

## **Australian Lawyers for Human Rights**

### **Submission to the Senate Legal and Constitutional Committee**

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

#### **Introduction**

1. The Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill 2005 introduces a number of amendments to the *Crimes Act 1914*, the *Foreign Evidence Act 1994* and associated legislation to provide new specific measures which make it easier for the prosecution to adduce evidence by video link. The new measures apply to proceedings with respect to alleged terrorism offences but also associated offences and civil cases under the *Proceeds of Crime Act 2002*.
2. Australian Lawyers for Human Rights (ALHR) wishes to comment upon the following aspects of the Bill because of the effect of those provisions upon the protection of human rights in Australian courts:
  - (a) The prosecution's privileged position with respect to the calling of video link evidence;
  - (b) The retrospective operation of the new provisions; and
  - (c) The use of observers.
3. ALHR is concerned to protect the rights of a defendant to a fair trial. The differential position in which prosecutor and defendant are put by some of the provisions in the Bill compromises the defendant's right to a fair trial. The retrospective operation of the Bill may operate to compromise the fairness of proceedings which are underway and the use of observers could be enhanced by ensuring independence and giving them adequate powers to do their work.

## Video Link Evidence

4. The Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill 2005 sets up a privileged position for the prosecution with respect to the adducing of evidence by video link. Proposed s.15YV(1) of the Crimes Act 1914 *requires* a court to direct or allow a witness to be called and give evidence by video link if the requirements in that sub-section are met such as notice to the court, the witness is not a defendant, is available and the facilities are also available. If the defence opposes the adducing of such evidence then the *defence* 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.”
5. By contrast the proposed s.15YV(2) requires the court to direct or allow a witness to be called by the defence unless the prosecution satisfies the court that “it would be inconsistent with the interests of justice for the evidence to be given by video link.”
6. ALHR is not opposed to the use of video link evidence and notes that there are relevant provisions in the rules of court of the States and Territories for the use of such evidence: see, for example, Part 31 rule 3 *Uniform Civil Procedure Rules 2005*, Part 36 r 2A of the *NSW Supreme Court Rules*. Importantly those rules retain a discretion in the court to make such decisions. Proposed s.15YV removes that discretion except in prescribed circumstances and is therefore a constraint upon the judicial officer concerned. The constraint is not specifically justified by the Commonwealth and is accordingly an unwarranted intrusion by the executive upon the judicial independence of the court.
7. In NSW if the prosecution or defence make an application for the use of evidence by video link and it is opposed by the other side then the applicant must establish that it is “in the interests of the administration of justice” for the court to allow the evidence to be adduced in that manner”: s.5B(3) *Evidence (Audio and Audio Visual Links) Act 1998* (NSW); see also s. 50EA of the

*Crimes Act 1914*. Accordingly, s.15YV(2) is similar to s.5B(3) but the onus is reversed.<sup>1</sup>

8. There is a clear disparity between the test the defence must establish to oppose an application by the prosecution to adduce evidence by video link and that which applies to the prosecution seeking to oppose an application by the defence. The prosecution is undoubtedly in a privileged position. This offends the principle of fairness in criminal trials which is a well understood tenet of the Australian common law and is also protected by international human rights standards.
9. Article 14 of the International Covenant on Civil and Political Rights sets out the established right to a fair trial:

*“Article 14*

1. **All persons shall be equal before the courts and tribunals.** In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, **everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. ...**  
...
3. In the determination of any criminal charge against him, **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;**...”

(The full text of the article is attached to these submissions.)

10. The privileged position in which the prosecution is put by virtue of s.15YV(1) clearly offends Article 14(3)(e) of the *International Covenant on Civil and Political Rights*. No specific justification is made by the government for overriding this human right other than it will allow “important evidence from

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<sup>1</sup> It is clear from the Explanatory Memorandum that the onus is placed upon the person opposing the application for video link evidence to satisfy the tests set out at the end of s.15YV(1) and (2): p 6.

overseas witnesses [to] be put before the court using video link technology”.<sup>2</sup>  
This facility already exists and is referred to above.

11. The unfairness which exists in the legislation is not cured by the test in s.15YV(1), it is entrenched. By using two different tests for video link evidence applications the legislation impliedly requires a court to allow in evidence which would *not* pass the “interests of justice” test but would pass the “substantial adverse effect” test. That is, there is a category of evidence which it would not be in the interests of justice to allow but with regard to which the defendant cannot show a substantial adverse effect on his or her right to receive a fair trial.
12. The “substantial adverse effect” test is clearly a high one for a defendant. First, the Court must be satisfied that the evidence *would* have such an effect not *may* have such an effect. To meet that test the defence will have to establish with great certainty the adverse nature of the evidence before the evidence has been given. Quite prematurely and unfairly a defendant may have to use evidence from his or her own case in order to challenge the application.
13. The types of matters that govern a court’s exercise of the discretion as to whether to allow video link evidence in NSW under the *Evidence (Audio and Audio Visual Links) Act 1998* have been established by case law:
  - (a) Nature of the evidence and extent to which it will be disputed;
  - (b) Whether there will be lengthy cross-examination and a credit challenge;<sup>3</sup>
  - (c) The risk that the court’s ability to assess a witness’s credibility will be undermined where evidence is given by video transmission;<sup>4</sup>
  - (d) Whether there will be extensive documentary cross-examination;<sup>5</sup>

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<sup>2</sup> Attorney-General Second Reading Speech, 14 September 2005.

