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

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Law and Bills Digest Section

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

Date Introduced: 14 September 2005

House: Representatives

Portfolio: Attorney-General

Commencement: The day after the Bill receives Royal Assent.

Purpose

This Bill amends the *Crimes Act 1914* (Cth) ('the Crimes Act') to create new video link evidence provisions that apply to proceedings for terrorism and other related offences and proceeds of crime proceedings relating to those offences. The Bill would allow evidence from overseas witnesses that are unable to travel to Australia to be put before the court using video link technology. An Australian observer would be present as a observer. These provisions put the onus on the defendant to show the evidence should not be allowed because it would have a substantial adverse effect on his or her right to a fair hearing. However, the prosecution only needs to satisfy the court of the broader test that allowing the evidence is in the interests of justice. If the court refuses to allow video evidence, the decision can be appealed.

The Bill amends the *Foreign Evidence Act 1994* to reflect in corresponding terms the admissibility of foreign evidence, such as video tapes and transcripts for terrorism offences, where video-linking itself is not possible, again changing the onus on the defendant to prove a substantive adverse effect on their right to a fair hearing.

The Bill also amends the Crimes Act in the following manner:

- to confer on Federal Court judges and Federal Magistrates the non-judicial functions and powers
- to facilitate the sharing of DNA profiles between Australian law enforcement agencies over a national DNA database system, and
- to expand the definition of 'tape recording' to enable new technologies, such as digital audio recording technology, to be used by federal law enforcement agencies to record interviews.

The Bill amends the *Surveillance Devices Act 2004* so that, when a surveillance device has been installed under an authorisation, a warrant can be obtained to allow that surveillance device to be retrieved.

Amendments are made to the *Financial Transaction Reports Act 1988* ('FTRA') to rectify an oversight in the *Proceeds of Crime (Consequential Amendments and Transitional Provisions) Act 2002*.

Finally, the *Proceeds of Crime Act 2002* ('POCA 2002') is amended to ensure that third parties, such as the Administrative Appeals Tribunal, which carry out examinations for the Commonwealth can be paid out of the confiscated assets account, and confirms the validity of examinations made by members of the Administrative Appeals Tribunal under regulation.

On 4 October 2005, the Senate referred the above Bill to the Senate Legal and Constitutional Legislation Committee for inquiry and report by 1 November 2005**.**

Background

Basis of policy commitment

When introducing the Bill, the Hon Philip Ruddock MP, (Attorney General) stated that:

> It is becoming clear that, to successfully prosecute a terrorist, it will often be necessary to rely on evidence from witnesses who are living overseas. In some cases a witness may be unable to travel to Australia to give evidence. For example, the witness may be incarcerated overseas.
>
> …The new video link evidence provisions strike a balance between facilitating the admission of video link evidence while ensuring that fundamental safeguards are maintained.[1]

Video evidence in criminal trials

The presumption in criminal trials is the defendant is innocent until proven guilty. A corollary of this principle is that the defendant in a criminal trial is entitled to confront witnesses giving evidence against him of her. The logic is that the prosecution may present witnesses who may have reason to fabricate or exaggerate evidence against the accused and they need to be subjected to cross examination from defence counsel in person to elicit the whole truth. The High Court has stated that 'confrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial'.[2]

An exception has been created to this rule in many Australian jurisdictions where the witness has a particular vulnerability which may mean that facing the defendant would inhibit their giving of evidence, for example, children in sexual assault trials, rape victims, or victims in war crimes trials. An example of an exception based on the protection of a

vulnerable witness is the *Crimes (Child Sex Tourism) Amendment Act 1994* (Cth). The legislation permits the use of video link evidence if the witness is outside of Australia and the attendance of the witness would cause unreasonable expense, inconvenience, distress or harm to the witness, or cause the witness to become so intimidated or distressed that their reliability as a witness would be significantly reduced (section 50EA Crimes Act).

As well as section 50E, video link evidence can currently be made available from overseas at the Federal level under subsection 12(3) of the *Mutual Assistance in Criminal Matters Act 1987* (Cth) and under Part 3 of the *Foreign Evidence Act 1994* (Cth).[3]

Australian State jurisdictions generally provide for the accused to give video link evidence in order to reduce movement of the prisoner to court, or for a witness to give video evidence at the court's discretion if it would be in the 'interests of justice'. The various Evidence Acts provide for this, as well as the legislation setting up each court and the orders or practice directions made under them.[4]

Other common law countries have similar provisions.[5] Parts 4 and 5 of the *Evidence and Procedure (New Zealand) Act 1994* (Cth) allow Australian and New Zealand courts to take video evidence from either country at their discretion.

