



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

No. 136, 2005

**An Act to amend various Acts relating to law and
justice, and for related purposes**

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)

Contents

1	Short title	1
2	Commencement	2
3	Schedule(s)	2
Schedule 1—Amendments		3
	<i>Crimes Act 1914</i>	3
	<i>Financial Transaction Reports Act 1988</i>	15
	<i>Foreign Evidence Act 1994</i>	15
	<i>Proceeds of Crime Act 2002</i>	17
	<i>Surveillance Devices Act 2004</i>	18



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No. 136, 2005

An Act to amend various Acts relating to law and justice, and for related purposes

[Assented to 15 November 2005]

The Parliament of Australia enacts:

1 Short title

*This Act may be cited as the Law and Justice Legislation
Amendment (Video Link Evidence and Other Measures) Act 2005.*

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2 Commencement

This Act commences on the day after it receives the Royal Assent.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Amendments

Crimes Act 1914

1 Before paragraph 4AAA(1)(a)

Insert:

- (aa) a Judge of the Federal Court of Australia;
- (ab) a Federal Magistrate;

2 Subsection 4AAA(2)

After “in the case of a”, insert “Judge of the Federal Court of Australia, Federal Magistrate,”.

3 After subsection 4AAA(3)

Insert:

Protection and immunity provided

- (3A) A Judge of the Federal Court of Australia or a Federal Magistrate performing a conferred function, or exercising a conferred power, has the same protection and immunity as a Justice of the High Court has in relation to proceedings in the High Court.

Note: The heading to subsection 4AAA(4) is deleted.

4 After subsection 4AAA(6)

Insert:

Contrary intention

- (6A) Despite subsection (1), a rule set out in this section does not apply if the contrary intention appears.

5 After Part IAD

Insert:

Part IAE—Video link evidence in proceedings for terrorism and related offences etc.

15YU Proceedings to which this Part applies

Criminal proceedings

- (1) This Part applies to any proceedings for:
 - (a) an offence against subsection 34G(5) of the *Australian Security Intelligence Organisation Act 1979*; or
 - (b) an offence against section 49 of the *Aviation Transport Security Act 2004*; or
 - (c) an offence against section 21 of the *Charter of the United Nations Act 1945*; or
 - (d) an offence against Division 72 of the *Criminal Code*; or
 - (e) an offence against Part 5.3 of the *Criminal Code*; or
 - (f) an offence against Part 5.4 of the *Criminal Code*; or
 - (g) an offence against section 24AA or 24AB of this Act; or
 - (h) an offence against Division 1 of Part 2 of the *Crimes (Aviation) Act 1991*; or
 - (i) an offence against section 8 of the *Crimes (Biological Weapons) Act 1976*; or
 - (j) an offence against the *Crimes (Foreign Incursions and Recruitment) Act 1978*; or
 - (k) an offence against section 8 of the *Crimes (Hostages) Act 1989*; or
 - (l) an offence against the *Crimes (Internationally Protected Persons) Act 1976*; or
 - (m) an offence against section 6 of this Act that relates to an offence mentioned in any of the above paragraphs.

Note: For other ancillary offences, see section 11.6 of the *Criminal Code*.

Other proceedings

- (2) This Part also applies to:
 - (a) any proceedings, including committal proceedings or proceedings of a similar kind, connected with proceedings covered by subsection (1); and

- (b) proceedings under the *Proceeds of Crime Act 2002* in relation to an offence referred to in subsection (1).

Timing of proceedings

- (3) It is immaterial whether proceedings covered by subsection (1) or (2) were instituted before or after the commencement of this Part.

Extended meaning of prosecutor and defendant

- (4) This Part has effect, in relation to a proceeding under the *Proceeds of Crime Act 2002*, as if:
- (a) the Director of Public Prosecutions were the prosecutor; and
 - (b) each other party to the proceeding were a defendant in the proceeding.

