



Use of overseas evidence in terrorism offences: The implications of the Commonwealth's new scheme for defendants and the courts

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This article considers changes made late last year to the ways in which courts may receive evidence in terrorism trials. The amendments enable testimony to be given via video link and also facilitate the use of foreign evidence in such proceedings. While commendable in principle, several concerns exist. These relate to the use of a double standard (apparently weighted in the prosecution's favour) guiding the court's discretion to refuse applications made to adduce such evidence; the rigour of the safeguards provided; and the Commonwealth's silence on how courts should handle evidence which may have been procured through torture. The article considers these issues chiefly by reference to the submissions made to, and the report and recommendations of the Senate's Legal and Constitutional Legislation Committee in its inquiry into the changes. The author argues that the amendments diminish the rights of defendants and risk public confidence in the integrity of the courts.

1 Introduction

The closing months of 2005 saw a protracted public and parliamentary debate about the introduction of new Commonwealth, State and Territory national security laws. The many substantial innovations of the government's Anti-Terrorism Act (No 2) 2005 (Cth) — chiefly orders for the preventative detention or control of terrorist suspects and a revamped law of sedition — and the dramatic arrests of suspects under urgently amended offence provisions,¹ inevitably ensured that other developments received far less attention than if they been ushered in at a less hectic time. The passage of the Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Act 2005 (Cth) through the parliament clearly demonstrated the limited capacity of the national security debate to deal with more than a few issues at any one time.

While certainly not as revolutionary as many of the key elements of the Commonwealth's other proposals, the Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Act 2005 (Cth) (the Act) is none the less significant in its alteration of the rules governing the evidence that may be adduced in proceedings for terrorism-related offences. It amends the Crimes Act 1914 (Cth) to create new provisions for the use of

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¹ Anti-Terrorism Act 2005 (Cth) Sch 1.

video link evidence, as well as making amendments to the Foreign Evidence Act 1994 (Cth) in order to facilitate the use of foreign evidence in these proceedings.

According to the Explanatory Memorandum:

These new provisions will facilitate the prosecution of terrorism offences by ensuring that, in the absence of compelling reasons to the contrary, important evidence from overseas witnesses that are unable to travel to Australia can be put before the court using video link technology.²

The practical appeal of allowing the admission of such evidence, in light of the contemporary operation of trans-national terrorist networks, is obvious. In expressing its support for the amendments, the Commonwealth Director of Public Prosecutions (CDPP) said that in criminal trials of terrorist suspects:

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.³

When introducing the Bill, Attorney-General Philip Ruddock stated that '[t]he new video link evidence provisions strike a balance between facilitating the admission of video link evidence while ensuring that fundamental safeguards are maintained'.⁴ It became clear after the Bill's introduction, however, that while the general aims of the legislation are worth pursuing, there are substantial concerns regarding the adequacy and appropriateness of the safeguards adopted.

In particular, a defining feature of the legislation is its use of a double standard for the admission of foreign or video link evidence depending upon which party is making the application to the court. The Bill attracted criticism on the basis that it narrowed the judicial discretion to refuse such evidence when the prosecution sought to call it, while maintaining the existing and broader test in respect of similar applications from the defendant. This difference lays the law open to the charge that it diminishes the right of an accused to a fair trial. Not only does that arguably represent a breach of Australia's international obligations, it poses a danger to the community standing of the courts and their verdicts in terrorism trials. Additionally, the Act gives rise to fears that evidence from other jurisdictions which is obtained through torture might more easily find its way into Australian courts as a result of the changes being introduced. This aspect of the debate was lent particular potency by the contemporaneous House of Lords decision on essentially the

2 Explanatory Memorandum, Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill 2005 (Cth), p 1. In fact, the provisions are 'applicable to witnesses within Australia as well as overseas', with the former catering for 'circumstances where bringing a witness into the court room to give evidence would pose an unacceptable security risk to the witness or another person'. It should be noted that the use of video link evidence does not amount to a failure to hold the trial in the State where the offence was committed, as required by the Commonwealth Constitution s 80: *R v Wilkie* (2005) 194 FLR 20.

3 CDPP, Submission to Senate Legal and Constitutional Committee Inquiry into the Provisions of the Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill 2005, p 1.

4 Commonwealth, *Parliamentary Debates*, House of Representatives, 14 September 2005, p 8 (Philip Ruddock, Attorney-General).

same question in respect of the courts of the United Kingdom.⁵

The purpose of this article is to give detailed consideration to the key amendments made by the Act and to determine their implications for defendants and the courts. In doing so, extensive attention is given not just to the text of the provisions, but also to the conflicting opinions regarding their operation, as received by the Senate Legal and Constitutional Committee in the course of its inquiry into the Bill. The Senate Committee's recommendations and the Attorney-General's response are also considered in relation to both the quality of the final Act and the legislative process demonstrated by this episode.

2 Key features of the legislation

It is important to note at the outset that allowing the use of video link evidence in Australian courts is far from novel. The State and Territory courts have possessed a general facility of this kind for several years now. Those courts have a discretion to admit such evidence after assessing whether it would be unfair to the defendant, and whether or not it is convenient and in the interests of justice. At the Commonwealth level, s 12(3) of the Mutual Assistance in Criminal Matters Act 1987 (Cth) allows federal courts to admit video link evidence from a foreign country. Additionally, since 1994 a scheme for the receipt of such evidence has been in operation specifically in respect of child sex tourism offences under Pt IIIA Div 5 of the Crimes Act. The Attorney-General pointed to the latter as a precedent for the introduction of offence-specific video link rules when introducing the provisions in respect of criminal trials for terrorism.⁶

What makes the Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Act unique against all existing practice is the way in which it limits the discretion of the court in terrorism proceedings by providing that, so long as certain conditions are met, and the limited exceptions do not apply, the court must admit the video link evidence. The conditions are stipulated in s 15YV and are as follows:

- The prosecution or defence must have made an application for a direction or order that a witness give evidence by video link;
- They must have given the court reasonable notice of their intention to make the application;
- The witness must not be the defendant in the proceedings;
- The witness must be available, or can reasonably be made available, to give evidence by video link; and
- The facilities required must be available, or can reasonably be made available.