Video evidence in the Lodhi trial

Terrorism trials pose specific problems for both the defence and the prosecution, and the court as a whole, which have led Governments to legislate changes to ordinary criminal procedures. As a recent report on the United States ('US') experience of terror trials notes:

> The chief objection to prosecuting accused terrorists in federal court has been that the defendant's rights in that forum – to confront the evidence against him, to obtain evidence in his favour, and to be tried in a public proceeding – jeopardize secret information vital to counterterrorism efforts. The chief objection to the new military commissions, in turn, has been that secret and un-rebutted evidence will play a major part in the process, unfairly depriving the defendant of the means to defend himself and opening the door to error and executive abuse.
>
> Both sides raise legitimate concerns. Protecting classified information in a terrorism prosecution is a serious challenge. Prosecution can hinge on evidence gathered through sensitive intelligence mechanisms, such as classified informants, signal intelligence, and delicate cooperation with the military and intelligence services of other countries. Fifteen U.S. intelligence agencies in the civilian and military establishments, besides the FBI and state and local police, may be involved in building a criminal case. Such agencies have good cause for keeping operations and intelligence-gathering strategies secret. Complicating matters further, the sheer scale of possible harm from a terrorist act means that waiting for such acts to be completed,

> or even to approach completion, is not an option. Prosecutors therefore must work with less evidence than in a run-of-the-mill criminal case.[6]

These tensions, and the first use of video evidence in a terrorism trial, have already arisen in the Australian case of Mr Fadheem Lodhi. Video evidence was tendered by the Commonwealth Director of Public Prosecutions ('DPP') in the committal hearings which were held between December 2004 and February 2005. Mr Lodhi has been arraigned in the NSW Supreme Court. His trial will take place in February 2006. A summary of the video-link evidence tendered in the committal hearings is provided to give context to the Bill.[7] As some of the key provisions of the Bill have retrospective operation, they may be in effect for this trial.

Mr Lodhi, a 34-year-old architect from Punchbowl, faces nine charges after allegedly plotting to bomb the National Electricity Group and several Sydney defence sites. He was arrested in 2004 and charged with;

- two counts of making and collecting documents connected with preparation for a terrorist act (section 101.5 of the *Criminal Code Act 1995* (Cth)) – maximum penalty of 15 years
- two counts of preparing for a terrorist act (section 101.6) — maximum penalty life imprisonment, and
- five counts of making false statements under questioning by the Australian Security Intelligence Organisation ('ASIO') (section 34G of the *Australian Security Intelligence Organisation Act 1979* (Cth)) — maximum penalty 5 years imprisonment.

The charges relate to Mr Lodhi's alleged involvement with Lashkar-e-Toiba ('LET') activities in both Pakistan and in Sydney. The charges resulted from ASIO and Australian Federal Police ('AFP') investigations into a French citizen, Willy Brigitte.[8]

In this case, the Commonwealth tendered the evidence of four overseas witnesses who all gave evidence at the committal hearing over defence objection on video link in late 2004 and early 2005.

One witness was being held in Singapore without charge under that country's National Security Legislation. The other three witnesses are serving sentences in the United States and had reportedly reached plea agreements with the US Government to give evidence in various trials in the US, Australia and the UK.[9]

The Singaporean witness Arif Naharudin purported to be able to identify Faheem Lodhi as a participant in LET training camps in Pakistan. Due to the operation of the *National Security Information (Criminal And Civil Proceedings) Act 2004* ('National Security Information Act'), defence counsel were not allowed to see certain parts of his evidence on national security grounds, and the cross-examination was held in secret.[10]

The defence argued in court that Naharudin's testimony may be suspect:

> PHILLIP BOULTEN: He's being held without charge. We do not know what pressures have been put on him. We want to know. If we're going to be restricted from asking questions about it, it's getting to the point in this whole process where there's barely any justice at all, let alone Australian justice! [11]

It was reported that his evidence raised self-incrimination issues as Naharudin said he had been granted immunity from prosecution in Australia, but not in the US or Singapore. Magistrate Michael Price advised Naharudin not to say anything that could show him to be guilty in other countries.[12] The prosecution later withdrew this witness.[13]

Reports of several other issues emerged during the cross-examination of US witnesses. Yong Ki Kwon admitted lying when questioned about his movements by the FBI in March 2003, and having done a deal with the FBI to lessen his sentence in exchange for information.[14] Ibrahim Al-Hamdi admitted that US authorities no longer considered him a credible witness after being impeached in a US trial.[15]

Phillip Boulten SC, in a recent article in *Australian Prospect,* has made the following claim that the evidence of the fourth Commonwealth witness may have been tainted by torture:

> A second American emerged badly from his cross-examination a the committal hearing in February 2005 where it was revealed that he had been arrested by Saudi Arabian police in Riyad, held without warrant and without charge for approximately 4 weeks in solitary confinement in a cell with the lights on 24-hours a day, interrogated regularly throughout the night by Saudi police then handed over the FBI who, after stripping him naked and photographing his genitals dressed him in prison greens, placed him in irons and placed dark goggles over his face then transported him from Riyad to Washington. He told Central Local Court in Sydney that it was in this flight that he first confessed his involvement in LET activities.[16]

There were also some technical issues. In December 2004, the Commonwealth DPP requested and was granted an adjournment of six months, saying the Australian translator spoke a different dialect to Naharudin, and difficulties with the video link were causing confusion.[17]

Main Provisions

Schedule 1—Amendments to the *Crimes Act 1914*

Federal Judges and Magistrates fulfilling non-judicial functions

Existing section 4AAA of the Crimes Act deals with the rules that apply if, under a law of the Commonwealth relating to criminal matters, a function or power that is neither judicial nor incidental to a judicial function or power, is conferred on specified judicial officers. The rules currently apply to State or Territory judges and magistrates.