<sup>3</sup> *ASIC v Rich* (2004) 49 ACSR 578

<sup>4</sup> *McDonald v Commissioner of Taxation* [2000] FCA 1261

- (e) Cost, convenience and duration of the evidence.
14. In terrorism cases it is very likely that the credibility of persons giving evidence against the defendant will be called into question. The Parliamentary Library has drawn attention to a number of concrete examples in the criminal proceedings against Fadheem Lodhi where the credibility of witnesses was seriously called into question.<sup>6</sup>
15. Some of the important matters which constrain a court in assessing the credibility of a witness by video link include:
- (a) Inability or difficulty in applying Australian laws on perjury and contempt to a witness in another jurisdiction;
  - (b) Inability of the court to assess whether duress had been placed on the witness (outside of the actual taking of evidence);
  - (c) Inability to control the provision of documents to a witness where cross-examination on those documents is crucial to the defence case; and
  - (d) Inability to fully observe the demeanour of the witness.
16. Depending on the case and circumstances it may be quite difficult for the defence to establish that the evidence will have a “substantial adverse effect” on the defendant’s right to a fair trial. For example, where the witness is known to be the subject of corruption, intimidation or torture in conjunction with the giving of his or her evidence there is a real question as to the veracity of the evidence proposed to be called. If that witness was physically in Australia then the chances of corruption or intimidation would be significantly reduced.
17. ALHR’s submission is that provisions similar to s.50EA of the *Crimes Act 1914* (Cth) which allows for video link evidence provides a sufficient facility for the prosecution to adduce such evidence and a reasonable safeguard for the

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<sup>5</sup> *Cigna Insurance v CSR Ltd* [2001] NSWSC 262

<sup>6</sup> See Parliament of Australia Library Digest of the Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill 2005, 12 October 2005 p 6.

defence. The privileged position that the prosecution is put in under this Bill should be removed in favour of equality of arms between prosecutor and defendant.

18. ALHR has identical concerns about the proposed s.25A of the Foreign Evidence Act 1994. The arguments are not repeated here.

### **Retrospective Effect**

19. It is proposed that the provisions with respect to video link evidence will have immediate effect on commencement of the Bill. That will clearly have the effect that a prosecutor will be able to rely on its provisions in proceedings which have already commenced. Perhaps that is the intention of the legislation.
20. Depending on the stage of the proceedings this may have an adverse effect on the case especially where the prosecution has been unable to adduce the evidence under the current provisions for video link evidence. The defence may have committed itself to a particular course in the proceedings on the assumption that this new evidence will not be called. For example, prosecution witnesses may have been cross-examined on the understanding that no such evidence would be called. Further, documentary evidence may have been let in by the defence with its consent when such evidence would have been opposed if the new evidence (by video link) was expected.
21. If such evidence is allowed after proceedings have commenced then the defendant may, in the ways suggested, be unfairly prejudiced by the introduction of new evidence at this late stage of proceedings.
22. ALHR acknowledges that in given cases there may be no prejudice to the defendant and, if that is the case, then any use of the new video link provisions in proceedings which have already commenced should be by leave of the court. That is, the prosecutor should be required to seek leave to adduce such evidence via the new procedures where proceedings have already commenced. The defendant would be given an opportunity to state what prejudice he or she suffers and the court, in the exercise of its discretion, determine whether the probity of the proposed evidence outweighs the prejudice to the defendant.

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

23. As it stands, the final paragraph of s.15YV(1) does not provide a sufficient safeguard to exclude the evidence based upon prejudice in current proceedings as the bar is set too high. That is, it is possible for a defendant to be unfairly prejudiced by new evidence introduced during the course of proceedings which have already commenced but the evidence would not have a “substantial adverse affect on the right of the defendant in the proceeding to receive a fair trial”. However, the equivalent final paragraph in s.15VY(2) provides a safeguard close to the current position at law.
24. If s.15YV(1) is to be maintained in its current form then there needs to be provision in the transitional arrangements for leave of the court to be sought by a prosecutor seeking to adduce new evidence by video link in proceedings which commenced prior to the commencement of the Bill.
25. ALHR submits that if the new provisions apply to proceedings which have commenced then the party seeking to adduce evidence pursuant to the new provisions should be required to seek the leave of the court to do so.

### **Observers**

26. Proposed s.15YW provides for the use of observers who are to be present when the evidence is taken by video link and who may report to the court about what has occurred. The safeguard proposed is weak and is unlikely to solve many of the difficulties with video link evidence. For example, one likely difficulty in cross-examination of such a witness is the provision of documentary evidence to the witness. The observer is not empowered to act as a de facto court officer providing each document in order to a witness as he or she is cross-examined. The observer is only empowered to “observe” the giving of evidence by the witness and report: s.15YW(7).
27. Proposed s.15YW(6) states that the position of the observer as a diplomatic officer or consular officer does not necessarily affect the person’s

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

28. The role of the observer is also very limited. That is, they may only observe “the giving of evidence by the witness”. The observer is not clearly empowered to report on intimidation applied to the witness outside of the giving of evidence. The observer may become aware of acts outside of the giving of evidence which would be germane to the prosecution or defence case such as intimidation of the witness outside the room where the evidence is given. He or she should be able to report to the court about such matters which may affect the giving of that evidence.
29. Finally, the legislation limits the use of the observer’s report to whether the evidence concerned should be admitted. One can conceive of a case where the observer’s report does not cause the court to refuse the admission of the evidence but instead the report affects the weight which may be placed on the evidence. The legislation as drafted does not allow for the judicial member to take weight into account or to instruct the jury on the issue of the evidence’s weight.

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## International Covenant on Civil and Political Rights

### *Article 14*

1. **All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.** The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. **In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:**
  - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
  - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
  - (c) To be tried without undue delay;
  - (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
  - (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;**
  - (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
  - (g) Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

(Emphasis added)