Human Rights and
Equal Opportunity Commission ***Legal Section***

Chairperson
Senate Legal and Constitutional Committee
Parliament House
CANBERRA ACT 2600

By email: Sophie.Power@aph.gov.au

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Dear Chair

Inquiry into the Law and Justice Legislation Amendment (Video Evidence and other measures) Bill 2005

Thank you for providing the proof Hansard of the Committee's hearing of 21 October 2005.

At the hearing, the Commission took the following question on notice (see, proof Hansard, p 17):

> **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.
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> **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.
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> **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.

The Commission sets out its response to that question in this letter.

It also wishes to respond to the Attorney-General Department's evidence about the use of different tests in the proposed s 15YV of the Bill.

1. Proposed amendments to the observer provisions

Ensuring that evidence tainted by torture is not be able to be adduced or admitted into evidence is of such fundamental importance that the Commission considers that s 15YW of the Bill should be re-drafted to give the court a broad and flexible power allowing the court to:

- require an observer's report at any time, including prior to the adducing of video link evidence or after such evidence has been adduced;

- specify the matters on which it requires the observer to report, those matters not being limited to what the person observed in relation to the giving of evidence by the witness, but including matters such as the conditions of detention; and

- make such use of the report as the court considers appropriate, including in relation to whether to make an order allowing video evidence to be adduced under proposed s 15YV or determining whether to admit that evidence or the weight to be given to such evidence if admitted.

Further, as the Commission observed in its submission, it would be desirable if the defence were able to require that the discretion be exercised in certain circumstances. That might be achieved by providing that the Court must require the use of an observer as a condition of adducing evidence where, for example, the country in which evidence is to be taken is known to be a country which allows torture.

No issue of extra-territorial jurisdiction arises in expanding the observer provisions in the manner suggested above.[1] The requirement for an observer is simply a condition of adducing the particular evidence. If it is not met, the court does not permit the evidence to be adduced. That is a purely domestic consequence and does not involve any attempt to compel a foreign government to do something. Of course, the Australian government will be in a position to seek to facilitate such things as an observer's access to a prison through discussions with the foreign government.

2. Response to Attorney-General's Department evidence in relation to the use of different tests in s 15YV of the Bill

The Commission notes that in its evidence to the Committee at the hearing, the Attorney-General's Department conceded that the tests proposed in relation to adducing evidence impose a differential standard on the prosecution and defence and that the test imposed on the prosecution is "lower" than that for the defence (see proof Hansard, p 22). The Attorney-General's Department outlined the policy behind this approach as being to facilitate the use of video evidence and create a level of certainty when the prosecution seeks to adduce evidence by video link (see proof Hansard, pp 22-23). The Attorney-General's Department says that different tests reflect the more onerous duties of disclosure that are imposed on the prosecution as a matter of general law which are not imposed upon the defence (see proof Hansard, pp 20, 26). The Attorney-General's Department says that in these circumstances it would not make

[1] Compare comments made by the Commonwealth DPP at proof transcript p25, first paragraph.

sense to impose the same test on both the prosecution and defence (see proof Hansard, pp 20, 26-27).

It is an established common law principle that the prosecution has a duty to disclose materials which may be relevant to the defendant case and, if the prosecution fails to discharge this duty, a miscarriage of justice may arise.[2] The higher duties of disclosure imposed on the prosecution reflect the privileged position of the State in relation to access to evidential material as compared with the defence.[3] As such the more onerous disclosure duties imposed on the prosecution are designed to create equality of arms between the parties and ensure a defendant has a fair trial.[4]

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[2]In *Grey v R* (2001) 184 ALR 593 the High Court held that the prosecution's failure to disclose a letter of comfort was a miscarriage of justice because it deprived the appellant of knowledge of a relationship between the investigating police and a crown witness. Gleeson CJ, Gummow and Callinan JJ stated [at 26-27] that the respondent "was bound to facilitate fair process by providing to the appellant all materials to which he was entitled to have access" and that the prosecution's failure to disclose the letter deprived the appellant of a fair chance of acquittal.
The principle that the prosecution's duty of disclosure of any material that would assist the defendant has been recognised as "an important ingredient of fair trial": *Steven John Carter v Hayes* (1994) SASR 451, 456 (King CJ, Bollen and Mullighan JJ agreeing); *Clarkson v DPP* [1990] VR 745, 755 (Murphy J); *R v Ratten* (1994) VR 201, 214 (Smith, Pape and Adam JJ). In *R v Keane* [1994] 2 All ER 478 the court held that, subject to the question of public interest, the prosecution must disclose all material documents, an approach which was approved in *R v Brown* [1997] 3 All ER 769 , with Lord Hope commenting [at 775] that an "issue in a case" must be given a broad interpretation. In *R v Reardon* (No. 2) 60 NSWLR 454 at [54] Hodgson JA stated that the principles stated in *R v Keane* and *R v Brown* should be taken to apply in New South Wales. Hodgson JA also cited with approval the comments of Sophinka J in *Stinchcombe v The Queen* (1991) 68 CCC (3d) I at 8 that disclosure by the Crown "may rob the cross-examiner of a substantial advantage but fairness to the witness may require that a trap not be laid by allowing the witness to testify without the benefit of seeing contradictory writings which the prosecutor holds close to the vest. The Principle has been accepted that the search for truth is advanced rather than retarded by disclosure of all relevant materials."

[3] In *R v McIlkenny* [1992] 2 All ER 417 Lloyd, Mustil and Farquharson LJJ observed [at 426] that while a disadvantage of the adversarial system may be that the parties are not evenly matched in resources, the "inequality of resources is ameliorated by the obligation on the part of the prosecution to make available all material which may prove helpful to the defence". See also Martin Hinton, "Unused Material and the Prosecutor's Duty of Disclosure" (2001) 25(3) *Criminal Law Journal* 121, 121-122.

[4] See FN 1, above. It is noted that article 6 3(d) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* and Article 14(3)(e) of the *International Covenant of Civil and Political Rights* both seek to guarantee that everyone charged with a criminal offence will have to the right to: "…examine , or have examined, witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against. In *Rowe and Davis v United Kingdom* **[**2000] ECHR 91 the European Court of Human Rights stated [at 60]: "It is a fundamental aspect of the right to a fair trial that criminal proceedings, including elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and the defence. The right to an adversarial trial means, in a criminal case, that both the prosecution and the defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party". See also *Jasper v The United Kingdom* [2000] ECHR 90 where the ECHR observed [at 51] that "it is a fundamental aspect of the right to a fair trial that criminal proceedings, including elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence . The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on observations filed and evidence adduced by the other party. In addition article 6(1) requires, as indeed does English law… that the prosecution authorities should disclose to the defence all material evidence in their possession or against the accused". The ECHR also noted [at 52] that the entitlement to disclose relevant material is not an absolute right and in criminal proceedings there may be competing interests which must be weighed against the rights of the accused.

As such, the effect of the argument put by the Commonwealth Attorney-General's Department can be put thus: the defence should have a more onerous test applied to it by reason of the fact that it has the benefit of a duty specifically designed to ensure a fair hearing. With respect, it is a surprising suggestion that the defence should be effectively 'penalised' by reason of a feature which is recognised, in international and domestic law, as an important component of a fair hearing. That is particularly so when the 'penalty' involves the application of a more onerous test for resisting the adducing of video link evidence, thus violating the principle of equality of arms which is another key feature of a fair hearing. The right to a fair hearing should be respected in all its component elements.

Please contact us if you require any further information and thank you again for allowing the Commission to participate in the inquiry.

Yours sincerely

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