Section 4AAA was inserted by the *Crimes Amendment (Forensic Procedures) Act 2000* (Cth) and affect Part 1A of the Principal Act. The Government at the time said the amendment flowed from the constitutional doctrine which requires federal judicial power to be separated from legislative and executive power under Chapter III of the Constitution. Under this doctrine, holders of Commonwealth judicial power can only exercise non-judicial power in limited circumstances. For example, non-judicial power which is incidental to the exercise of judicial power may be conferred and exercised. Further, non-judicial power may be exercised by the holder of judicial office if it is conferred in a personal capacity and with the consent of the federal judge. Functions cannot be conferred which are incompatible with the exercise of federal judicial power. The original section 4AAA was framed to reflect the High Court's language in their decision of *Grollo v Palmer* (1995) 184 CLR 348 which found that Federal Court judges could validly issue telecommunications interception warrants.

Grollo v Palmer and the 'Incompatibility' principle

In the case of *Grollo v. Palmer,* the High Court discussed how incompatibility issues might prevent a judge from exercising non-judicial functions even when that function was conferred in a personal capacity (*persona designata)* and by consent. The incompatibility condition stipulates that:

> … no function can be conferred that is incompatible either with the judge's performance of his or her judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power …[18]

Incompatibility can arise in various ways. For instance, if the performance of the non-judicial function prejudices a judge's capacity to perform their judicial duties with integrity or if it undermines public confidence in that capacity or in the integrity of the judiciary as a whole, then the action will be unconstitutional.[19]

As Fiona Wheeler has pointed out, in *Grollo v. Palmer*:

> Three features of service as an 'eligible Judge' suggested that it was liable to undermine public confidence in the Federal Court. First, the circumstances associated with the issue of a warrant could subsequently generate a 'matter' coming before the Federal Court for resolution. Thus, an individual judge might need to disqualify himself or herself, a situation complicated by the duty of confidentiality to which persons issuing interception warrants were subject. Second, the issue of a warrant was an intrusive aspect of the criminal investigative process. Third, the manner in which the power was exercised was contrary to the traditional judicial process, being discharged ex parte, in secret, and without the giving of reasons.[20]

As Wheeler states, what saved the provisions under challenge in that case were the views of Brennan CJ, Deane, Dawson & Toohey JJ that the authorisation of interception warrants involved the judges in a '… valuable social function the objective of which was consistent with the traditional role of the courts.' The joint majority said:

> … it is precisely because of the intrusive and clandestine nature of interception warrants and the necessity to use them in today's continuing battle against serious crime that some impartial authority, accustomed to the dispassionate assessment of evidence and sensitive to the common law's protection of privacy and property … be authorised to control the official interception of communications.[21]

In the later case of *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs*, the court said the use of a federal judge as a reporter under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* offended the incompatibility principle because the reporter was not independent of the Executive Government.[22]

Items 1 to 3 add Judges of the Federal Court of Australia and Federal Magistrates to the categories of judicial officers.

Item 4 notes that the rule can be expressly overridden in legislation with a contrary intention.

It is not clear why the Commonwealth is seeking to widen the non-judicial functions categories to the Federal level at this juncture. The example given in the *Explanatory Memorandum* is the power of Judges of the Federal Court to issue an arrest warrant under section 31 of the *Australian Crime Commission Act 2002*.[23]

The proposed amendments may not withstand Constitutional challenge depending on exactly what the judicial officer is required to do. For example, doubt was cast over whether the principle in *Grollo v Palmer* would extend to Federal Magistrates acting as 'prescribing authorities' during the Parliamentary Joint Committee on ASIO, ASIS and DSD (PJCAAD) Review of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002.[24] A prescribed authority is present while a person is questioned under a Division III warrant.

Chapter Two of the Report states at Paragraph 2.20:

> Dr Greg Carne, however, commented that the 'obligations of the federal magistrate's PA [a Federal Magistrate acting as a prescribed authority] exceed the principles set down by the High Court in the Grollo v. Palmer case and 'are likely to collapse on the basis of a constitutional challenge.' Similarly, Professor Williams stated:
>
> In the earlier case of Grollo v. Palmer, the High Court decided that telephone tapping was not incompatible, that could be a source of power given to judges. However, I think in this instance, particularly given the criticism that has been levelled at Grollo v. Palmer since it was handed down, there is a strong possibility that this goes much further than that and, indeed, would be seen as distinguishable from that circumstance. A judge in this case would be giving a warrant that would amount to a far higher degree of intrusion into private rights.

This issue may also arise in relation to the proposal agreed at the Council of Australian Governments Special Meeting in September 2005 to allow the Australian Federal Police to

place persons in preventative detention. The Communiqué states at page 9 that the 'issuing authority' would be a Magistrate or Judge who agrees to authorise the issue of warrants in their personal capacity.

Video Link Evidence

Item 5 inserts **new Part 1AE** into the Crimes Act.

