of the courts to deal with.

Senator LUDWIG—There is even a different wording between the defence test in the Foreign Evidence Act and the defence test in the Criminal Code. I presume you intend to have a different effect, as you are putting them at the same time? If you are not changing one then there must be a difference. What is the difference supposed to be? There has to be the presumption that there is a different intent as there is slightly different wording.

Mr G Gray—Just looking at those words, sorry, I withdraw what I said. I was under the impression we had changed that test as well. The answer is that we have not changed it.

Senator LUDWIG—I know what the answer is. I was wondering why you have allowed two tests.

Mr G Gray—The reason is that, when you look at the form of that test, it achieves the same result.

Senator LUDWIG—But the presumption would be that it cannot—you would have to rebut that. The presumption would be, wouldn't it, that there is a different intent because there is a different wording?

Mr G Gray—I could not agree with that. If you go through Commonwealth law, you find that different drafters use different wording in a lot of different places.

Senator LUDWIG—At the same time?

Mr G Gray—The test is that the court has discretion to direct the foreign material not be adduced as evidence if justice would be better served. So it does achieve the same result.

Senator LUDWIG—As far as we are aware.

Mr G Gray—I would say that it does achieve the same result.

Senator LUDWIG—Why didn't you change that at the same time? What was the intention behind not doing so? I am trying to ascertain why you did not change it.

Ms Cockshutt—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. Thus we have added in the prosecution test for the foreign video link provisions.

Senator LUDWIG—Yes, and you will fall back to 25, the existing test under the Evidence Act?

Ms Cockshutt—Yes, that is right.

Senator LUDWIG—I understand how it operates.

Mr G Gray—The short answer is that there was a preference for making as few changes as possible, given that this is, obviously, controversial and difficult legislation. The Foreign Evidence Act is part of the suite of legislation which hangs on the mutual assistance act, as you know, and also interacts with state evidence laws. It is a complicated and difficult piece

of legislation to work with. The answer to your question is: it was just felt that it would be better to make minimal changes if there was a need to do so.

Senator KIRK—Thank you very much for your submission. You were referring earlier to the observer provisions. A number of witnesses, including the ALHR—Australian Lawyers for Human Rights—have raised some concerns about the independence of those observers.

Mr G Gray—They have, and there has been some discussion. Let us make this perfectly clear: the court specifies who the person must be. The court will name the person in the order. The court must be satisfied that the person is independent of the prosecutor and independent of the defendant. This section of the bill then goes on to say that the mere fact—and that is the key word—that a person is an Australian diplomatic officer or an Australian consular officer does not mean that the person is not independent of the prosecutor. There have been questions like: 'What if you have an ASIO officer or a police officer?' That person is not going to be independent of the prosecutor or the prosecution. They might be an Australian consular official who happens to also be an ASIO officer. They are knocked out not because they are a consular official but because they are an ASIO officer. It is a multiple test. There has been talk about specifying them, listing who they should be and making it mandatory that they have those provisions, but these provisions have been quite deliberately drafted so that they are not mandatory and are quite open and general.

Again, you come back to trusting the court. The court has to be satisfied that the person it is appointing to observe the proceedings on its behalf is an appropriate person to do so. We thought that is the role that diplomatic and consular officials perform. When a consular official is in a foreign country, they represent Australian citizens and Australian interests; they do not represent the DPP or the law enforcement agencies, so the first consular officer from a particular embassy may be an entirely appropriate person to come to court and observe the proceedings. They may be much more appropriate than a local lawyer or somebody appointed by the defendant. Therefore, we wanted it to be made clear in these provisions that it could be a consular official, but not if that consular official is somebody who has had some role in the case or is in bed with the prosecution.

I have some difficulties. These provisions, which I thought were quite good, are attracting criticism. I can understand the criticism of people saying that they want the observers to do more. I said before, we just do not see how that can be done, certainly in this bill. There were some suggestions also that these provisions for observers should be picked up and put into the Foreign Evidence Act.