These conditions are germane to both the prosecutor and defendant. Once they are met, the legislation provides the court with a discretion to deny the application on specified grounds. Significantly, the test that governs the discretion varies depending upon whether it is the prosecution or defence who has applied for the admission of the evidence.

⁵ *A v Secretary of State for the Home Department (No 2)* [2006] 1 All ER 575.

⁶ Explanatory Memorandum, above n 2, p 3.

If the defence has made the application, the court must direct or order the witness to give evidence 'unless the court is satisfied that it would be inconsistent with the interests of justice for the evidence to be given by video link'.⁷ This test accords with the standard expression of judicial discretion regarding the admission of such evidence. For example, the question of whether the admission of evidence by video link would be in the interests of justice underpins the court's decision to allow such evidence in child sex cases under s 50EA(e) of the Crimes Act.

However, when the prosecution makes an application under the Act, the court must direct or order the witness to give evidence unless it is of the view that to do so would have 'a substantial adverse effect on the right of the defendant in the proceeding to have a fair hearing'.⁸

The Explanatory Memorandum to the Act was quite direct in acknowledging the narrowing of the discretion to refuse applications made by the prosecution to use video link evidence:

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 a reasonable doubt, the court will only be able to disallow video link evidence where there is a compelling reason to do so.⁹

That the discretion in respect of a request by the defendant gives the prosecution greater scope to resist the admission of video link evidence is seemingly acknowledged by the Explanatory Memorandum, which admits that the 'interests of justice' test is broad enough to allow the court to consider the interests of both parties.¹⁰ The appropriateness of the use of a double standard that is contingent upon which party makes what is, unquestionably, the same request, will form a substantial part of the discussion in the following sections of this article.

The other notable feature of the scheme for video link evidence in terrorism trials is the use of observers. Under s 15YW, the court may provide that an observer be present when a witness gives evidence under a s 15YV direction or order. The rationale is not hard to discern — the measure provides an assurance that there are no physical circumstances, beyond the view of the camera, suggestive of impropriety. What is slightly surprising is that the court is free to dispense with such an important safeguard. Also surprising is the Act's conferral of a further discretion as to whether any appointed observer is required to provide the court with a report about what they saw at the location when the witness provided his or her testimony.

While it is hard to imagine that a court would in practice admit evidence by video link without also requiring the presence of an observer who subsequently will provide a report of the event, the disparity in the Act's approach to these matters is revealing of its particular priorities. On one hand, the court is granted a tightly circumscribed discretion to reject evidence in this

7 Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Act s 15YV(2).

8 Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Act s 15YV(1).

9 Explanatory Memorandum, above n 2, p 6.

10 Ibid.

form but, on the other, the legislature is happy to be far less directive with regard to the use of safeguards. If anything, one might have expected the law to provide that courts *may* grant applications for video link evidence, but in doing so they *must* order that there be an observer who provides a report. Instead, the Act adopts the reverse approach.

If an observer is appointed, he or she can be an Australian diplomatic officer, an Australian consular officer, or any other person, provided that he or she is independent of the prosecutor and defendant, is in a position to give the court a report about what they observe in relation to the giving of evidence, and is reasonably available and appropriate to perform the role in the proceedings. Lest there be some question over the matter, s 15YW(6) expressly states that for these purposes the mere fact that a person is an Australian diplomatic officer or Australian consular officer does not mean the person is not independent of the prosecutor.

There are a number of other new provisions in the Act which support this scheme. These include arrangements for the administering of oaths or affirmations, the technical requirements that must be met and recognition of the right to seek an adjournment and appeal after the making of an order sought by the opposing legal team.

The other substantial purpose of the Act is to amend the Foreign Evidence Act 1994 (Cth) (the FEA) so as to keep the rules relating to foreign evidence in terrorism-related proceedings in step with the new scheme for video link evidence. The Explanatory Memorandum explains that foreign evidence will 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.¹¹ More practically, it also enables evidence to reach the court where poor technological facilities in the other jurisdiction are an obstacle to the provision of evidence by video link. Under the FEA, the court may admit evidence classed as 'foreign material' which, for criminal proceedings, is defined as testimony, and any exhibit annexed to such testimony, obtained as a result of a request made by or on behalf of the Attorney-General to a foreign country.¹² The testimony must have been taken under oath or equivalent and must be signed or certified by a judicial officer of the foreign country concerned.

There is little restriction as to the form of the foreign material. What distinguishes it from the giving of evidence by video link is the live quality of the latter. Indeed, the foreign evidence need not even have been brought into existence for the purposes of the Australian trial at which it is admitted. For example, the testimony may be produced from the transcript of a proceeding in a foreign court, though the FEA is express in not limiting it to that or affidavit form.¹³ Any writing or audio or video recording which is suitably sworn and certified will constitute testimony which can be admitted in proceedings.

It is not difficult to imagine that serious qualms might exist over the reliability of evidence arising from certain jurisdictions whose methods of

¹¹ Ibid, p 12.

¹² FEA s 3.

¹³ FEA s 23(2).

collecting and verifying evidence are less conscientious than our own. In particular, it is well known that several countries regularly utilise torture methods to extract information from persons.¹⁴ These inevitable concerns have been somewhat allayed by s 25(1) of the FEA, which grants to the courts a discretion which, for the purposes of comparison, is worth stating in full:

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 breadth of this discretion, which leaves the matter completely open to the court in each case, was significantly narrowed with respect to terrorism proceedings by the enactment of the Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Act. A new s 25A of the FEA provides that if the proceeding is a criminal proceeding for a designated offence (a list of offences under the many pieces of Commonwealth anti-terrorism legislation — inserted by the Act into s 3 of the FEA) or under the Proceeds of Crime Act 2002 (Cth) in relation to a designated offence, and the prosecution seeks to adduce foreign evidence, then s 25(1) does not apply. Instead, the provision states that the court may direct that the foreign material not be adduced as evidence if the court is satisfied that adducing the material would have 'a substantial adverse effect on the right of the defendant to receive a fair hearing'.