Proposed section 15YU sets out the proceedings for terrorism and other related offences to which the video link evidence provisions in new Part 1AE of the Crimes Act will apply. The offences are:

- subsection 34G(5) of the *Australian Security Intelligence Organisation Act 1979* (offence to give false and misleading answers when questioned by ASIO about terrorist matters)
- section 49 of the *Aviation Transport Security Act 2004* (weapons on board an aircraft)
- section 21 of the *Charter of United Nations Act 1945* (giving an asset to a proscribed person or entity)
- Division 72 of the *Criminal Code* (international terrorist activities using explosive or lethal devices)
- Part 5.3 of the *Criminal Code* (terrorism offences)
- Part 5.4 of the *Criminal Code* (harm against Australians)
- sections 24AA and 24AB of the *Crimes Act 1914* (treachery and sabotage offences)
- Division 1 of Part 2 of the *Crimes (Aviation) Act 1991* (Hijacking and other acts of violence on board aircraft)
- section 8 of the *Crimes (Biological Weapons) Act 1976* (Restriction on development etc. of certain biological agents and toxins and biological weapons)
- the *Crimes (Foreign Incursions and Recruitment) Act 1978*
- section 8 of the *Crimes (Hostages) Act 1989*, and
- the *Crimes (Internationally Protected Persons) Act 1976.*

The *Explanatory Memorandum* states that subsection 34G(5) of the *Australian Security Intelligence Organisation Act 1979* has been included because:

> Whilst an offence against this section is not directly related to a terrorism offence as such, evidence from witnesses who are overseas may be required to prove that the person made such false or misleading statements in the context of investigating the terrorism offence. It is important that special questioning powers for investigating terrorist offences can be enforced.[25]

These offences would also include ancillary offences such as attempts, incitement or conspiring to commit one of the offences listed in proposed section 15YU (due to the operation of section 11.6 of the *Criminal Code Act 1995*) and accessories after the fact (under section 6 of the Crimes Act).

Proposed **paragraph 15YU(2)(b)** provides that new Part IAE will also apply to civil proceedings under the *Proceeds of Crime Act 2002* ('POCA') relating to the offences listed in subsection 15YU(1).

The *Explanatory Memorandum* gives the following example of how the provision might work:

> …the Commonwealth Director of Public Prosecutions may seek to take POCA proceedings to restrain or confiscate property (for example, money in a bank account) which has been used or was intended to be used as an instrument of a terrorism offence. Paragraph 15YU(2)(b) also provides that the video link evidence rules in proposed Part 1AE of the Crimes Act 1914 would apply to the POCA proceedings to restrain and confiscate the money in the bank account, whether or not criminal proceedings have been taken in relation to the terrorism offence.

Proposed **subsection 15YU(3)** states that the new rules in Part 1AE will apply prospectively to proceedings initiated before the commencement of Part 1AE. Therefore, these provisions would have a retrospective effect.

Proposed **section 15YV** sets out the circumstances in which the court must direct or allow a witness to give evidence by video link. There are five general requirements both sides must satisfy:

- either the prosecution or defendant must have made an application under section 15YV for a direction or order that a witness give evidence by video link
- the prosecutor and defendant must have given the court reasonable notice of their intention to make the application, so the technical arrangements can be made, and to the other party sufficient opportunity to consider the proposal
- the witness must be available to give evidence by video link
- the facilities required by proposed section 15YY must be available or reasonably capable of being made available, and
- the witness cannot be a defendant in the proceeding.

If these requirements are fulfilled, the court then applies one of two different tests depending on whether the prosecution or the defence has applied for the video-evidence.

Proposed subsection 15YV(1) provides that, where the prosecutor has applied for the direction or order, the court must direct or allow the witness to give evidence by video link unless the court is satisfied that giving the direction or making the order would have **a**

substantial adverse effect on the right of the defendant in the proceeding to receive a fair hearing.

The *Explanatory Memorandum* states that:

> This ensures that, in a terrorism prosecution, where evidence from a witness may be critical to the prosecution's capacity to prove the guilt of the defendant beyond reasonable doubt, the court will only be able to disallow video link evidence where there is a compelling reason to do so. Under State and Territory video link provisions the onus is generally on the party seeking to adduce evidence by video link to convince the court that it should allow the evidence. These new rules essentially put the onus on the other party to provide a compelling reason why the evidence should not be allowed.[26]

The phrase 'substantive adverse effect' is defined in section 7 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* to mean 'an effect that is adverse and not insubstantial, insignificant or trivial'. It has yet to be judicially considered.

The phrase was considered in detail by the Senate Legal and Constitutional Committee in its Report into the Provisions of the National Security Information Legislation Amendment Bill 2005 dated 11 May 2005. The Committee was concerned that when making a suppression order the court is asked to give greatest weight to the issue of whether there would be a risk of prejudice to national security over whether any such order would have a substantial adverse effect on the defendant's right to receive a fair hearing, including in particular on the conduct of his or her defence (National Security Information Act subsection 31(7)).

The phrase is also used in Section 40(1)(c) and (d) of the *Freedom of Information Act 1982*. The Freedom of Information Memorandum No. 98 prepared by the Attorney-General's Department dated 31 December 2003 at paragraph 1.6.1.1 notes:

> In the FOI context, the word *substantial* has variously been interpreted to mean *severe, of some gravity, large or weighty or of considerable amount, real or of substance and not insubstantial or nominal consequences*…. The word *substantial* certainly *requires loss or damage that is more than trivial or minimal* (*Tillmanns Butcheries Pty Ltd v Australasian Meat Employees Union & Ors*).
>
> The *adverse effect* must be sufficiently serious or significant to cause concern to a properly informed reasonable person…The AAT in *Re Dyki and Commissioner of Taxation*, at 129 (D259), notes: (t)he onus of establishing a 'substantial adverse effect' is a heavy one. However, with reference to *Re Barkhordar and Australian Capital Territory Schools Authority* (D172), the AAT in Re Dyki at 130 states: *whilst a 'substantial adverse effect' may be a formidable obstacle for the Commissioner to establish, it is certainly not impossible*.[27]

Proposed subsection 15YV(2) provides that where the defendant applies for the direction or order, the court must direct or allow the witness to give evidence by video link unless

the court is satisfied that **it would be inconsistent with the interests of justice for the evidence to be given by video link**.