ACTING CHAIR—This is the concern that I have. You mentioned that an ASIO officer, for example, might be inappropriate. An ASIO officer is a member of the Attorney-General's Department. On the other hand, you said that a member of the foreign affairs department is okay. A consular official employed by the department of foreign affairs would be all right, but someone employed by the Attorney-General's Department would not necessarily be okay.

Senator LUDWIG—We may not know that he is an ASIO official.

ACTING CHAIR—My question is, and Senator Kirk touched on this: is someone who is part of the executive going to be an appropriate person to have as an observer? I do not know,

but you see the problem, don't you? Whether someone is appropriate will depend upon the bloody department. I do not know; is that wrong?

Mr G Gray—I see the question. I am not sure that I would define it as a problem, because I think the answer is yes. We had discussions with the department of foreign affairs, before we put this provision in the bill, to find out whether they thought that was an appropriate role for their officials to perform, and they said yes. It falls within the sorts of things that they do. Consular officials are not there to represent the government against the citizen or the individual; they are there to represent the overall interests. I may not be expressing this perfectly well, but—

ACTING CHAIR—I accept that. I am not saying that we cannot trust them. My point is that the in-principle distinction is very difficult.

Mr G Gray—I do not think so.

ACTING CHAIR—So an ASIO officer is inappropriate, because they are appointed by the Attorney-General's Department; someone employed by a different department is okay?

Mr G Gray—I would have thought it comes into the function. If it is a question of who you trust, you have to trust somebody at some stage to do the right thing. If your job is, as an ASIO officer—

ACTING CHAIR—We are politicians!

Mr G Gray—That is right. A police officer's duty—I am not quite sure what ASIO officers do—is to enforce the criminal law. The duty of a consular official is to represent the rights and interests of the country and the interests of Australian citizens, and so it is a much different task. If they perform that task, they are appropriate people. If you have doubts about whether a consular official will perform that task, then they are not an appropriate official and the court should say no. A lot of this will come down to what the defence want: what they say, whether they object to the person and whether they can come up with an alternative who is suitable. The minute we start putting in the suggestion of some local lawyer it becomes very hard, but there will be cases when an appropriate lawyer is entirely appropriate and acceptable.

Senator KIRK—How is this person to be chosen? Are you saying that the prosecution and the defence might nominate a particular individual? How does this individual come forward in the first place for the court to make an assessment about their appropriateness or otherwise?

Mr G Gray—I am thinking and hoping that this process will work on a cooperative basis and that the defence and the prosecution will come together and decide: 'Is this is a case where we need an observer?' There will be some cases where nobody thinks there should be an observer, which is why it has not been made mandatory. I was talking before about purely formal evidence, directed at business records, where everybody says, 'We don't need an observer.' That is fine. The minute the defence say they want an observer I would think the court would take that into account. They are not going to proceed on the basis of not having an observer if the defence have said they want one. As to who that person should be, I would suspect that they will look to the DPP, to the prosecutor, and ask how they propose to address it, because the defence will not have the capacity to appoint someone. There will be ways of

addressing it. Yes, it could be a local lawyer. You give the defence the telephone book from the local bar society or the local legal profession, or the DPP or somebody arranges for the defence lawyer, somebody chosen by the defence in Australia, to travel to the foreign country.

There is a precedent for this: some time ago the DPP took evidence via video link from New Zealand. An observer was sent over from the defence. It was the wife of the solicitor who was representing the defendant. They were happy for that person, who was not a lawyer and who had no concept of the criminal law, to watch what was going on and to make sure there was nothing untoward. That is why we want to keep it flexible. Or do we put in a provision saying that it may be the wife of the solicitor?

Ms Cockshutt—The appointment of the observer does not rely on the application of either the prosecution or the defence. It is totally up to the court.

Mr G Gray—I think that is right. Although, it is an adversarial process and you would reckon that the court would be guided by the wishes of the parties.

Senator KIRK—Yes, I would have thought so. I would like to move to another issue, but I am not quite sure to whom to address the question. It is about section 4AAA of the Crimes Act and the amendments thereto.

Mr G Gray—That would probably be to me.

Senator KIRK—In your submission you mention that those amendments may not withstand constitutional challenge.

Mr G Gray—That is not our submission.