15YV When court may take evidence by video link

Application by prosecutor

- (1) In a proceeding, the court must:
- (a) direct; or
 - (b) by order, allow;
- a witness to give evidence by video link if:
- (c) both:
 - (i) the prosecutor applies for the direction or order; and
 - (ii) the court is satisfied that the prosecutor gave the court reasonable notice of his or her intention to make the application; and
 - (d) the witness is not a defendant in the proceeding; and
 - (e) the witness is available, or will reasonably be available, to give evidence by video link; and
 - (f) the facilities required by section 15YY are available or can reasonably be made available;
- unless the court is satisfied that giving the direction or making the order would have a substantial adverse effect on the right of a defendant in the proceeding to receive a fair hearing.

Application by defendant

- (2) In a proceeding, the court must:
-

- (a) direct; or
 - (b) by order, allow;
- a witness to give evidence by video link if:
- (c) both:
 - (i) a defendant in the proceeding applies for the direction or order; and
 - (ii) the court is satisfied that the defendant gave the court reasonable notice of his or her intention to make the application; and
 - (d) the witness is not a defendant in the proceeding; and
 - (e) the witness is available, or will reasonably be available, to give evidence by video link; and
 - (f) the facilities required by section 15YY are available or can reasonably be made available;
- unless the court is satisfied that it would be inconsistent with the interests of justice for the evidence to be given by video link.

Definition

- (3) In this section:

substantial adverse effect means an effect that is adverse and not insubstantial, insignificant or trivial.

15YW Observers

Observer

- (1) The court may, in a section 15YV direction or order, provide that the witness can give evidence under the direction or order only if, when the witness is giving evidence by video link, there is physically present, at the place where the evidence is given, a person specified in the direction or order for the purposes of this section.
- (2) If a section 15YV direction or order is in force, the court may vary the direction or order so as to provide that, after the variation, the witness can give evidence under the direction or order only if, when the witness is giving evidence by video link, there is physically present, at the place where the evidence is given, a

person specified in the direction or order for the purposes of this section.

Substitution of observer

- (3) If:
- (a) a direction or order is in force under section 15YV; and
 - (b) the direction or order specifies a person for the purposes of this section;
- the court may vary the direction or order so as to substitute another specified person.

Who can be an observer

- (4) A person specified for the purposes of this section may be:
- (a) an Australian diplomatic officer; or
 - (b) an Australian consular officer; or
 - (c) any other person.
- (5) The court must not specify a person for the purposes of this section unless the court is satisfied that the person is:
- (a) independent of the prosecutor; and
 - (b) independent of each defendant in the proceeding; and
 - (c) in a position to give a report to the court about what the person observes in relation to the giving of evidence by the witness; and
 - (d) reasonably available to observe the giving of evidence by the witness; and
 - (e) an appropriate person to be specified for the purposes of this section.
- (6) For the purposes of this section, the mere fact that a person is an Australian diplomatic officer or Australian consular officer does not mean that the person is not independent of the prosecutor.

Report of observer

- (7) If:
- (a) a direction or order is in force under section 15YV; and
 - (b) the direction or order specifies a person for the purposes of this section;
-

the court may:

- (c) direct or allow the specified person to give the court a report, in such form and by such time as the court requires, about what the person observed in relation to the giving of evidence by the witness; and
- (d) make such use of the report as the court considers appropriate for the purpose of deciding whether evidence given by the witness under the section 15YV direction or order should be admitted as evidence in the proceeding.

Definitions

(8) In this section:

Australian consular officer has the same meaning as in the *Consular Fees Act 1955*.

Australian diplomatic officer has the same meaning as in the *Consular Fees Act 1955*.

15YX Adjourment after a section 15YV direction or order etc.

Court gives a direction or makes an order

(1) If:

- (a) a court gives a section 15YV direction or makes a section 15YV order; and
 - (b) the prosecutor applied for the direction or order;
- a defendant in the proceeding may apply to the court for an adjourment of the proceeding to allow time for the defendant to:
- (c) decide whether to appeal against the direction or order; and
 - (d) if the defendant decides to do so—make the appeal.

(2) If:

- (a) a court gives a section 15YV direction or makes a section 15YV order; and
- (b) a defendant in the proceeding applied for the direction or order;

the prosecutor may apply to the court for an adjourment of the proceeding to allow time for the prosecutor to:

- (c) decide whether to:

- (i) appeal against the direction or order; or
- (ii) withdraw the proceeding; and
- (d) if the prosecutor decides to do so—make the appeal or withdrawal.