The 'interests of justice' test is commonly used by courts to determine procedural issues and involves balancing the interests of both parties and the wider integrity of the court system. [28]

The *Explanatory Memorandum* also emphasises that:

> Where an applicable State or Territory law also allows evidence to be given by video link, it would be open to the prosecution or defendant to instead make a video link application under that State or Territory law, in which case, the rules in proposed Part 1AE would not apply.[29] (See **proposed sections 15YZE and 15YZF**)

Item 5 inserts **new section 15YW** which deals with observers. The court has discretion to make the giving of video evidence conditional on an independent observer being present at the site if it is concerned about issues such as duress. It is not mandatory. Under **subsection (4),** an observer can be an Australian diplomat or consular officer, or any other person. However, the person must be specified by the court in the direction or order under **subsection (1).** The court is limited to who can be specified in the order under the conditions of **subsection (5),** and must be independent, competent, available and appropriate. The court can change the specified person under **subsection (3).** The observer can give the court a report on what they observed in relation to the giving of evidence by the witness (**subsection 7**).

The Attorney-General in his second reading speech stated that:

> This is a safeguard that will ensure that the court is aware of everything that is occurring at the point where the witness is giving the evidence.[30]

It is not clear what safeguards are present if a witness is called under State or Territory laws.

Proposed section 15YX deals with adjournments. Where the court gives a direction or makes an order or refuses to give a direction or make an order under section 15YV, the prosecutor or defendant may apply to the court to adjourn the proceedings, to decide whether to appeal against the direction or order, and if necessary, to appeal the direction or order. The court must grant the adjournment.

The prosecution can also apply to the court for an adjournment to allow time for the prosecution to decide whether to withdraw the proceeding, and if the prosecution decides to do so, make the withdrawal.

The *Explanatory Memorandum* states:

> For example, if the prosecution makes an application to have a witness give evidence by video link and the judge refuses to give a direction or order under section 15YV because the judge is of the view that it would have a substantial adverse effect on the defendant's right to a fair hearing, the adjournment will allow time for the prosecution to decide whether they have sufficient evidence to proceed with the prosecution without the video link evidence.[31]

Proposed section 15YY provides that video link evidence can only be given if the place where the court is sitting and the place where the evidence is to be given are each equipped with video facilities to enable appropriate persons in both places to see and hear each other via the video link.

Proposed section 15YZ provides that if a proceeding involves a jury, and a witness gives evidence by video link and that evidence is admissible, the judge must give the jury a direction to ensure that the jury gives the same weight to the evidence as if the witness had given the evidence in the courtroom.

Proposed subsection 15YZA(1) states that a witness who gives evidence by video link will, in giving that evidence, be governed by the same laws as they would be if they were giving that evidence in court, including laws relating to the rules of evidence, procedure, contempt of court and perjury.

Proposed section 15YZC authorises the court to make orders 'as are just' for the payment of expenses incurred in connection with the giving of evidence by video link.

Proposed section 15YZD allows the prosecutor or defendant to appeal the decision of the court under section 15YV to give a direction or make an order or refuse to give a direction or make an order that a witness give evidence by video link.

Tape recordings

Item 6 repeals the definition of tape recording in subsection 23B(1) of the Crimes Act and replaces it with a new definition to include audio recording, video recording or recording by other electronic means. This mirrors section 23WA of the Crimes Act. **Item 7** provides that the new definition of tape recording in section 23B(1) applies to a recording made after the commencement of this item.

Forensic procedures

Part 1D of the Crimes Act regulates forensic procedures, including the obtaining, use and destruction of DNA samples.

Items 8 to 19 propose amendments to Part 1D to facilitate the sharing of DNA profiles between Australian law enforcement agencies over a national DNA database system. The

Explanatory Memorandum explains in detail the rules regarding the matching of DNA profiles with DNA samples under existing section 23YDAF.

Existing section 23YDAC is a definitions provision. In it, the expression 'DNA database system', is defined as a database (in computerised or other form) containing specified indexes. These indexes are:

- crime scene index-an index of DNA profiles from forensic material found at places, on or in victims, on victims' clothing or belongings, or on persons or things or at places associated with prescribed offences
- missing persons index-an index of DNA profiles from forensic material of missing persons or their volunteer blood relatives
- unknown deceased persons index-an index of DNA profiles from forensic material of deceased persons whose identities are unknown
- serious offenders index-an index of DNA profiles from forensic material taken from
  - serious offenders under Division 6A or a corresponding State or Territory law, or
  - suspects convicted of a prescribed offence
- volunteers (unlimited purposes) index-an index of DNA profiles from forensic material taken from volunteers under Commonwealth law or under a corresponding State/Territory law for any purpose for which the DNA database system can be used. It may include DNA profiles derived from material taken from deceased persons whose identity is known
- volunteers (limited purposes) index-an index of DNA profiles from forensic material taken under Commonwealth law or under a corresponding State/Territory law for a specified purpose under paragraph 23XWR(2)(b)
- suspects index-an index of DNA profiles from forensic material taken under Commonwealth law or a corresponding State/Territory law, and
- statistical index-an information index compiled for statistical purposes from the analysis of forensic material taken under Commonwealth law or under a corresponding State/Territory law.