Senator KIRK—It is not? I beg your pardon, I see that it is in the *Bills Digest*. What is your response to that?

Mr G Gray—In my opinion they will survive constitutional challenge.

Senator KIRK—Can you elaborate upon that?

Senator LUDWIG—Is that a high or a low bar?

Mr G Gray—These provisions are very limited in their application. Concerns have been expressed in some of these submissions about the extent to which courts are being given non-judicial functions. That is a totally different issue. What this does is assume that the Federal Court has been given a non-judicial function, and that is done in a whole lot of different places under different laws. This was a request from the Federal Court to give greater certainty of protection to their officers, and this provision will confirm it. If it is done it is given to the judge in their personal capacity, not as a judge. That is for constitutional reasons. Then it says that when judges access that power they have protection. That was the issue that concerned the Federal Court: when judges exercise non-judicial functions. When they exercise judicial functions they have all the protections that come from being judges. If you give all these non-judicial functions, such as issuing warrants and arrest warrants and other stuff, sometimes they have protection and other times they do not. This amendment will ensure that they have protection and that it will flow to them, as with the same sorts of protections they have when they perform judicial functions. That is all this provision is

designed to do, and that is all it does do. I cannot see any possible basis on which it could be challenged constitutionally.

Senator KIRK—Isn't the issue whether the non-judicial function may be incompatible with their judicial role? That is the constitutional reason.

Mr G Gray—Yes. But, for example, judges are given powers to issue warrants under the Surveillance Devices Act and the Telecommunications Interception Act, which was the issue considered by Grollo v Palmer. Those provisions sit in specific pieces of legislation—the Telecommunications Interception Act and the Surveillance Devices Act—so if there were to be a constitutional challenge it would be to that power being given to the judge, not to this provision. This one works on the assumption that the drafters, the people who developed the other legislation, have done the job right.

Senator KIRK—They may not have, though. That is always possible. The Gilbert and Tobin Centre of Public Law suggested that the changes that are being made will not necessarily guarantee the validity of specific conferrals of power.

Mr G Gray—That is right.

Senator KIRK—What is your response in relation to that?

Mr G Gray—It is not designed to do that. I think it is fairly clear. Sometimes there are questions. When you give a judge a non-judicial function, there is a huge overlap. When is a function judicial and when is it not judicial? It may fall within the character of the non-judicial functions. If it is a judicial function, then there is no problem. And there is no problem—as the High Court has said in Grollo v Palmer—in giving them a non-judicial function, provided it is not incompatible with the performance of their judicial function. That question has to be assessed by looking at the power that they have been given. This act will not have any bearing on that. If the power cannot be exercised by a judge because it is inconsistent with the judicial function, then this will not say that they can exercise it. This assumes that there has been a valid conferral.

Senator KIRK—Each time there is a conferral, is it not possible that there could be a challenge to it?

Mr G Gray—Yes. The issue has to be addressed every time there is a conferral. There are people, unfortunately not in my branch, who address that issue and will decide whether it should be given to the judge. If they come to the conclusion that it should, then hopefully that is on a sound legal basis and any challenge that is raised will not succeed. But it is always possible. There will always be challenges to search warrants and arrest warrants. That is a common ground for challenge.

Senator STOTT DESPOJA—I want to explore some other issues, specifically in relation to the changes to do with DNA. Mr Gray, is it the Attorney-General's Department or the AFP—

Mr G Gray—It is us.

Senator STOTT DESPOJA—I will begin by asking for the reason that the changes have been made, specifically in relation to interjurisdictional matching, volunteer samples and expanding the use of those samples, for example.

Mr G Gray—I will start by saying 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. The legislation was enacted in 2001. I do not know if you have looked at those provisions but they are very long and complicated and run for many pages, which reflects the sensitivity of this area, and there are lots of protections. The whole system of the national criminal intelligence DNA database is meant to be supported by the Commonwealth and all the jurisdictions. They put data on it and they can share it. YUD is the provision which makes it clear that that was intended by the legislation and that it is a mechanism that is intended to allow that to occur.