Three things should be noted about this new provision. First, as is immediately apparent, it adopts the higher threshold of 'substantial adverse effect' which now guides the court's discretion regarding applications by the prosecution for use of video link evidence under the Crimes Act, as amended. Second, once again, this narrower test applies only when the prosecution seeks to adduce the evidence in question. The discretion to refuse when the application is made by the defendant is still governed by the much broader test found in s 25. Lastly, s 25A does not, in distinction from s 15YV of the Crimes Act in respect of the video link applications, express the court's discretion in mandatory terms. Despite the otherwise strong similarity between the new provisions in the two Acts, the direction that the court *must* allow video link evidence is not mirrored in the FEA, though whether this disparity is intentional is impossible to say.

3 Key concerns with the legislation

(a) Shifting values in the context of anti-terrorism

The few changes which this Act makes to the trial process are representative of the way in which legislatures across the world have embraced novel measures in response to a heightened state of alert over terrorist activity. Indeed, at the very same time as the Act was going through the

¹⁴ Various human rights organisations identify locations where torture is sporadically or routinely employed. For present purposes, it suffices simply to note that torture appears as an issue in respect of each regional breakdown in the *Amnesty International 2005 Report — The State of the World's Human Rights*.

Commonwealth Parliament far more radical and sweeping changes to the Australian justice system were being unveiled as part of the Anti-Terrorism Act (No 2) 2005 (Cth). Our understanding of legislative change in response to terrorism is crucially informed by the climate of exceptionalism in which legislation such as this was created and by which it was publicly justified.

In light of its only recent technological development, the use of witness testimony via video link is still regarded as an innovation of standard trial procedure and a departure from the principle that an accused is entitled to confront witnesses that are giving evidence against him or her. Of course, this does not mean it is never appropriate to make an exception. As noted above, video link evidence was permitted under State and Territory legislation prior to the introduction of this Act and was also permitted at the Commonwealth level, most notably in respect of child sex tourism offences. However, as the Bills Digest points out, the resort to video link evidence has traditionally been motivated by the witness' vulnerability and a desire to shield them from direct exposure to the accused.¹⁵ Those sensitivities do not apply in the present context. Instead, the witnesses envisaged by the Act may be prisoners incarcerated for their involvement in terrorism offences. These individuals may have incentives — such as a reduction in their sentence or immunity from further suit — that could affect the veracity of their evidence, making the use of video link evidence in such cases much more problematic.

The establishment of a new and offence-specific scheme for video link evidence under the Act was prompted and justified by its undeniable utility in terrorism proceedings. It is not difficult to imagine that trials for terrorist offences — particularly those relating to training with, or membership of, terrorist groups — will benefit from the testimony of persons not presently in Australia. It would seem fair to say that the need for such evidence is greater in terrorism proceedings than is the case in proceedings relating to most other offences under Commonwealth law. It was presumably for this reason that the Attorney-General was not content to allow the matter to remain governed by the existing generic laws regarding the receipt of video evidence and instead took the view that matters of national security warrant the application of special rules.

No submission to the Senate inquiry on the Act objected to the enactment of special provisions to overcome logistical impediments to terrorism trials by enabling video link evidence from overseas. To the extent that the government wished to legislate specifically in that context, there seemed no particular disquiet. Division occurred, however, over the processes and standards by which this end was to be achieved. In particular, a number of those who made submissions to the inquiry, and ultimately the Senate Legal and Constitutional Legislation Committee itself, felt that the degree of disadvantage that this form of evidence might cast upon the accused required the use of appropriate safeguards to minimise the injurious effects of the departure from usual practice.

Ultimately, those concerns fell on deaf ears and the Bill was passed as originally drafted. Whether the features of the legislative regime are adequate

¹⁵ Bills Digest, Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill 2005 (Cth), pp 3–4.

to protect the defendant or whether they will operate to diminish the integrity of the courts remains to be seen. That the changes made by the Act possess the capacity for the latter outcome is made apparent through consideration of its distinctive features.

(b) The onus

As noted in Part II's description of the new s 15YV, when faced with an application by a party to call evidence by video link, the court must allow it unless the other party can satisfy the court that to do so is either not in the interests of justice (in respect of an application from the defendant), or will have substantial adverse effect on the defendant's right to a fair hearing (for applications by the prosecution).

In the Explanatory Memorandum, the Attorney-General's Department was frank in saying:

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.¹⁶

Even under the Commonwealth laws governing child sex crimes, the onus is placed on the party wanting to employ video link evidence. It is important to appreciate the novelty of what the Act does in respect of terrorism offences. The reversal of the onus in the context of terrorism proceedings represents a marked shift in the values which underpin our system of criminal justice. The Act's changes to the Crimes Act and the FEA require those objecting to employment of video link to argue against it, not for those wanting it to make the case for its use. Given the challenge that such evidence presents to the traditional rights of an accused at trial, this is a remarkable development.

The challenge presented to the accused by the shifted onus is further complicated by the secrecy that pervades trials for an offence of threatening national security. At the time the Act was being considered, these difficulties had already been made very apparent in the case of Mr Fadheem Lodhi. Lodhi was charged with terrorist offences under Div 101 of Pt 5.3 of the Criminal Code, as well as with making false statements to the Australian Security Intelligence Organisation (ASIO) under the terrorism questioning regime. At his committal proceedings the Commonwealth was granted permission, despite objections from the defence, to call four witnesses to give testimony via video link. It transpired that those called were all incarcerated — three in the United States where they had made a plea bargain under which they agreed to give evidence in numerous trials and one in Singapore who was being held without charge.¹⁷

Attempts by the defence to discover the particulars of the latter individual's position, and accordingly what pressures might apply to colour his credibility, were forestalled by the operation of the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth). This Act gives the

¹⁶ Explanatory Memorandum, above n 2, p 6.

¹⁷ P Boulton, 'Australia's Terror Laws: The Second Wave' (October 2005) *Australian Prospect* 7.

Attorney-General the power to intervene in any court matter to suppress evidence where judged necessary to protect national security.