Section 23YADF contains a table called a ‘matching table’ which shows which samples can be matched with which profiles contained in a database as listed above.

A volunteer is defined in the Crimes Act under subsection 23XWQ(1) as meaning a person;

(a) who volunteers to a constable to undergo a forensic procedure; or

(b) in the case of a child or incapable person—whose parent or guardian volunteers on the child or incapable person's behalf to a constable that the child or incapable person undergo a forensic procedure.

The *Explanatory Memorandum* states that the purpose of the proposed amendments to the Commonwealth matching table in section 23YDAF contained in **items 8 to 16** is to streamline the rules governing the matching of DNA profiles by:

- ensuring that where a volunteer has stipulated a limited purpose for the use of their DNA profile, their profile can be matched with other profiles on the DNA database so long as the match is conducted for that limited purpose and only used for that limited purpose, and
- remove the requirement that inter-jurisdictional matching be confined to a specific investigation.[32]

Items 17 to 19 remove any limitations on inter-jurisdictional matching under existing section 23YUD.

The Bills Digest No. 81 (2000-01) on the *Crimes Amendment (Forensic Procedures) Bill 2000* notes in relation to volunteers:

> A more general concern about the volunteers indexes was expressed by the Australian Privacy Charter Council and the New South Wales Privacy Commissioner. Both took the view that samples taken from volunteers should only be retained for the purposes of the particular investigation. The Bill enables samples in the volunteers (unlimited purposes) index to be retained for as long as the volunteer agrees. The Australian Privacy Charter Council remarked:
>
> 'Whatever the justification for the use of DNA samples for targeted law enforcement investigations, it should not be permitted to build up a permanent database of DNA information about people who are in no way suspected of any wrongdoing.'[33]

The Senate Legal and Constitutional Legislation Committee inquiry may wish to seek briefings from the relevant agencies to examine the full ramifications of these amendments.

Amendments to the *Financial Transaction Reports Act 1988*

Items 20 and 21 amend existing paragraph 16(b)(1) of the *Financial Transaction Reports Act 1988* ('FTRA') to ensure that cash dealers are required to report a transaction to the Director of the Australian Transaction Reports and Analysis Centre (AUSTRAC) where a cash dealer has reasonable grounds to suspect that information the cash dealer has may be of assistance in enforcement of the *Proceeds of Crime Act 2002* ('POCA 2002') or regulations under it. The paragraph already applies in the case of the *Proceeds of Crime Act 1987*.

Amendments to the *Foreign Evidence Act 1994*

Items 22 to 25 propose amendments to the Foreign Evidence Act to allow other types of foreign material such as video tapes and transcripts of examinations to be treated in a similar manner to the new video link evidence rules in Part 1AE of the Crimes Act in terrorism-related trials. These amendments are to 'assist in circumstances where it is not possible for evidence to be given by video link, perhaps because of restrictions under the law of the foreign country'.[34]

Existing subsection 25(1) of the Foreign Evidence Act states that the court may direct that foreign material not be adduced as evidence if it appears to the court's satisfaction that, having regard to the interests of the parties to the proceeding, justice would be better served if the foreign material were not adduced as evidence.

Proposed section 25A provides that if a proceeding is a criminal proceeding for a designated terrorism-related offence or a proceeding under the POCA 2002 in relation to a designated terrorism-related offence and the prosecution seeks to adduce foreign material as evidence in the proceeding, then the 'interests of justice' test in subsection 25(1) does not apply.

Instead, like **proposed subsection 15YV(1)** discussed above, **proposed paragraph 25A(1)(d)** provides that the court may direct that the foreign material not be adduced as evidence if the court is satisfied that adducing the foreign material would have a substantial adverse effect on the right of a defendant in the proceeding to receive a fair hearing.

Proposed subsection 25A(3) stipulates that it is immaterial whether the proceedings for the designated offence or proceedings under the POCA 2002 in relation to the designated offence were instituted before or after the commencement of this section. Therefore, these provisions would have a retrospective effect.

The *Explanatory Memorandum* confirms that section 24 of the Foreign Evidence Act will still apply, 'so that the foreign material will only be admissible if the nature of the material is such that the witness could have given the evidence in person'.[35]

Amendments to the *Proceeds of Crime Act 2002*

Item 27 inserts **new paragraph (ga)** into subsection 297(1)(g) of the POCA 2002. The paragraph enables payments to be made out of suspended funds in the Confiscated Assets Account (CAA) in relation to the conduct of examinations. Under Part 3-1 of the POCA 2002 a court can make an examination order on the application of the Director of Public Prosecutions (DPP) where a restraining order has been made against a person's property. The amendment will empower the DPP to approve a payment to a third party which has carried out the examination.

The effect of **item 28** is to provide that third parties, such as the Administrative Appeals Tribunal, which carry out examinations for the Commonwealth can be paid out of the confiscated assets account, and retrospectively validates examinations made by members of the Administrative Appeals Tribunal under regulation.

Amendments to the *Surveillance Devices Act 2004*

Item 29 amends existing subsection 22(1) of the *Surveillance Devices Act 2004* ('SDA') so that a warrant can be obtained to retrieve a surveillance device installed under an authorisation under existing section 39 of the SDA.