Two things have happened. Firstly, the states enacted their own legislation, so we need to enter into ministerial arrangements and recognise corresponding laws, and that is a very complex and difficult process. Secondly, the database had not been developed when the legislation came into force. It has now been developed and it is operational, but 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 that we have run into, but, unfortunately, they do not cut away all the problems. You are likely to see further amendments down the track before we can actually bed in this legislation so that it can operate in the way it was intended.

Senator STOTT DESPOJA—Could you tell me about some of the problems that you think are yet to be addressed?

Mr G Gray—I could tell you about two. I do not know that I could go into detail on the ones we have not addressed, and I might mention why that is. The first that came in was about the sharing of information. It currently states that the minister may, on behalf of the Commonwealth, enter into arrangements with a participating jurisdiction under which information from the DNA database system that may be relevant to the investigation of a matter related to a participating jurisdiction can be shared with that jurisdiction. The wording looks fine. I was not involved in the drafting, but I understand why it looked fine when it was drafted. But it 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. Those words are being modified so there can be greater—

Senator STOTT DESPOJA—It does not work in the sense that investigations take too long? What is the practical concern?

Ms Cockshutt—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.

Mr G Gray—The use restrictions are still there, the table is still there—we are going to make a modification to the table which I will talk about—and all the protections are still there. The way that the database is set up is that there is no identification material on it. What

goes up at the moment is the profile. If there is a match with another jurisdiction and you want details, you have to contact the authorities in the particular state—and there will be a contact number. We think 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. What is happening is that this sort of unintended consequence is restricting the use of the database, the operation and the way in which it was meant to operate. This will go a big step towards resolving those problems.

The other thing we are doing is changing the matching table. The concept of the matching table is very complex. When DNA samples relate to a crime scene, they can be used for some purposes and not others. The table was drafted, again, when the legislation was drafted. There are some yeses and some noes, and some of the noes we now think are not appropriate largely because when the states have come to do their own matching tables they have come up with different models. They have come to us and said, 'Why is yours different from ours?' We looked at it said, 'We don't quite know.' This proposal will deal with volunteers (limited purposes) and that is all. 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. For reasons which are not entirely clear, the initial draft of this table has a whole lot of noes about what can be done with volunteers (limited purposes) material. If it is within the purpose for which it was given, then they should all be yeses. That is what this amendment will do—it will address that.

There are other issues about the matching table and there may be some further changes that we would bring forward, and we will justify those at the time. We will take short steps. The reason why I am reluctant to go into other issues is that we are still in negotiations with other jurisdictions. We are hoping that we can reach a solution that does not require legislative change because of the time that it takes. Matching has commenced for some jurisdictions.

Ms Cockshutt—Queensland and Western Australia are now doing interjurisdictional matching; the Commonwealth is not at this point. We are still in negotiations to make sure that our legislation is complied with when we do interjurisdictional matching.

Senator STOTT DESPOJA—The impression that people may have is that the current confines of the use of volunteer samples for a specific investigation is being expanded to any or all investigations. You are making it clear that that is not the case, that it is still to do with specific purposes. This is assuming volunteer consent as well, is it not?

Mr G Gray—Yes, informed consent; so things have to be explained and set out in the legislation.

Senator STOTT DESPOJA—Mr Gray, you mentioned the issue of privacy earlier. Again this is a related matter, but I am just wondering when the department is going to respond to the Australian Law Reform Commission's AHEC report—essentially yours—because this—

ACTING CHAIR—I am not sure how relevant that is, but I will allow it.

Senator STOTT DESPOJA—Arguably there are privacy implications in relation to genetic information—

Senator LUDWIG—Mr Gray, you should say it is not your area.

Mr G Gray—I was tempted to say that. I do not know. The government is considering its response. I cannot give any information; I do not have that information. It really is not my area. I do not know whose area it is.

Senator STOTT DESPOJA—Neither do I and I keep asking everyone in the hope that someone will tell me. Please, do not get me wrong, I do understand that there is a whole-of-government approach in responding to that particular report—which is a fantastic report—

Senator LUDWIG—If we get Mr MacDonald before us, will he be able to answer?

Senator STOTT DESPOJA—but there are privacy implications obviously in relation to DNA databases.