Thus, Lodhi's defence counsel was not made privy to parts of the Singaporean witness' evidence. Although that witness was later withdrawn, the Lodhi story presents a good example of how the laws governing procedures in terrorism trials can result in tying the hands of the defence team. The operation of the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) may have the effect of rendering almost immovable the defendant's onus to convince the court to refuse the prosecution's application for video link evidence. The potential of the Act to deny the defendant a fair trial will be further considered below.

During the Senate Committee hearings, staff from the Attorney-General's Department were quizzed as to whether the tests underpinning s 15YV might serve to influence the form of a broader scheme, which those witnesses conceded might be possible in a future review of other existing laws.¹⁸ That exchange alone serves as a reminder of the reasons for wariness over laws such as these. The experience of other legal systems demonstrates that invocation of the exceptional to combat terrorism rarely stays neatly confined to that issue.

However, given that these provisions may well set a precedent which is applied in contexts other than terrorism, the shift in the position of the onus per se is but one of several worrying features. The aspect of the laws that has attracted most consternation is the fact that the threshold to be cleared — for the exercise of the court's discretion to exclude the evidence — differs according to who holds the onus. This feature of the Act has invited the serious charge that it is intended to aid the prosecution and disadvantage the defence.

(c) Different tests for the prosecution and defence

The clear purpose of s 15YV of the Crimes Act is to limit the discretion of the court to refuse applications for the admission of evidence by video link. The court is able to refuse an application from the prosecution only on the basis that, if granted, the direction or order for a witness to give evidence by video link would have 'a substantial adverse effect on the right of a defendant to receive a fair hearing'. Applications by the defendant for the admission of evidence by video link are subject to a wider and more familiar ground for refusal, with the court able to reject the application on the basis that it would be inconsistent with the interests of justice for the evidence to be given by video link.

In parliamentary debate, the Attorney-General was at pains to explain the disparity as only semantic in character. In responding to concerns that the two tests worked to the disadvantage of defendants, Phillip Ruddock said that:

to imply that different tests necessarily mean that one party is disadvantaged over another is not, in my view, a safe assumption . . . The question, in my view, should

¹⁸ Evidence to Senate Legal and Constitutional Committee, Parliament of Australia, Sydney, 21 October 2005, p 35 (Mr Geoffrey Gray).

not be whether the tests are different but whether the tests that have been set for the prosecution and the defence are fair and appropriate.¹⁹

This stance alone, however, cannot explain the move to two tests in the first place. It can merely excuse it after the fact.

When questioned about why the law was drafted to limit the court's discretion using two different tests depending upon the applicant, the Attorney-General explained as follows:

It would not be practicable to make the test for the defendant's applications analogous to those that the prosecution has to meet. That test of course would be that if the defendant makes the application the court must allow the witness to give evidence by video link unless to do so would have a substantial adverse effect on the right of the prosecution in proceedings to have a fair hearing. In my view, those words would make no sense because the prosecution does not get a right as such to a fair hearing in the same way that you expect a defendant should.

The test needs to be different, and the interests of justice test for the defendant applications is an appropriate and flexible test that will give the court the capacity to protect the interests of the defendant. It will also allow the interests of the prosecution to be taken into account. The test for the prosecution applications is more narrowly focused on protecting the defendant's interests, as in that situation there is no need for the court to second-guess what is in the interests of the prosecution.²⁰

It is worth citing this passage at length because it encapsulates the basic argument which the departmental witnesses presented to the Senate Committee inquiry. The rationale has, at first, a certain superficial logic to it. It would be most odd indeed to require the prosecution to show the court that granting a defendant's application for use of video link evidence would have a substantial adverse effect upon its case. This argument, however, only appears satisfactory if one does not ask why it takes as its starting point an attempt to match the test in respect of defendant applications with the test that applies to applications by the prosecution. Mr Geoffrey Gray, appearing for the Attorney-General's Department before the Senate Committee, defended the double standard in a similar way. Almost his first comment in the committee hearing pointed to the great difficulty of winding forward the defence test to that of the prosecution.²¹ This reasoning was crucial in the department's argument that the use of two tests was inescapable, as demonstrated when Mr Gray said:

So, if we assume for the moment that we are not going to lower the prosecution tests — and you cannot raise the defence test — you end up with two different tests. That is the position. That is the reason — the justification, if you like — for there being two different tests.²²

What is *not* addressed is why, in the first place, the court's discretion to refuse an application from the prosecution takes as its threshold the

¹⁹ *Parliamentary Debates*, above n 4, p 38 (Philip Ruddock, Attorney-General).

²⁰ *Ibid*, p 21.

²¹ Evidence to Senate Legal and Constitutional Committee, above n 18, p 28 (Mr Geoffrey Gray).

²² *Ibid*, p 37.

requirement of a 'substantial adverse effect on the right of a defendant to receive a fair hearing'.

There is much to suggest that the use of that particular threshold is designed, just as it appears, simply to restrict — as much as possible — the court's discretion to reject an application by the prosecution. The Attorney-General, when responding to the concern that there was no similar test in respect of other schemes for video link evidence, admitted that 'the test is intentionally different because the Bill is designed to facilitate the admission of video link evidence in terrorist cases'.²³ Given that the broader 'interests of justice' test for challenging applications made by the defendant in s 15YV(2) is the test that is invariably used elsewhere, this statement practically admits that the distinction between the two tests in the immediate context is indeed a real one, weighted to the benefit of the prosecution. Passages of the Explanatory Memorandum merely reinforce that impression.²⁴

In oral evidence before the Senate Committee, the Attorney-General's Department asserted that the difference between the two tests 'is a matter of form and not of substance'.²⁵ However, this message was repeatedly undercut by their own admissions as to the purpose and nature of those tests. Mr Gray, echoing his Minister, explained that the underlying policy of the Bill was to 'encourage and promote the use of video link evidence'.²⁶ In pursuit of this goal, the department's method was to:

apply the same approach to the prosecution and the defence, which is to put both bars as high as you can — to allow video evidence except in those cases where it would be inappropriate to allow it in terms of fairness and justice — you could put it higher for the prosecution than for the defence or at a different point for the prosecution than the defence because of the different roles that are played by the defence and the prosecution in the criminal process.²⁷

This notion that the different role of each side in a criminal matter somehow justifies use of a different threshold will be considered below. At this point, however, we should note the acknowledgment that the tests *are*, as a matter of substance, not simply equal to each other. At the very beginning of his questioning by the committee, Mr Gray admitted this even more explicitly. When Senator Mason asked why the defence should not simply have to show that granting a prosecution application for video link evidence would not be in the interests of justice, Gray responded:

²³ *Parliamentary Debates*, above n 4, p 39 (Philip Ruddock, Attorney-General).

