



DPP

Commonwealth Director of Public Prosecutions

Your reference:

Our reference:

17 October, 2005

Mr Owen Walsh
Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
CANBERRA ACT 2600

Dear Sir

INQUIRY INTO THE PROVISIONS OF THE LAW AND JUSTICE LEGISLATION AMENDMENT (VIDEO LINK EVIDENCE AND OTHER MEASURES) BILL 2005

Thank you for your invitation for this Office to make a submission to the parliamentary inquiry into the *Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill 2005*. In response to your invitation I enclose a submission on behalf of the Commonwealth Director of Public Prosecutions.

Should you have any enquiries please contact Mr Graeme Davidson, Acting Deputy Director, on 02 6206-5642

Yours sincerely

John Thornton
First Deputy Director

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Commonwealth Director of Public Prosecutions

SUBMISSION BY THE COMMONWEALTH DPP

AUSTRALIAN SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

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

Introduction

The Office of the Commonwealth Director of Public Prosecutions ("CDPP") is responsible for the prosecution of criminal offences against the laws of the Commonwealth. These offences include the terrorism offences in Part 5.3 of the Commonwealth Criminal Code as well as a range of other offences that may be applicable to terrorist conduct. This submission addresses the provisions of Part 1AE relating to video link evidence in relation to the cases there specified.

The CDPP's experience in prosecuting these significant cases, is that it is likely that relevant evidence will need to be adduced from witnesses who themselves may have been involved in terrorist related conduct and who cannot for reasons of security or practical reality be brought before an Australian court to give evidence in person. Indeed because of the extra territorial operation of many of these provisions, overseas evidence is more likely to be required to prove the offences.

There is a clear public interest and expectation that these cases will be brought before the courts promptly and efficiently notwithstanding the difficulties in adducing evidence from witnesses who are overseas or otherwise unavailable to give evidence before the courts in Australia.

There are serious implications and ramifications in laying charges in these cases. Currently where evidence is sought by video link from another country the applicable provisions are set out in State legislation that is applied to these prosecutions. Generally speaking these provisions require a court to be satisfied that it is the interests of justice that the evidence be adduced by video link. Some courts have in the past been reluctant to make such orders in the trial of serious offences in light of the common law's traditional approach to a defendant being entitled to face his or her accusers in person. The CDPP submits that in this situation, having regard to the importance of these prosecutions, there is a need for greater certainty than currently exists to ensure that evidence can be called by video link in these prosecutions, consistent with the right of a defendant to a fair trial. Accordingly the CDPP supports this Bill.

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

Schedule 1 of the Bill inserts into the *Crimes Act* 1914 a new Part IAE entitled "Video link evidence in proceedings for terrorism and related offences etc." Section 15YU(1) sets out the range of criminal proceedings to which the new provisions will apply. In each case the offences

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set out potentially cover terrorist related conduct. Sub-section 15YU(2) makes it clear that the provisions apply to any proceedings including committal proceedings and proceedings under the *Proceeds of Crime Act 2002* that are connected with an offence set out in sub-paragraph (1). The provisions operate prospectively in relation to these proceedings.

Proposed section 15YV – The proposed tests as to when a Court may take evidence by video link

The principal provision of the Bill in relation to the taking of video link evidence in terrorism related criminal proceedings is section 15YV. Section 15YV deals with applications to take evidence by video link by the prosecutor and by the defendant in sub-sections 15YV(1) and 15YV(2) respectively.

When an application is made to the court by either the prosecutor or the defendant to take evidence by video link in a specified proceeding covered by the Bill, the court must direct or by order allow the witness to give evidence by video link if certain conditions are met. The Bill thus reduces the discretion of the court to allow evidence by video link in these prosecutions.

When an application is made by the prosecutor pursuant to sub-section 15YV(1) the court must give a direction or make an order permitting the witness to give evidence by way of video link unless 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. When an application is made by the defendant the court must give a direction or make an order permitting the witness to give evidence by way of video link unless it is satisfied that to do so would be inconsistent with the interests of justice.

Whilst currently it may be possible for State and Territory video link provisions to be utilised in terrorism cases, the CDDP submits that there is considerable advantage in a specific Commonwealth provision for terrorism cases. In our view proposed section 15YV is an appropriate measure as it would provide a greater degree of certainty for both the prosecution and defence as to what evidence may be relied on in court in these important prosecutions. This would greatly assist in assessing whether under the Prosecution Policy of the Commonwealth there is likely to be available evidence to prove the charges. The test takes into account whether the defendant's right to a fair hearing will be substantially adversely affected. The requirement that the adverse effect be substantial is appropriate in light of the argument that may be available that there is an adverse effect by the mere fact that the witness is not physically present in the courtroom. To lessen this test would run the real risk of not providing for the necessary level of assurance in these cases that the evidence may be called by video link.

Proposed section 15YV(2) provides that where a defendant applies for a witness to give evidence by video link and the pre-conditions are met, the court must direct or by order 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 proposed Commonwealth provision does not require a defendant to bear the onus of convincing a court that it should allow evidence to be taken in this way as would be the case under the present applicable provisions.

The CDDP submits that the tests, although framed in different terms, are appropriate in light of the different considerations that would be present when assessing the issue of admitting evidence by video link during the prosecution and defence cases.

There are different roles and responsibilities for the prosecutor and defence counsel. The prosecutor is required to disclose to the defence not only all the evidence that the prosecutor

intends to adduce during the hearing of the case but also any unused material that may be relevant to the credibility of prosecution witnesses and any material that may either advance the defence case, lead to a line of inquiry for the defence or adversely affects the prosecution case. Before any evidence is led by the prosecution, defence counsel will be aware of what the witnesses can say. Further, defence counsel will have an opportunity to test that evidence in committal proceedings or prior to it being led before a jury. The relevant enquiry as to whether the witness's evidence should be taken by video link will be whether there is a substantial adverse effect on the defendant's right to a fair hearing and both parties will be a position to advance argument on the effect of that evidence and whether leading that evidence by video link will have a substantial adverse effect on the defendant's right to a fair hearing.

