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Committee Secretary
Senate Legal and Constitutional Legislation Committee
Department of the Senate
Parliament House
Canberra ACT 2600

Dear Secretary

Inquiry into the provisions of the Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill 2005

Thank you for the opportunity to comment upon this Bill. On the whole, the amendments contained in the *Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill 2005* would improve the processes surrounding the prosecution of terrorist offences. In particular, the central aim of the Bill to better facilitate the hearing of evidence which might not otherwise be accessible to Australian courts is of great value.

However, some of the amendments raise the following concerns:

A Rules relating to conferral of non-judicial power upon Judges of the Federal Court of Australia and Federal Magistrates (Items 1-3)

(1) Use of members of the federal judiciary for non-judicial roles

The Explanatory Memorandum accompanying the Bill says that the amendments to section 4AAA of the *Crimes Act 1914* are necessary in order to ensure the constitutionality of the conferral of non-judicial power upon Judges of the Federal Court of Australia and Federal Magistrates. The Memorandum is correct in saying that the Constitution's strict separation of judicial power from those of the other arms of government means that when judicial officers of the Commonwealth exercise non-judicial power it must be very clear that they are doing so in their personal capacity, quite independent of the Court of which they are a member: *Grollo v Palmer* (1995) 184 CLR 348.

Although, subject to the comments below about Item 3, there is nothing objectionable about the text of the proposed amendments, there are concerns as to the reason such a change is required. The Memorandum says it is because members of the Federal judiciary are 'increasingly being conferred non-judicial powers in criminal matters under Commonwealth law'. That is, in itself,

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a worrying trend which I would like to draw to the committee's attention. While such practices are hardly new, there are strong arguments for restraint in the allocation of such duties upon judicial officers. Many of the High Court's decisions on the question have featured sharp divisions of opinion as to when the separation of judicial power has been breached which indicates that the line is often a difficult one to draw. It is presumably for that reason that section 4AAA (as it presently stands) applies to non-federal judges – it is generally much less problematic for them to be the recipients of non-judicial power from the Commonwealth.

In short, while the amendments in Items 1 and 2 make sense if elsewhere the Commonwealth has conferred non-judicial functions upon members of the federal judiciary, the broader wisdom of those conferrals and their effect upon public perception of the impartiality of the federal courts might warrant some scrutiny. It should also be said that, even once amended, section 4AAA will not guarantee the validity of each and every conferral. Ultimately, that must depend upon the specific nature of the function conferred in each case. The amendments to section 4AAA will not save a conferral if it is found to be simply incompatible with the Judge's judicial role: *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

(2) Protection and Immunity

It is not clear why in performing a conferred function, a Judge of the Federal Court or a Federal Magistrate is to enjoy 'the same protection and immunity as a Justice of the High Court has in relation to proceedings in the High Court' (Item 3). This wording is notably different from that which presently protects non-federal judges under section 4AAA(4):

> A State or Territory judge or magistrate performing a conferred function, or exercising a conferred power, has the same protection and immunity as if he or she were performing that function, or exercising that power, as, or as a member of, a court (being the court of which the judge or magistrate is a member).

There is no reason why similar wording cannot be used in respect of Judges of the Federal Court and Federal Magistrates. This would confer just the same level of protection and immunity without the confusing resort to the High Court as a standard.

B Video link evidence in proceedings for terrorism and related offences (Item 5)

(1) Proposed section 15YV

I appreciate that the purpose in this section is to limit the discretion of the court to refuse applications for evidence via video link, but it is worrying that two different standards are employed depending upon who is making the application. The court is able to refuse an application from the prosecution only on the basis that, if granted, the order would have 'a substantial adverse effect on the right of a defendant to receive a fair hearing' (section 15YV(1)(f)). While that test would be illogical in the case of applications made by the defendant, it is notable that such applications are subject to a much wider ground for refusal ('it would be inconsistent with the interests of justice for the evidence to be given by video link') which does not guide the court's discretion when the motion has come from the prosecutor.