²⁴ See, eg, Explanatory Memorandum, above n 2, p 1:

These new provisions will facilitate the prosecution of terrorism offences by ensuring that, in the absence of compelling reasons to the contrary, important evidence from overseas witnesses that are unable to travel to Australia can be put before the court using video link technology.

²⁵ Evidence to Senate Legal and Constitutional Committee, above n 18, p 37 (Mr Geoffrey Gray).

²⁶ *Ibid*, p 50.

²⁷ *Ibid*, p 37.

Because the interests of justice test is lower than the test here [substantial adverse effect]. This test quite deliberately raises the bar to the point as high as the drafters and the legal advisers think it can be taken without going beyond that which is constitutionally permissible.²⁸

He then submitted that use of the lower ‘interests of justice’ test for the prosecution would not achieve the stated policy approach.²⁹ For those concerned about this aspect of the Act, statements of this sort simply reinforced the differential treatment of the prosecution and defence in terrorism trials which was clear from the employment of distinctive textual formulations. The department’s insistence that despite completely different words, the two tests were essentially the same was always going to be a rather strained argument, which was not assisted by candid admissions of the kind just considered. To the extent that the substantive difference between the two standards was undeniable, the attempt to explain this on the basis of the unique roles of the opposing parties was also problematic.

The Attorney-General’s Department and the CDPP both stressed that the prosecution was subject to more onerous duties and obligations than the defence.³⁰ In particular, the prosecution is required to disclose details of the evidence that they intend to bring at a committal proceeding. The defence, on the other hand, does not have to present their case or identify their witnesses until the actual trial. The attempt to explain the differing tests on this basis was utterly rejected by the Human Rights and Equal Opportunity Commission (HREOC), which argued that the duties of disclosure are imposed upon the prosecution to create equality of arms between the parties, and could not provide justification for the imposition of unequal evidentiary rules with respect to other matters. HREOC submitted that:

it is a surprising suggestion that the defence should be effectively ‘penalised’ by reason of a feature which is recognised, in international and domestic law, as an important component of a fair hearing. That is particularly so when the ‘penalty’ involves the application of a more onerous test for resisting the adducing of video link evidence, thus violating the principle of equality of arms which is another key feature of a fair hearing.³¹

Australian Lawyers for Human Rights (ALHR) highlighted the negative implications for the defence arising from the combination of carrying the onus to challenge the prosecution’s application to use video link evidence and the high standard required to do so successfully:

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.³²

28 Ibid, p 31.

29 Ibid.

30 Ibid, pp 28–30 (Mr Geoffrey Gray and Mr John Thornton).

31 HREOC, Submission (No 2) to Senate Legal and Constitutional Committee Inquiry into the Provisions of the Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill 2005, p 4.

32 ALHR Submission to Senate Legal and Constitutional Committee Inquiry into the

The novel disadvantages faced by the defendant in this situation cannot be said to be offset by the requirement that the prosecution divulge details of its case at committal.

In order to demonstrate the nature of the inequality that the two tests would enable, HREOC pointed out that while — under the interests of justice test — the prosecution may object to the admission of video link evidence on the basis of a broad range of considerations extending well beyond the interests of the defence and the prosecution, such as ‘the expense occasioned by the making of the direction or order, the effect it would have on the length of the trial, the interests of the general community and the interests of the proposed witness’,³³ the grounds upon which the defence might object to evidence adduced by the prosecution are far narrower. Indeed, ‘the only relevant consideration where the prosecution makes such an application . . . is the effect on the right of the accused to a fair hearing’.³⁴ Mr Gray, in oral evidence before the committee, attempted to defuse — but could not refute — this argument by saying that those additional matters would rarely be successfully invoked by the prosecution to prevent a defendant calling evidence by video link which was relevant to his or her case.³⁵ This kind of logic actually led him to then suggest that in fact *neither* of the exceptions to the legislative direction to the court to allow such evidence really warranted the level of concern being expressed since the department did ‘not see the discretions in this Act being exercised on a regular basis’.³⁶ While the placing of the onus upon the objector must, as considered in the preceding section, result in less use of the discretions than might otherwise be the case, that consideration cannot paper over the clear distinctions between the two standards upon which the exception can be invoked.

Indeed, a sizeable portion of the committee’s time was spent just seeking to understand exactly what constituted a ‘substantial adverse effect’. The Bills Digest identified two other uses of the expression in federal legislation — neither of which left much doubt that it was a difficult standard to satisfy. In particular, s 7 of the National Security Information (Criminal and Civil Proceedings) Act expressly acknowledges that the effect is to be not ‘insubstantial, insignificant or trivial’.³⁷ A clarification of that sort might be seen by many as a profoundly unhelpful statement of the obvious, but its

Provisions of the Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill 2005, at [12]. The Attorney-General’s Department attempted to counter this argument by setting up an extreme meaning of the test for comparison. Mr Gray at the Senate’s hearings said: ‘The defendant does not have to show that they are actually going to be convicted when they might otherwise be acquitted. They are going to show that if that evidence comes in in that form there is a reasonable prospect that they might lose a reasonable chance of acquittal’: Evidence to Senate Legal and Constitutional Committee, above n 18, p 33 (Mr Geoffrey Gray).

33 HREOC, Submission (No 1) to Senate Legal and Constitutional Committee Inquiry into the Provisions of the Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill 2005, p 20.