Mr G Gray—Perhaps we can take that on board and pass it on to the appropriate section of the department?

Senator LUDWIG—I was going to say it would be helpful if you took it on notice. Curiously, though, with that table that you indicated had a number of noes, why did you not go back to the Model Criminal Code officers who developed the original DNA model in the first place and ask them why they developed that table in that frame, because that is where it came from? They developed it in 1998-99. They then drafted it and it went through all the states in quite a convoluted process, but they came up with what they thought was an excellent bill at the time. I think the department congratulated them for the work that they did at that time and then brought it forward.

Mr G Gray—I think they did excellent work. We are talking now about legislation, although we are still not operating the database the way it was intended. It is quite dated legislation. The point about that is yes, we did. We are now the representatives of the Commonwealth on the MCOCC and we did speak to the former representative and got some information. The reasons for this, it is fair to say, are somewhat lost in the mists of time. The other point is this: the states have enacted their own legislation except for the Northern Territory. Everybody except the Northern Territory has a matching table. The Northern Territorians decided they did not need one at all, and that is an issue we are examining. But every other state and territory has got a matching table. Their legislation was also based on the MCOCC model, but—guess what—they have come up with different models in different states for different reasons. We are in a position where there is just not much point in looking back on this and saying, 'This is pristine; this is the way to go.' We have to move forward and get a table which can operate with the jurisdictions, unless there is valid reason not to and we come to a point when we say, 'We're just not prepared to see the Commonwealth information used for that purpose.' But I cannot see any reason in logical protection of privacy, if somebody says, 'Yes, you can use my DNA for the following purposes,' that we then have a restriction which prevents it from being used for those purposes.

Senator LUDWIG—Can you give us an example?

Ms Cockshutt—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—

Mr G Gray—Or for specific crime scenes.

Ms Cockshutt—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. We have tried to search for reasons as to why no was put in, and we cannot seem to find any good reason.

Senator LUDWIG—I cannot recall any either. I was on the committee that looked into that some time ago. In fact, my recollection is that it was designed to exclude yourself as a possible—

Ms Cockshutt—Yes, one of the major reasons to take a volunteer sample was to exclude them from a crime scene. We have just said that as long it is within your purpose then it is okay to match.

Senator STOTT DESPOJA—On the issue of the retention of volunteer samples and the fact that samples can be retained for the period of time to which a volunteer agrees, in practical terms—I am not quite sure if the AFP or A-Gs want to comment--how is that usually structured? Are you collecting data on the duration for which most volunteers are happy for their samples to be retained? I am happy for you to take it on notice, but I would be interested, given the system has been working now for some time, to make sense of that.

Mr G Gray—The impression I have from discussions with state police and the AFP is that the volunteer limited purpose material is very rarely placed on the database. What they tend to do is limit it to an operation: they have a specific operation, they take the samples, they exclude people, then they destroy the samples. The concept of putting it on NCIDD—it just does not seem to be happening. You might then ask, ‘Why have it in there?’ I think it is facilitative. The minute that we do not have it in there they will have a case where they have volunteers and a limited purpose and want to put it on the NCIDD database. But the feedback we are getting at the moment is that they will take it for very limited purposes for a very limited time. DNA material, despite all the television shows, is still controversial. There are privacy issues. Investigators still have to explore the full potential of its use. That is why it is so important to get this database up and running.

Ms Cockshutt—Also, 23YDAG makes it an offence for a person not to take the DNA profile and identifying information off the system, in accordance with whatever the volunteer said. So there is an offence there with imprisonment of up to two years as well; there is that safeguard.

Mr G Gray—And there is the right, as you are probably aware, of a volunteer to withdraw their consent at any time; there is then an obligation to remove it. The CrimTrac people are not here but I can assure you that they take all of that very seriously. They are very conscious of the duty and obligation which is entrusted to them. They have a multimillion-dollar computer system, which is set up in such a way as to ensure that it complies with all the tests and obligations. But that question, if you really want to pursue it, would have to be put to the CrimTrac people.

Senator STOTT DESPOJA—We might do some of that through estimates; I will not take up your time with it now. My final question again relates to the ALRC document. Were your recommendations essentially taken into account when drafting the changes to the Crimes Act?