Consequently, the Bill markedly favours the prosecution over the defendant in the ability to adduce video evidence. The disparity caused by granting the prosecutor a broader ground for

objection to the defendant's use of video evidence is difficult to justify given the existing ability of either party to seek a certificate from the Attorney-General excluding a witness on the grounds of national security: *National Security Information (Criminal and Civil Proceedings) Act 2004*, s 28.

The 'interests of justice' standard should be common to the courts' ability to refuse applications for evidence via video link from either party.

There is also the question of onus generally. This section will place the onus not upon the party seeking to utilise video evidence but that which seeks to prevent it. This seems odd as it should fall to the party attempting to rely on such evidence to satisfy the Court of its integrity, not the other way around. In particular, a defendant seeking to oppose such an application by the prosecutor will, if only for practical reasons, not necessarily be in a strong position to expose the technical defects in the evidence being adduced.

(2) Observers

Under section 15YW, the court may allow video evidence on the condition that an observer is appointed to be physically present at the place where the evidence is being given. The Attorney-General in his second reading speech quite correctly stressed this provision as an important safeguard by which the integrity of the video evidence may be assured.

However, given the importance of that issue, it is arguable that the safeguard could be strengthened by removing the discretionary aspects of section 15YW. At present, the Court need neither appoint an observer (subsection 1) not require a report if one is appointed (subsection 7). Although we suspect reasons of convenience and practicality underlie the present approach, it would be preferable for the legislation to require an observer in respect of all section 15YV directions or orders and for that person to make a report to the court as a matter of course.

C Foreign Evidence Act 1994 (Items 22 to 25)

The changes proposed to the *Foreign Evidence Act* will limit the courts' ability to refuse such evidence to be adduced. The existing basis upon which the court may make such a determination is found in section 25(1):

> 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.

The remainder of that section lists a number of factors which the court may take into account to that end.

The Bill's new section 25A expressly removes the question of foreign evidence in proceedings for designated offences from the reach of section 25. Instead, the only basis upon which a court may deny an attempt by the prosecutor to adduce foreign evidence in such cases is if it is satisfied that to do so 'would have a substantial adverse effect on the right of a defendant in the proceeding to receive a fair hearing' (the same narrow standard seen earlier in respect of the proposed section 15YV of the *Crimes Act 1914*).

The reduction of the Court's discretion to refuse an application by the prosecutor in these designated cases is worrying given the possibility that some foreign evidence may have been procured through use of torture. This may well also be a concern in respect of the changes to the *Crimes Act* considered above which allow testimony to be made to the court via video link, but the use of an observer reduces that possibility somewhat. However, in the context of use of foreign material already existing that safeguard is not an option. Thus the danger of evidence having been produced in violation of fundamental human rights is more pronounced.

Although it might be argued that any evidence tainted by torture would still fall foul of the standard in section 25A(1)(d) or the existing requirements for testimony under section 22 of the Act, some more express safeguard is in order.

This Bill is an excellent opportunity for the Commonwealth Parliament to affirm its abhorrence of the use of torture in the procurement of evidence. The Court's discretion to refuse such evidence should expressly include those occasions when it is not satisfied that the evidence in question was not obtained through the use of torture or inhuman and degrading treatment or extraordinary rendition (effectively torture by proxy).

Conclusion

In short, the following comments may be made in respect of the Bill:

- The changes to section 4AAA of the *Crimes Act* are valid and serve to clarify the constitutional propriety of conferrals of non-judicial power upon federal judicial officers. However, the validity of specific conferrals will remain dependent upon their not being incompatible with the recipients' judicial role;
- The proposed Part 1AE to be inserted into the *Crimes Act* could be improved in two respects:
    - Use of a single standard governing the courts' discretion to allow evidence via video link – regardless of which party makes the application; and
    - A mandatory requirement for a court appointed observer who is to deliver a report on the conditions under which evidence was given at the place of the witness;
- The changes to the *Foreign Evidence Act* should include an express ground for the court to refuse an application for use of foreign evidence where the court is not satisfied that the evidence in question was not obtained through the use of torture or inhuman and degrading treatment or extraordinary rendition (effectively torture by proxy).

Yours sincerely,

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