34 Ibid.

35 Evidence to Senate Legal and Constitutional Committee, above n 18, pp 50–1 (Mr Geoffrey Gray).

36 Ibid, p 51.

37 Bills Digest, Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill 2005 (Cth), p 11.

absence in respect of s 15YV might be construed as an attempt to downplay the disparity between the two tests. In all likelihood, the failure to include such a provision was simply an oversight — one remedied in the Act by the addition of subs (3) which mirrors the provision from the National Security Information Act. In any case, as we have already seen, despite their core insistence that the two tests were the same in substance, the government departments and agencies appearing before the Senate could not help but admit that the test of ‘substantial adverse effect’ was ‘as high as the drafters and the legal advisers think it can be taken’.³⁸ The CDPP’s submission shed some more light on why that was felt necessary: lest some defendant argue ‘that there is an adverse effect by the mere fact that the witness is not physically present in the courtroom’.³⁹

Both HREOC and ALHR, while appreciating the purpose and desirability of a facility for taking evidence by video link, felt that the relative weighting of the defendant’s interests in this way was an unmistakeable abrogation of the right to a fair trial. ALHR argued that — in the context of terrorism — the court’s ability to assess the credibility of witnesses is vital and the Act’s focus on promoting use of video link did not adequately take that into account.⁴⁰ The Attorney-General’s Department endeavoured to split these issues by saying that the mode by which evidence is delivered does not affect the usual rules and powers of the court and thus, in the assessment of the demeanour of a witness, there is no ‘significant difference between the position of the witness giving evidence by video link and the position of the witness coming to Australia’.⁴¹ That view was met with scepticism from the Senate Committee.⁴²

It should be apparent from all the above that the suggestion from the Attorney-General and his department that the two tests amount to the same thing was, and is, untenable. There are two specific arguments against the adoption of the double standard approach.

The first is that s 15YV infringes Australia’s obligations under the International Covenant on Civil and Political Rights⁴³ (ICCPR) to guarantee universally accepted norms of fair trial. While the admission of evidence by video link would not, of itself, give rise to a contravention of the principles set out in Art 14(1) of the ICCPR, the imbalance created by the two tests for the exclusion of evidence favours the prosecution and violates the principle of ‘equality of arms’ that finds expression in Arts 14(1) and 14(3)(e) of the ICCPR.⁴⁴ In a further argument which echoed the difficulties faced by the

38 Evidence to Senate Legal and Constitutional Committee, above n 18, p 31 (Mr Geoffrey Gray).

39 CDPP Submission, above n 3, p 2.

40 Evidence to Senate Legal and Constitutional Committee, above n 18, p 17 (Mr Simeon Beckett).

41 Ibid, p 32 (Mr Geoffrey Gray).

42 Ibid, pp 32–4 (Senator Ludwig and Senator Mason).

43 International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

44 HREOC, Submission to Senate Legal and Constitutional Committee Inquiry into the Provisions of the Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill 2005, at [30]; see also ALHR, Submission to Senate Legal and Constitutional Committee Inquiry into the Provisions of the Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill 2005, at [10].

defence team in the Lodhi trial, HREOC suggested that the covenant could be breached by the 'cumulative effect' of Commonwealth statutes.⁴⁵ The obvious combination being, of course, s 15YV of this Act with the suppression orders available to the Attorney-General under the National Security Information (Criminal and Civil Proceedings) Act. The Attorney-General's Department responded directly to the charge that the provisions are in contravention of Australia's obligations at international law merely by resorting to the position that the tests bring about the same result for both parties.⁴⁶

The second basis for opposing the Act's scheme is the concern that public confidence in the court system might diminish as a result of the clear disadvantage faced by the defendant under the double standard. The defence is arguably denied a fair chance to object to the admission of evidence that may well be highly prejudicial to their case in circumstances where that evidence may be very unreliable and is delivered under uncontrolled conditions. The potential for a false conviction as a result of this scheme is against the interests not only of the defendant, but also the wider public who are entitled to have confidence in the conviction of terrorists by the Australian court system. In debate over the Bill in the House of Representatives, this concern underscored Daryl Melham's calling to mind the terrible miscarriages of justice against Irish nationals by the United Kingdom courts in the 1970s.⁴⁷

Just as importantly — if not more so — is the moral and ethical imperative which is intrinsic to our ongoing efforts to combat terrorism. It is important to be able to say that convicted terrorists have had an entirely fair trial. To expose the Australian court system to the criticism that the odds have been stacked against the accused is only to play into the hands of our enemies by diminishing our own commitment to long-held values.

(d) Observers

An important safeguard in the scheme for use of video link evidence is the Act's provision for an observer to be appointed under s 15YW. It was, however, somewhat ambitious of the Attorney-General — at the second reading of the Bill — to claim: '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.'⁴⁸ That sweeping assurance was not readily accepted by many of those making submissions to the Senate inquiry, nor by the committee in its report on the Bill. A number of shortcomings were noted, ranging from the inappropriateness of giving the court an unguided discretion over whether observers are appointed,⁴⁹ and whether they must present a

45 HREOC, Submission to Senate Legal and Constitutional Committee Inquiry into the Provisions of the Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill 2005, at [34].

46 Evidence to Senate Legal and Constitutional Legislation Committee, above n 18, p 38 (Mr Geoffrey Gray).

47 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 October 2005, p 35 (Daryl Melham).

48 Ibid, p 9 (Philip Ruddock, Attorney-General).

49 Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Act s 15YW(1).

report to the court,⁵⁰ to concerns over their independence,⁵¹ the limited role prescribed for them by the provisions,⁵² and the limited role of any report that they produce.⁵³

The balance of prescriptive and discretionary elements of the Act, having strongly directed the court to allow video link evidence through s 15YV, then leaving all matters relating to observers entirely to the court's unguided discretion was noted earlier as illuminative of the legislative priorities at work — the paramountcy of the admission of the evidence and the seeming insignificance of adequate protections for the accused. The equanimity over whether an observer should be appointed at all is puzzling and renders the 'safeguard' far weaker than would otherwise be the case. HREOC expressed concern that since the discretion came unaccompanied by factors that might determine its use, it would be difficult for parties to challenge the court's decision.⁵⁴ They went so far as to suggest that the defence should be able to insist upon the use of an observer, at least in certain circumstances.⁵⁵

It is arguably even more difficult to understand why an observer, if appointed, would not be required to report on what they witness unless the court chooses to invoke its discretion under s 15YW(7) to direct that a report be given. Similarly, concerns exist regarding the scope of any report, which is confined to what 'the person observed in relation to the giving of evidence by the witness'.⁵⁶ The immediacy of that specific context was seen by some as preventing a report to the court about more general matters — such as the conditions under which a witness was being held by the authorities in the foreign jurisdiction or acts of intimidation occurring prior to the giving of evidence, about which the observer might be able to learn.⁵⁷ Senator Mason expressed this very concern when he said: 'it is not going to be the gun to the side of the video link [that intimidates witnesses], it is going to be the belting

50 Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Act s 15YW(7).