Ms Cockshutt—From the Commonwealth's point of view, the main reason for the changes with the interjurisdictional matching is to get it up and running—to make sure that we get interjurisdictional matching happening. Concerning the changes in the table, the ACT recently did the same amendments. We looked at it and said it was just an opportunity to fix this without going into thinking too much about other areas that we may or may not want to review after we have looked at the report.

Senator STOTT DESPOJA—Are you saying it was not necessary or that they were not—

Ms Cockshutt—Privacy was consulted when we did these amendments and they were happy with the amendments in the current form.

Mr G Gray—I think the short answer is that they were not taken into account, because they were not relevant to these particular issues. These are just purely mechanical issues, as we see it. The question of the long-term operation of the database and whether the protections are appropriate and all of that is not relevant to this current exercise, which is very limited, as you would expect in a consequential amendment.

Senator LUDWIG—Could you provide us with that table, if it is available? If not, you can take on notice the question of what outstanding matters on that table cannot be dealt with by the volunteer. In other words, where do you have a difference between, say, Queensland and the Commonwealth?

Mr G Gray—Could you repeat the question?

Senator LUDWIG—The table which is in the current legislation and then the Queensland—is there a snapshot of the differences and what we are seeking to change?

Ms Cockshutt—We are not making any changes to the Queensland table—

Senator LUDWIG—No, because that is their legislation.

Ms Cockshutt—The way the CrimTrac database works is that it looks at the Commonwealth table and it looks at the Queensland table. If there is a 'no' in either of the jurisdictions then it is a 'no' match, even though the Commonwealth might say 'yes'. So they create a third table, if you like, for the CrimTrac database to operate. I am happy to provide you with those third tables if you need them.

Senator LUDWIG—I would like some information so that we can get an idea of the differences. See what you can do.

Mr G Gray—We will take that on notice and see what we can provide.

ACTING CHAIR—I return to section 15YW—observers. I wish to raise a question that was raised in the human rights commission's submission. It talks about the report of the observer at 15YW(7)(c): 'The court may direct or allow the specified person to give the court a report.' That is in relation to the giving of evidence by the witness. Do you think, Mr Gray, that is sufficiently broad to cover situations where the observer may observe conduct prior to the taking of evidence that may have involved intimidation?

Mr G Gray—That is an interesting question. I think it is ambiguous. I suspect the answer is that it is not encompassed in the provision. The provision certainly talks about what is

observed in relation to the giving of evidence, and I suppose you could argue that the giving of the evidence was influenced by what was observed.

ACTING CHAIR—The question was raised when we started our discussion, all that time ago, about the intimidation of witnesses.

Mr G Gray—Yes, exactly. For example, if they look out of the window and notice the witness being beaten and then brought before the court.

ACTING CHAIR—Whatever; yes.

Mr G Gray—If they observed that, I would have thought that that would relate to the giving of evidence by the witness, because it would be relevant to the way they gave evidence. I suppose if they observe something, there must be some limit to how far that can go. But 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, 'I just heard this. I'm not quite sure what to do about it, but I thought I should pass it on to you.'

ACTING CHAIR—I wonder about the procedural aspects of that. I don't know. You are the prosecutor—

Senator LUDWIG—How does the court receive that evidence?

ACTING CHAIR—Yes, how do they receive the evidence?

Mr G Gray—There could be a procedure. But this person is performing the role, as I see it, of an officer and a representative of the court. It seems to me that there cannot be any possible difficulty with the observer. It would be like the judge looking out of the window and seeing the witness being beaten up. The judge is not going to say, 'I didn't observe that in the court process so I can't do anything with it.' I do not know what the judge would do, but I can guarantee the judge would do something.

ACTING CHAIR—I do not want Mr Thornton to think it is another highfalutin, hypothetical example. Because, in effect, that is when the intimidation will occur, obviously; it is not going to be the gun to the side of the video link, it is going to be the belting before the court starts and before the evidence is taken. But, anyway, Mr Gray, if that is your answer—

Mr G Gray—That is my answer on this.