Court refuses to give a direction or make an order

- (3) If:
 - (a) a court refuses to give a section 15YV direction or refuses to make a section 15YV order; and
 - (b) the prosecutor applied for the direction or order;
the prosecutor may apply to the court for an adjournment of the proceeding to allow time for the prosecutor to:
 - (c) decide whether to:
 - (i) appeal against the refusal; or
 - (ii) withdraw the proceeding; and
 - (d) if the prosecutor decides to do so—make the appeal or withdrawal.
- (4) If:
 - (a) a court refuses to give a section 15YV direction or refuses to make a section 15YV order; and
 - (b) a defendant in the proceeding applied for the direction or order;
the defendant may apply to the court for an adjournment of the proceeding to allow time for the defendant to:
 - (c) decide whether to appeal against the refusal; and
 - (d) if the defendant decides to do so—make the appeal.

Grant of adjournment

- (5) If an application is made under this section, the court must grant the adjournment.

Note: For appeals, see section 15YZD.

15YY Technical requirements for video link

- (1) A witness can give evidence under a section 15YV direction or order only if:
-

- (a) the courtroom or other place where the court is sitting (the *courtroom point*); and
 - (b) the place where the evidence is given (the *witness point*);
- are equipped with video facilities that:
- (c) enable appropriate persons at the courtroom point to see and hear the witness give the evidence; and
 - (d) enable appropriate persons at the witness point to see and hear appropriate persons at the courtroom point.
- (2) In subsection (1):

appropriate persons means such persons as the court considers appropriate.

15YZ Direction to jury

- (1) If:
- (a) a proceeding involves a jury; and
 - (b) a witness gives evidence under a section 15YV direction or order; and
 - (c) the evidence is admissible in the proceeding;
- the judge must give the 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.
- (2) Disregard subsection (1) in determining:
- (a) the directions (if any) that should be given by a judge in proceedings to which this Part does not apply; and
 - (b) the weight that should be given to evidence given by video link in proceedings to which this Part does not apply.

15YZA Application of laws about witnesses

- (1) A person who gives evidence under a section 15YV direction or order is taken to give it at the courtroom or other place where the court is sitting.
- (2) Subsection (1) has effect, for example, for the purposes of laws relating to evidence, procedure, contempt of court and perjury.

15YZB Administration of oaths and affirmations

An oath or affirmation to be sworn or made by a witness who is to give evidence under a section 15YV direction or order may be administered either:

- (a) by means of the video link, in as nearly as practicable the same way as if the witness were to give the evidence at the courtroom or other place where the court is sitting; or
- (b) as follows:
 - (i) on behalf of the court and as directed by it;
 - (ii) by a person (whether an Australian official or not) authorised by the court;
 - (iii) at the place where the witness is to give the evidence.

15YZC Expenses

A court may make such orders as are just for payment of expenses incurred in connection with giving evidence under a section 15YV direction given, or a section 15YV order made, by the court.

15YZD Appeals against section 15YV directions or orders etc.

Court gives a direction or makes an order

- (1) If:
 - (a) a court gives a section 15YV direction or makes a section 15YV order; and
 - (b) the prosecutor applied for the direction or order;a defendant in the proceeding may appeal against the direction or order.
- (2) If:
 - (a) a court gives a section 15YV direction or makes a section 15YV order; and
 - (b) a defendant in the proceeding applied for the direction or order;the prosecutor may appeal against the direction or order.

Court refuses to give a direction or make an order

- (3) If:
-

- (a) a court refuses to give a section 15YV direction or refuses to make a section 15YV order; and
 - (b) the prosecutor applied for the direction or order;
the prosecutor may appeal against the refusal.
- (4) If:
- (a) a court refuses to give a section 15YV direction or refuses to make a section 15YV order; and
 - (b) a defendant in the proceeding applied for the direction or order;
the defendant may appeal against the refusal.

Jurisdiction

- (5) A court that has jurisdiction to hear and determine appeals from a judgment, order or direction in the proceeding has jurisdiction to hear and determine any appeal under this section.

15YZE Other laws about evidence not affected

This Part does not prevent any other law about taking evidence of a witness from applying for the purposes of a proceeding.