51 Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Act s 15YW(4) specifies that an observer may be (a) an Australian diplomatic Officer; (b) an Australian consular Officer; or (c) any other person.

52 Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Act s 15YW(7)(c) provides that the observer may make a report 'about what the person observed in relation to the giving of evidence by the witness'.

53 Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Act s 15YW(7)(d) provides that the report is to be used 'for the purpose of deciding whether evidence given by the witness under the section 15YV direction or order should be admitted into evidence in the proceeding'.

54 HREOC Submission to Senate Legal and Constitutional Committee Inquiry into the Provisions of the Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill 2005, at [45].

55 Ibid.

56 Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Act s 15YW(7)(c).

57 ALHR Submission to Senate Legal and Constitutional Committee Inquiry into the Provisions of the Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill 2005, at [28]; HREOC Submission to Senate Legal and Constitutional Committee Inquiry into the Provisions of the Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill 2005, at [46]. See also Evidence to Senate Legal and Constitutional Legislation Committee, above n 18, pp 16, 48–9.

before the court starts and before the evidence is taken.⁵⁸

In response to Senator Mason's comment, Mr John Thornton from the CDPP made a comment that revealed a markedly laissez-faire approach to the function of reporting itself, saying:

I would have thought that, if there was something that really did concern an observer while they were over there, there would be a way of actually getting that information back. They could get in touch with the court, because they are court appointed.⁵⁹

This seems a strange response when the legislation itself could easily formalise the reporting role so that the initiative need not be taken by the observer. The Attorney-General's Department sought to support Mr Thornton:

Mr G Gray — That is another area where we deliberately kept the provision vague and flexible.

Acting Chair — You say 'vague and flexible'; other people say that we need to make it more prescriptive.

Mr G Gray — Okay, if they want it to be more prescriptive, we say, 'That's fine. You can make it certain and prescriptive, and that will achieve a good result in this situation.' And then you could get into another situation and it could all fall to pieces because it is too prescriptive. So that is the approach that has been taken into account.⁶⁰

It is difficult to envisage circumstances where a requirement that an observer must provide a report to the court would make the situation 'all fall to pieces'. That outcome would seem unlikely even if the section stipulated additional matters to be addressed by such a report. If the observer has difficulty in accessing facts about the witness' situation beyond what they see when the evidence is given, then presumably the report would just be silent or unable to express an opinion as to those matters.⁶¹ It could not conceivably destroy the case. The Act's current formulation, however, means that when damaging information is to hand, there is a real risk that it will not be brought to the attention of the court.

A separate issue which aroused critical comment was the range of persons who might serve as observers under the provisions. While physical proximity to the location in which the witness will give evidence must be the overriding

58 Evidence to Senate Legal and Constitutional Legislation Committee, above n 18, p 48 (Senator Mason).

59 Ibid, p 48.

60 Ibid, p 49.

61 It might also be added that this view does *not* amount to a request that the Attorney-General's Department should draft the law so as to give observers the role or function of 'protect[ing] the rights of the defendants or to regulate the activities of the foreign investigators or the foreign authorities': Evidence to Senate Legal and Constitutional Legislation Committee, above n 18, p 29 (Mr Geoffrey Gray). That would be inappropriate as well as highly difficult, but it is to skew the complaint that is being made about the limited scope of reporting. Mr Gray's insistence that the observer is simply 'the eyes and ears of the judge' seeks to equate the video link evidence with testimony provided in person in the court. It is clear, however, that the very different circumstances of the former mean that facts outside the giving of evidence might be worthy of some assessment and comment. In respect of evidence given locally, judges can have confidence in the conditions under which a witness is detained and or questioned. The same cannot always be said for witnesses appearing via video link, and thus the court is properly interested in hearing any relevant information in this regard.

practical consideration,⁶² the Act does also require the person to be independent of all parties and generally appropriate.⁶³ The ideal of independence, however, may be constrained in practice by the limited number of suitable persons that the court is likely to find available in the other jurisdiction. For this reason, the Act expressly recognises that Australia's diplomatic or consular staff are not to be seen as lacking independence from the prosecution by the 'mere fact' that they are in such employment.⁶⁴ ALHR insisted that the provisions are inadequate in ensuring an appropriate level of 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.⁶⁵

This contribution highlights the lack of a really robust attempt to ensure the observer's independence. As the AHLR indicated, nothing appears in the Act to prevent a member of the executive arm of government filling the role, so long as he or she is not able to be linked directly to the prosecutor. The idea that personnel from the Australian Federal Police — no matter that they have had no involvement in preparing the prosecution case — could act as observers is clearly unsatisfactory given the perception to which it gives rise.⁶⁶ The same can also be said of persons affiliated with Australia's security agencies and government staff generally. The Act apparently condones members of the executive adopting this role (as evidenced by its express inclusion of diplomatic and consular staff). A detailed proscription might be one response to this concern, though a clearer indication as to who would be preferred candidates is probably less unwieldy. The suggestion that these persons be drawn from the legal profession would accord with the observer's obvious duty to the court.

(e) Torture

The most alarming concern raised over the Act's amendment of both the Crimes Act and the FEA was that it does not adopt a clear safeguard against the admission into Australian courts of evidence procured through torture. In

⁶² Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Act s 15YW(5)(d).

⁶³ Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Act s 15YW(5).

⁶⁴ Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Act s 15YW(6).

⁶⁵ ALHR Submission, to Senate Legal and Constitutional Committee Inquiry into the Provisions of the Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill 2005, at [27]. See also HREOC discussion of this point: Evidence to Senate Legal and Constitutional Legislation Committee, above n 18, p 21 (Mr Craig Lenehan).