The *Explanatory Memorandum* gives the following example of the perceived gap in the current regime this amendment is designed to rectify:

> A problem may arise where, for example, a law enforcement officer has placed a tracking device on a vehicle under an authorisation (under section 39), but the vehicle becomes inaccessible because it is moved onto private property. In these circumstances, the law enforcement officer cannot get a retrieval warrant under section 22(1) because the subsection does not currently provide for this. The law enforcement officer also cannot get an authorisation to remove the tracking device because section 39(8) requires that there is permission to enter onto the premises or interference with the interior of the vehicle.[36]

Concluding Comments

There are three interesting questions about the use of video evidence in terrorism trials related to this Bill. The first question is whether the prosecution might gain an unfair advantage in terrorism trials due to the combination of the provisions of this Bill and other legislative measures such as the *National Security Information (Criminal And Civil Proceedings) Act 2004* ('National Security Information Act').

Ian Harrison QC, President of the NSW Bar Association has been reported as stating in relation to the differential tests for the allowance of video evidence in this Bill:

> I have a very significant suspicion that the dissimilarity was intended to aid the prosecution and disadvantage the defence. It seems a higher bar to get over for the defendant.[37]

The combination of video evidence and suppression orders due to national security concerns under the National Security Information Act may need to be further examined, as was exemplified by the Lodhi committal hearings. There have already been criticisms made by the legal profession of the National Security Information Act, which gives power to the Attorney-General to directly intervene in the conduct of a criminal trial if there are national security concerns.

Brian Walters SC, the head of Liberty Victoria told ABC Radio PM:

> Under this Act, statements of witnesses can be tendered without cross-examination, summaries of evidence can be given, such that a prosecution case could be completely reshaped.[38]

The second question relates to the integrity of the evidence gained by video-link. Video-link evidence has traditionally been allowed as an exception to the defendant's right to confront his or her accusers where the witness is vulnerable, such as child sexual assault victims. The witnesses envisaged by this Bill may be prisoners about to be or already incarcerated for terrorism offences with the possible incentives of a reduction in their sentence and immunity from further suit.

As noted above, **proposed section 15YZ** provides that if a proceeding involves a jury, and a witness gives evidence by video link and that evidence is admissible, the judge must give the jury a direction to ensure that the jury gives the same weight to the evidence as if the witness had given the evidence in the courtroom. Presumably this means the judge can give any directions which would be normal in a criminal trial regarding the credibility of evidence tendered by informants.

The third question relates to the admissibility of evidence heard under this scheme if there are suspicions that it has been extracted or influenced by torture of the witness by foreign agents. The presence of an Australian observer at the actual time of the giving of evidence may not suffice to reassure a court that there is not a previous or continuing threat of torture or inhuman treatment that creates the situation of duress for the witness. This was an issue raised by the defence counsel Phillip Boulten SC in relation to the committal hearing of Mr Faheem Lodhi, as noted above.[39] The admissibility of evidence gained from witnesses who may have been tortured in foreign jurisdictions has not been decided upon in Australia, but it is the subject of current debate and adjudication by the courts in the US and the UK.[40] Even the limited legislative safeguard of an observer is not mandatory, and does not arise at all if the prosecution elects to take video-evidence under a State or Territory law.

As noted, the 'tension between secrecy and accountability is unavoidable in the context of terrorism trials'.[41] In this context, Parliament may wish to seek further clarification over the following issues:

- concerns by the legal commentators that the prosecution may be advantaged over the defence in adducing video evidence
- how Australian courts will deal with the integrity of video evidence allowed by this Bill if given by informants, and
- how Australian courts will deal with the admissibility of video evidence allowed by this Bill if there is suspicion it has been tainted by the torture or inhumane treatment of the witness by foreign agents.

Endnotes

1 The Hon Philip Ruddock MP (Attorney General), House of Representatives, *Debates*, 14 September 2005, p. 8.

2 *Lee v The Queen* (1998) 195 CLR 594 at 602. The position in Australian law reflects that in international law. Article 14(3)(e) of the *International Covenant on Civil and Political Rights* guarantee to accused persons the entitlement to examine, or have examined, the witnesses who testify against them.

3 *Regina v Marchando* [2000] NSWCCA 8 (11 February 2000).

4 For a NSW example, see further *Park v Citibank Savings Ltd* (1993) 31 NSWLR 219. Relevant rules are Pt 36 r 2A of the Supreme Court Rules 1970 (NSW) and O 40 r 1A of the Rules of the Supreme Court (Qld) - the latter rule also relates to submissions. In Western Australia, the Video Technology in Courts Steering Committee concluded that videoconferencing could be suitable for use in almost any type of case provided adequate safeguards are in place to protect the rights of all parties. Accordingly the *Acts Amendment (Video and Audio Links) Act* gives the court the power to make an order for a video appearance or sentence as long as it is in the interests of justice. See s.121(2) *Evidence Act 1906* (WA) and s.14A(2) *Sentencing Act 1995* (WA).

5 For example, subsection 46(2) of the *Canada Evidence Act* notes: For greater certainty, testimony for the purposes of subsection (1) [by an overseas witness] may be given by means of technology that permits the virtual presence of the party or witness before the court or tribunal outside Canada or that permits that court or tribunal, and the parties, to hear and examine the party or witness.

6 Serrin Turner & Stephen J. Schulhofer, *The Secrecy Problem In Terrorism Trials'*, Liberty & National Security Project, Brennan Center For Justice, NYU School Of Law, New York, 2005.