Mr Thornton—I would have thought that, if there was something that really did concern an observer while they were over there, there would be a way of actually getting that information back. They could get in touch with the court, because they are court appointed. I guess there is some difficulty in getting in touch directly with defence or prosecution, because they are independent persons, but I would imagine that it is something that the court would bring to the attention of counsel, if that was the case. I think there is provision for interim reports to be given by an observer, for example, so that a person could come and actually give a report midway through the process. Or, if there was other material or something substantive

that could be followed up, the court could ask that that be done. It really depends on the nature of it, I guess.

Mr G Gray—That is another area where we deliberately kept the provision vague and flexible.

ACTING CHAIR—You say ‘vague and flexible’; other people say that we need to make it more prescriptive.

Mr G Gray—Okay, if they want it to be more prescriptive, we say, ‘That’s fine. You can make it certain and prescriptive, and that will achieve a good result in this situation.’ And then you could get into another situation and it could all fall to pieces because it is too prescriptive. So that is the approach that has been taken into account.

ACTING CHAIR—It is a balance. I understand that. I turn to the question of substantial adverse effect in relation to section YV—the application by the prosecutor. ‘Substantial adverse effect’: we heard evidence on that before, from the human rights commission. For one, we know it is not defined in the act. Senator Ludwig brought this point up before: that phrase is not defined in the act. What does it mean? Does it mean, in accordance with case law, ‘considerable’ or ‘large’? Or does it mean ‘more than normal’? What does it mean, Mr Gray?

Mr G Gray—It means more than minimal and that is how, in my opinion, a court would read it.

Senator LUDWIG—‘National security’ is defined, but why haven’t you picked up the same definition—

ACTING CHAIR—and also put that in the proposed act?

Senator LUDWIG—Will that apply?

Mr G Gray—It will not apply directly, but you have got the same term being used in different laws and being defined in one in the same type of context. That definition is the definition which the court will apply. This is a drafting thing, and I suppose the drafter took the view that it was not necessary—

ACTING CHAIR—to put a definition in?

Mr G Gray—Yes.

Senator LUDWIG—It is that plain, is it?

Mr G Gray—It obviously is. I think it is beyond doubt how a court will construe it.

Senator LUDWIG—So why do they put it as ‘national security’?

Mr G Gray—If the DPP try to argue that it means something higher than ‘more than minimal’ they will lose.

ACTING CHAIR—I have another question as to what the commission raise in their submission. In relation to the interests of justice test in an application to the court by the defendant, the commission make this point in paragraph 20:

Rather the interests of justice test would appear to allow consideration of matters such as the expense occasioned by the making of the direction or order, the effect it would have on the length of the trial, the interests of the general community and the interests of the proposed witness.

So they say all those things would come into that assessment when the defendant applies to use video link evidence. In other words, there would be a general test with all those particular aspects involved in it whereas when there is an application by the prosecutor—and this is also in paragraph 20 of the commission's submission—those factors would not be taken into account.

Mr G Gray—They would not. The answer to the first part of the question is yes, they would not be taken into account under the power of subsection (1). As to whether they would be taken into account under subsection (2), I do not necessarily accept they are going to be taken into account under YV(2).

ACTING CHAIR—You don't accept that?

Mr G Gray—It is another provision which has been drafted widely to give the court the capacity to look at whatever factors it thinks are relevant.

ACTING CHAIR—Therefore it might take into account those factors.

Mr G Gray—It might take them into account but given the balance in exercise and given also that the thrust of this is that the video link evidence must be adduced and then you have got the tests of the prosecution, this is a provision designed to encourage and promote the use of video link evidence. So, taking those factors into account, when the defendant seeks leave to call evidence by video link, if the DPP starts talking about time and delay and cost—

ACTING CHAIR—and community interest—

Mr G Gray—Can I come back to community interest and the rights of the defendant?

ACTING CHAIR—Okay.

Mr G Gray—I think cost and time can be relevant in the context of the case. When the DPP starts using those to oppose the defence calling video link evidence, it is not going to carry a great deal of weight. If I am a defendant in a trial, I can call exculpatory evidence. Say I cannot call the person here so I want to call them by video link evidence. Using this legislation, a court will not say, 'No, you're not going to call your exculpatory evidence' because it is going to cost too much or because it is going to cause delay. I have got some confidence in the fact that judges will apply this test.