On the other hand there is, in general, no requirement on the part of defence counsel to notify the prosecution of defence witnesses or what those witnesses might say. In considering a defendant's application to adduce evidence by video link it would not be appropriate to apply a test of whether the adducing of video evidence would be likely to adversely affect the right of the prosecution to fairly present its case as, by definition, the prosecution will have already presented its case. The Bill applies the more general test of whether it would not be in the interests of justice given that there will potentially be more relevant factors to consider. The test provides greater certainty to defendants seeking to rely on evidence from persons that cannot attend court in Australia.

Further given the emphasis of the Bill on making video link evidence available it is difficult to conceive of normal situations where a court would be satisfied that it was not in the interests of justice to allow a defendant to adduce evidence by way of video link if the evidence was otherwise admissible. A defendant is quite properly entitled to adduce relevant evidence in defending a charge brought against him or her.

The proposed Bill would not give the prosecution a greater advantage than the defence in seeking to adduce video link evidence.

The integrity of video link evidence

It should be noted that the Bill does not change fundamental issues in relation to the reliability of evidence, its relevance or weight. If there are concerns about whether the evidence taken by video link is credible, relevant or reliable, those concerns may be raised during the proceedings. The Bill seeks to ensure that, providing the tests are satisfied, the evidence of the witness may be led by video link and that witness cross examined and re-examined by video link in the same way as if the person was physically present in the court room.

If it is suspected that a witness has been provided with incentives to cooperate those allegations may be explored in the same way as if the witness were physically present in the court room. If the witness has received a benefit for cooperation, such as a reduction in sentence, that may be put to the witness and the witness will be required to answer.

Evidence tainted by torture or inhumane treatment

In relation to evidence taken by video link, the Bill does provide for additional protection by way of the appointment of an observer, however, it is acknowledged that any instances of torture or ill treatment prior to the giving of evidence by video link may not necessarily be revealed by the presence of the observer at the time of giving of evidence.

If the prosecution was in possession of any material that suggested that a witness had been tortured or ill treated it would be required to disclose that material to the defence. If such

material emerged either prior to the court proceedings or during the course of the proceedings the evidence may be ruled inadmissible or unreliable. The video link provisions only relate to the method of giving evidence not its ultimate admission or reliability and issues relating to the treatment of witnesses and the conditions under which they are held are often the subject of cross examination and defence counsel can quite properly explore those issues. This is the case whether or not that person is giving evidence by video link under State provisions or the proposed Bill or in person.

Different Judicial approaches to video link testimony

Judicial authority has differed in relation to the taking of video link evidence. To assist the Committee some examples of judicial statements on the topic are set out below.

In relation to taking evidence by video link, Coldrey J of the Supreme Court of Victoria in *R v Kyu Hyuk Kim* (1998) 104 A Crim R 233 stated:

“the necessary public scrutiny may still occur with video link, the production of documents need not occasion difficulty, there is no real delay in voice transmission and the demeanour of a witness may be assessed using video link” (at p 235).

Similarly, in *McDonald v Commissioner of Taxation* (2002) ATC 4271 at [21]-[22]; Finn J stated:

“As is now well known, the video link facility is being utilised with greater regularity and acceptance in court proceedings – particularly in this court - as judges have come to acknowledge that apprehended disadvantages from the use of video links have not materialised as expected . . .

Equally, judges have accepted in relation to trials that a video link is, for practical purposes, much the same as hearing evidence in court and that it does not pose a significant impediment to the assessment of a witness’ demeanour.”

This approach was applied by Katz J in *Tetra Pak Marketing Pty Ltd v Musashi Pty Ltd* [2000] FCA 1261 at [25] where His Honour concluded that there was “a strong current of authority in favour of permitting the relatively new video link technology to be used, in the absence of some considerable impediment telling against its use in the particular case”.

This approach to the taking of evidence by video link has however not been uniformly followed.

In *ASIC v Rich and Ors* (2004) 49 ACSR 578 Austin J considered a range of authorities on the taking of video link evidence. His Honour identified a number of relevant factors and concluded (at p582-583) that the authorities broadly disclosed two approaches to the utility of audiovisual links. One line of cases was generally in favour of audiovisual evidence whereas another line was described as taking a more cautious approach to the use of audiovisual evidence.

After reviewing these cases, Austin J considered that generally courts should strongly encourage the use of current-generation electronic aids to its work, but His Honour recognised that there will be exceptional cases where the court will decide there are good grounds for proceeding by viva voce evidence. Accepting this, His Honour considered that it was unnecessary and unhelpful to argue about whether audiovisual evidence is for practical purposes the same as viva voce evidence.

In light of these judicial comments, and having regard to the existence of differing views that are less inclined to allow video link evidence, the CDPP submits that it is appropriate in the case of terrorism offences for the legislature to enact legislation that will give greater certainty to the ability of parties in Commonwealth criminal proceedings to call evidence by way of video link.

Other Provisions

Proposed section 15YZ provides that Judges must give a jury such direction as the judge thinks necessary to ensure that the jury gives the same weight to the evidence as if it had been given by the witness in the courtroom or other place where the court is sitting. The CDPP submits that the inclusion of this proposed section is justified given the available technology in this area.

The CDPP also supports the proposed provisions relating to material dealt with under the *Foreign Evidence Act 1994* that assist in treating foreign evidence such as video tapes and transcripts of examinations in a similar manner to the new video link rules in Part 1AE of the Bill.