15YZF Saving of other laws

This Part is not intended to exclude or limit the operation of any other law of the Commonwealth or any law of a State or Territory.

6 Subsection 23B(1) (definition of *tape recording*)

Repeal the definition, substitute:

tape recording means audio recording, video recording or recording by other electronic means.

7 Application of amendment—subsection 23B(1) of the *Crimes Act 1914*

The amendment of subsection 23B(1) of the *Crimes Act 1914* made by this Schedule applies to a recording made after the commencement of this item.

8 Subsection 23YDAF(1) (cell at table item 1, column 4)

Repeal the cell, substitute:

only if
within
purpose

9 Subsection 23YDAF(1) (cell at table item 2, column 4)

Repeal the cell, substitute:

only if
within
purpose

10 Subsection 23YDAF(1) (cell at table item 3, column 3)

Repeal the cell, substitute:

only if
within
purpose

11 Subsection 23YDAF(1) (cell at table item 3, column 4)

Repeal the cell, substitute:

only if
within
purpose

12 Subsection 23YDAF(1) (cell at table item 3, column 5)

Repeal the cell, substitute:

only if
within
purpose

13 Subsection 23YDAF(1) (cell at table item 4, column 4)

Repeal the cell, substitute:

only if
within
purpose

14 Subsection 23YDAF(1) (cell at table item 5, column 4)

Repeal the cell, substitute:

only if
within
purpose

15 Subsection 23YDAF(1) (cell at table item 6, column 4)

Repeal the cell, substitute:

only if
within
purpose

16 Subsection 23YDAF(1) (cell at table item 7, column 4)

Repeal the cell, substitute:

only if
within
purpose

17 Subsection 23YUD(1)

Repeal the subsection, substitute:

- (1) The Minister may, on behalf of the Commonwealth, enter into arrangements with a responsible Minister of a participating jurisdiction under which:
 - (a) information from the DNA database system of the Commonwealth is to be transmitted to the appropriate authority in the participating jurisdiction; and
 - (b) information from a DNA database system of the participating jurisdiction is to be transmitted to the Commissioner.

These arrangements may deal with keeping, and otherwise managing, such information.

18 After subsection 23YUD(1A)

Insert:

- (1B) Information that is transmitted under this section must not be used except for the purpose of:
 - (a) the investigation of a matter relating to the participating jurisdiction, or proceedings in respect of that matter; or
 - (b) the investigation of a matter relating to the Commonwealth, or proceedings in respect of that matter.

19 Transitional—arrangements under subsection 23YUD(1) of the *Crimes Act 1914*

- (1) This item applies to an arrangement if:
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- (a) the arrangement was entered into under subsection 23YUD(1) of the *Crimes Act 1914*; and
 - (b) the arrangement was in force immediately before the commencement of this item.
- (2) The arrangement has effect, after the commencement of this item, as if it had been entered into under subsection 23YUD(1) of the *Crimes Act 1914* as amended by this Schedule.

Financial Transaction Reports Act 1988

20 At the end of subparagraph 16(1)(b)(i)

Add “or”.

21 At the end of paragraph 16(1)(b)

Add:

- ; or (iv) may be of assistance in the enforcement of the *Proceeds of Crime Act 2002* or the regulations made under that Act;

Foreign Evidence Act 1994

22 Subsection 3(1)

Insert:

designated offence means:

- (a) an offence against subsection 34G(5) of the *Australian Security Intelligence Organisation Act 1979*; or
- (b) an offence against section 49 of the *Aviation Transport Security Act 2004*; or
- (c) an offence against section 21 of the *Charter of the United Nations Act 1945*; or
- (d) an offence against Division 72 of the *Criminal Code*; or
- (e) an offence against Part 5.3 of the *Criminal Code*; or
- (f) an offence against Part 5.4 of the *Criminal Code*; or
- (g) an offence against section 24AA or 24AB of the *Crimes Act 1914*; or
- (h) an offence against Division 1 of Part 2 of the *Crimes (Aviation) Act 1991*; or

- (i) an offence against section 8 of the *Crimes (Biological Weapons) Act 1976*; or
- (j) an offence against the *Crimes (Foreign Incursions and Recruitment) Act 1978*; or
- (k) an offence against section 8 of the *Crimes (Hostages) Act 1989*; or
- (l) an offence against the *Crimes (Internationally Protected Persons) Act 1976*; or
- (m) an offence against section 6 of the *Crimes Act 1914* that relates to an offence mentioned in any of the above paragraphs.