ACTING CHAIR—So you are saying that if a prosecutor, in their application, put that submission to the court, in effect they would be laughed out of court, so that simply would not happen?

Mr G Gray—The court may turn to the defence and say, 'Who is this witness? What can this witness give evidence to?' That does not happen in the case of the prosecution because everybody already knows who the witness is. If it is a totally frivolous application which is going to cause six months delay in the trial while you make inquiries and line witnesses up and the court says, 'This person just can't give any evidence that is going to help you,' then that may be a situation where the court will say it is not in the interests of justice. But the minute that there is a hint of this person giving relevant evidence which is potentially

exculpatory, I think the DPP will have a quite difficult test in trying to prevent that evidence being called by video link.

The other point is: why would the DPP want to prevent the evidence being called by video link? It is a point that I wanted to make before, which I will make now. We do not see the discretions in this act being exercised on a regular basis. The act essentially says that evidence should be called by video link ‘unless’—and then there is an exception there which preserves the right of the court. I would envisage that, if an application were made, in the majority of cases orders would be made—assuming the witness can be brought before a video camera in the foreign jurisdiction, and that is a different issue—to allow the evidence to be given by video link.

I think the real issue is going to be admissibility, reliability or cogency of the evidence. The DPP have the person before the video camera in the foreign country. They start leading the evidence and then allegations are made of torture or corruption or whatever. That is going to be the real issue. As we discussed before, the court has powers under the normal rules of evidence; it has the real ability to control its proceedings. People are concentrating, or honing in, on the tests that are different. Those are exceptions; they are not ‘the test’.

ACTING CHAIR—That is the problem. That the tests are different raises all these questions. The Human Rights and Equal Opportunity Commission are quite right in raising this. You say that perhaps it does not apply. Well, the tests are different. For us, as a committee, these are the issues before us.

Mr G Gray—I understand that you have to look at the issues. Can I make one last point in relation to that. You talked about the rights of the witness and the rights of the general community. The test relates to the interests of justice. So if we say, ‘It is a bit harsh on this witness,’ you can imagine situations where the interests of the community or the interests of the witness would somehow be connected to the interests of justice. I am not saying that it is not possible, but you cannot say: ‘This is going to be inconvenient to the witness.’ You have to tie it back to the interests of justice. So, although I accept that it is a general term and there is the authority that has been referred to, that authority has to be looked at in context. In this context, I do not think those sorts of factors would carry much weight if the evidence were potentially exculpatory.

Senator LUDWIG—In the interests of time, could you and the AFP take on notice the cases currently on foot which could utilise these provisions if they were passed?

Mr G Gray—That would be a question for the DPP.

Mr Davidson—We currently have a number of CT cases on hand.

Senator LUDWIG—Could you provide that in written form?

ACTING CHAIR—Could you take it on notice, Mr Davidson?

Mr Davidson—Certainly.

Mr Thornton—I would like to make a final comment. It is interesting listening to these tests. If you postulated a test for the defence which was equivalent to the prosecution—for example, you said it could be unfair to the prosecution—in looking at the interests of justice, a court might say, ‘I agree it is unfair to the prosecution but this is vital evidence for a

defendant.' So you could finish up with the evidence being called, whereas if you applied equivalent tests in those circumstances it would not be allowed to be called by video. 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. That is fundamental. I do not see that as a huge hurdle either. The legislation says 'substantial' but I interpret 'substantial' to mean that it is not trivial. That is the way the definition has been interpreted in the NSI legislation. So I do not necessarily think that test is going to be so difficult to satisfy in the circumstances of these cases if there is something of real concern to the way the evidence is being presented. I know what my colleague says about the two different tests, but when you get them before a court I am not sure that they will look that different.

ACTING CHAIR—I thank officers very much for their attendance today. We have kept you longer than we initially intended, but your evidence has been very valuable and we thank you for that.

Committee adjourned at 12.24 pm