7 The transcript of the committal hearing is not available, so the summary relies on media reports and an article by the Defense Counsel, Phillip Boulten SC, 'Australia's Terror Laws: The Second Wave', *Australian Prospect*, (Special Article), October 2005.

8 See further Phillip Boulten SC, 'Australia's Terror Laws: The Second Wave', *Australian Prospect*, (Special Article), October 2005.

9 Boulten, op. cit., p. 7.

10 Marian Wilkinson and Les Kennedy, 'Secrecy to surround trial for terrorism', *Sydney Morning Herald*, 11 June 2005. Natasha Wallace, 'Court battle over secret evidence', *Sydney Morning Herald*, 18 December 2004.

11 Peta Donald, 'Police notes withheld from Lodhi defence lawyers', ABC Radio *PM*, 17 December 2004.

12 Amy Coopes, 'Sydney terror trial on hold', *AAP*, 22 December 2004

13 Marian Wilkinson and Les Kennedy, 'Secrecy to surround trial for terrorism', *Sydney Morning Herald*, 11 June 2005.

14 AAP, 'Terror suspect admits training with Brigitte', *The Age*, 4 May 2005.

15 Peta Donald, 'US deems its witness in Australian terrorism case unreliable', ABC Radio *PM*, 16 December 2004. Natasha Wallace, 'Lodhi witness admits his jihad exploits largely involved drinking tea' *Sydney Morning Herald*, 17 December 2004.

16 Phillip Boulten SC, 'Australia's Terror Laws: The Second Wave', *Australian Prospect*, (Special Article), October 2005, pp. 7-8.

17 Amy Coopes,'Sydney terror trial on hold', *AAP*, 22 December 2004.

18 *Grollo v. Palmer* (1995) 184 CLR 348 at 364–5.

19 Fiona Wheeler, 'Federal judges as holders of non-judicial office', in Fiona Wheeler & Brian Opeskin (eds) *The Australian Federal Judicial System*, 2000.

20 ibid, p. 461.

21 *Grollo v. Palmer* (1995) 184 CLR 348 at 367.

22 (1996) 189 CLR 1.

23 *Explanatory Memorandum*, p. 2.

24 Section 34B of the ASIO Act was subsequently amended to omit Federal Magistrates.

25 *Explanatory Memorandum*, p. 4.

26 *Explanatory Memorandum*, p. 6.

27 Accessed 10 October 2005.

28 This phrase is judicially considered by the *Q v Seymour* (1993) A Crim R 514 in the context of 'in camera' proceedings in the Federal Court.

29 *Explanatory Memorandum*, p. 5.

30 The Hon Philip Ruddock MP (Attorney General), House of Representatives, *Debates*, 14 September 2005, p. 8.

31 *Explanatory Memorandum*, p. 7.

32 ibid, pp. 9–11.

33 Jennifer Norberry, 'Crimes Amendment (Forensic Procedures) Bill 2000', *Bills Digest No. 81 (2000-01),* Parliamentary Library, Canberra, 30 January 2001.

34 *Explanatory Memorandum*, p. 12.

35 ibid.

36 ibid, p. 14.

37 Joseph Kerr and Cynthia Banham, 'New rules raise bar against defendant', *Sydney Morning Herald,* p. 2.

38 ABC Radio, 'National security obstacle to Melbourne terror trial', *PM*, 27 September 2005. See also Elizabeth Colman, 'Ruddock changing the rules' says terror lawyer', *The Australian*, 11 February 2005, p. 6.

39 For example, in the US prosecution of Zacarias Moussaoui, the government has claimed that certain detainees cannot be made available to testify as witnesses in a trial proceeding (even by remote video) for national security reasons, for fear of interrupting ongoing interrogation efforts. Turner and Schulhofer (op cit) note that 'the difficulty with using these detainees as witnesses, however, may have less to do with national security concerns than other reasons, not the least of which is the possibility that the information they provided regarding Padilla was extracted through coercive methods'.

40 In the UK, a special nine-judge panel of the House of Lords Judicial Committee convened on 4 October 2005 to consider whether evidence from third countries obtained under torture can be used in indefinite detention cases. The point arises from a separate August 2004 majority ruling by the Court of Appeal that such evidence can be used provided the UK neither 'procured nor connived at' the torture (*A, B, C and Another v the Secretary of State for the Home Department* [2004] EWCA Civ 1123). .

On 6 October 2005, the US Senate added an amendment to a Pentagon money bill to place clear limits on interrogation techniques on suspected terrorists and other detainees in US military prisons. See also Stephen Grey, 'US accused of 'torture flights'', *The Sunday Times*, 14 November 2004.

41 'The government inevitably has secrecy concerns related to intelligence activities – both its own intelligence activities and those of other countries. Some secrets cannot be disclosed, or at least not without a cost… Yet the same assertions of government secrecy can cloak malfeasance, lies, and even possible torture... By stripping the defendant of the ability to probe weaknesses in the government's evidence, secrecy threatens to turn a criminal trial into an empty ritual drained of the adversarial features that are its very reason for being…' Serrin Turner & Stephen J. Schulhofer, 'The Secrecy Problem In Terrorism Trials', *Liberty & National Security Project*, Brennan Center For Justice, NYU School Of Law, New York, 2005.

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