Note: For other ancillary offences, see section 11.6 of the *Criminal Code*.

23 At the end of subsection 20(1)

Add:

- ; or (c) a proceeding under the *Proceeds of Crime Act 2002* in relation to a designated offence.

24 At the end of subsection 25(1)

Add:

Note: See also subsection 25A(1) (proceedings for designated offences).

Note: The heading to section 25 is altered by adding at the end “—general”.

25 After section 25

Insert:

25A Discretion to prevent foreign material being adduced— proceedings for designated offences

- (1) If a proceeding is:
 - (a) a criminal proceeding for a designated offence; or
 - (b) a proceeding under the *Proceeds of Crime Act 2002* in relation to a designated offence;and the prosecutor seeks to adduce foreign material as evidence in the proceeding, then:
 - (c) the court must not give a direction under subsection 25(1) in relation to the foreign material; and
 - (d) the court may direct that the foreign material not be adduced as evidence in the proceeding 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.

Extended meaning of prosecutor and defendant

- (2) This section has effect, in relation to a proceeding under the *Proceeds of Crime Act 2002*, as if:
- (a) the Director of Public Prosecutions were the prosecutor; and
 - (b) each other party to the proceeding were a defendant in the proceeding.

Timing of proceedings

- (3) It is immaterial whether proceedings covered by subsection (1) were instituted before or after the commencement of this section.

Definition

- (4) In this section:

substantial adverse effect means an effect that is adverse and not insubstantial, insignificant or trivial.

Proceeds of Crime Act 2002

26 At the end of section 6

Add:

Note: See also Part IAE of the *Crimes Act 1914* (video link evidence).

27 After paragraph 297(1)(g)

Insert:

- (ga) making any payments in relation to the conduct of an *examination, so long as the payments have been approved by the *DPP;

28 Transitional—validation of certain examinations etc.

- (1) This item applies to each of the following:
- (a) a purported examination conducted under the *Proceeds of Crime Act 2002* during the interim period by a designated

- AAT member in the purported capacity of approved examiner;
- (b) the purported giving of a notice or direction under Part 3-1 of that Act during the interim period by a designated AAT member in the purported capacity of approved examiner;
- (c) the purported doing of any other act or thing under Part 3-1 of that Act during the interim period by a designated AAT member in the purported capacity of approved examiner.
- (2) The examination, notice, direction, act or thing is as valid, and is taken always to have been as valid, as it would have been if the designated AAT member had been an eligible legal practitioner during the interim period.
- (3) The designated AAT member has, and is taken always to have had, the same protection and immunity under section 194 of the *Proceeds of Crime Act 2002* that the member would have, or would have had, if the member had been an eligible legal practitioner during the interim period.
- (4) In this item:
- designated AAT member*** means a non-presidential member of the Administrative Appeals Tribunal who is not an eligible legal practitioner.
- eligible legal practitioner*** means person who is enrolled as a legal practitioner of:
- (a) the High Court; or
- (b) another federal court; or
- (c) the Supreme Court of a State or Territory;
- and has been so enrolled for at least 5 years.
- interim period*** means the period:
- (a) beginning at the start of 7 September 2004; and
- (b) ending at the end of 19 August 2005.

Surveillance Devices Act 2004

29 Subsection 22(1)

Omit all the words after “in respect of”, substitute:
a surveillance device that:

- (a) was lawfully installed on premises, or in or on an object, under:
 - (i) a surveillance device warrant; or
 - (ii) a tracking device authorisation; and
- (b) the law enforcement officer suspects on reasonable grounds is still on those premises or in or on that object, or on other premises or in or on another object.

30 At the end of subsection 39(8)

Add:

Note: Section 22 deals with applications for a retrieval warrant in respect of a tracking device that was lawfully installed under a tracking device authorisation.

*[Minister's second reading speech made in—
House of Representatives on 14 September 2005
Senate on 7 November 2005]*

(150/05)