⁶⁶ This scenario was discussed before the Senate Committee: Evidence to Senate Legal and Constitutional Legislation Committee, above n 18, p 15 (Senator Ludwig and Mr Simeon Beckett).

respect of evidence given by video link under the Crimes Act, the risk of evidence procured in this way being admitted is rather less, given that an observer may be present at least at the time testimony is provided. Clearly the narrow operation of the observer's role and the discretion as to whether one is even appointed — deficiencies discussed in the preceding section — mean that concern over tainted evidence cannot be entirely eradicated.⁶⁷ However, it is in respect of the Act's amendment of the rules governing foreign evidence under the FEA that the legislature has arguably left the door open to the admission of evidence tainted by the use of torture.

First, there is no provision for the use of an observer in respect of such evidence and indeed, as a matter of practicality, such a mechanism is not feasible in this context. It will be recalled that the 'foreign material' which may be adduced under the FEA need not have been brought into existence for the specific purpose of the Australian proceedings. It could well be testimony taken from the transcript of a proceeding in a foreign court, or any other writing or audio or video recording that is suitably sworn and certified. At the time such evidence is produced no observer appointed by an Australian court will be likely to be in attendance. Second, the form that the foreign evidence may take means that it is far less direct than evidence given by a witness interacting with members of the court via video link. Third, the fact that the evidence adduced must be sworn and certified is, depending upon its origin, not much of an assurance. During the Senate inquiry, Senator Ludwig in particular was very concerned that the Act adopted a 'one-size fits all' approach to the giving of evidence and that countries 'outside the rule of law are not ruled out'.⁶⁸

Of course, these issues are always raised to some degree upon receiving evidence from another jurisdiction, but they are further intensified in the immediate context by the use of the double standard which, for all the reasons canvassed earlier in this article, appear to improve the odds for the prosecution when it applies to call such evidence. Indeed, the concern over the use of a higher standard to limit the court's discretion in respect of applications from the prosecution is central to other objections about the Act. The common standard that applied to all applications for the admission of foreign evidence

⁶⁷ The HREOC submission raised this concern directly in respect of the new s 15YV of the Crimes Act. While HREOC acknowledged that it is likely that evidence that was tainted by torture would be excluded, they considered that (HREOC Submission to Senate Legal and Constitutional Committee Inquiry into the Provisions of the Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill 2005, at [42]):

the possibility remains that it may be admitted as a matter of discretion. Given that there appears to be grounds for concern about video link evidence which may be adduced under the Bill from witnesses testifying in foreign states, the Commission considers that it would be desirable to remove any such discretion and simply proscribe the admission of such evidence, at least where it is adduced via video link.

⁶⁸ Evidence to Senate Legal and Constitutional Legislation Committee, above n 18, p 24. Earlier the Senator expressed concern that 'there does not seem to be any bar on which countries could be utilised for video evidence': Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Sydney, 21 October 2005, p 3. It is safe to say that the concerns about the integrity of evidence from certain jurisdictions, as received by video link, are magnified in the context of the broad range of foreign evidence admissible under the FEA.

before the Act came into force — s 25 of the FEA — employs an ‘interests of justice’ test for both parties, and while the possibility of admitting evidence tainted by torture remains, those concerns must be accepted as going with the territory. The loaded standard applicable to prosecution attempts to adduce foreign evidence in respect of terrorism proceedings under the amended FEA increases this risk simply because it narrows the court’s discretion to reject the application with no acknowledgment of the real uncertainties pertaining to such evidence.

Some care is required here not to overstate the case. It definitely remains within a court’s discretion to reject an application — made by either party — to rely on evidence that was obtained ‘improperly . . . unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained’.⁶⁹ One would like to think it almost certain that a court that has cause to believe the evidence in question was obtained by torture would reject it. This was the tenor of submissions which downplayed the concern over torture, though the context in which such remarks were made was generally confined to the provisions affecting video link evidence.⁷⁰

Be that as it may, all non-government submissions to the Senate contained significant concerns about torture. The lack of appropriate safeguards in this respect is, once again, referable to the Act’s pursuit of the policy of not just *enabling* use of video link and foreign evidence, but actually *promoting* it — at least when brought forward by the prosecution. Caution is not apparent on the face of the statute, in apparent incongruity with the highly prescriptive nature of some of its provisions. It seemed reasonable and in fact entirely appropriate for the parliament to take this opportunity to give expression in domestic law to its abhorrence of torture.⁷¹ In so doing it would, as HREOC pointed out, be enacting obligations already undertaken by the Commonwealth at international law.⁷²

The importance and value of such an approach was, at the very time of the

69 Uniform Evidence Act 1995 (Cth, ACT, NSW, Tas) s 138. As HREOC pointed out in its submission, in States where the common law rules apply the question is still one of discretion which may see the evidence admitted: HREOC Submission to Senate Legal and Constitutional Committee Inquiry into the Provisions of the Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill 2005, at [41].

70 For example, Mr Gray of the Attorney-General’s Department in Evidence to Senate Legal and Constitutional Legislation Committee, above n 18, pp 31–2 said:

Those protections come in under the normal rules, protections and powers of the court under the Evidence Act and the normal ability to control proceedings . . . You do not then need a provision in here to say that that evidence is not admissible. It would not be admitted through the exercise of the normal discretions and powers of the court.

See also CDPP Submission, above n 3, pp 3–4.

71 Gilbert + Tobin Centre of Public Law Submission to Senate Legal and Constitutional Committee Inquiry into the Provisions of the Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill 2005, p 4.

72 HREOC Submission to Senate Legal and Constitutional Committee Inquiry into the Provisions of the Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill 2005, at [37]–[40]. Though HREOC favoured as a safeguard, ‘a narrower set of exhaustive considerations which apply equally to both parties. Any amended provision should also clearly state that the right of the accused to a fair hearing should not be violated’: at [56].

Act's introduction, demonstrated by a House of Lords case regarding the legality under the law of the United Kingdom of foreign evidence obtained by torture. The decision of *A v Secretary of State for the Home Department*⁷³ was handed down on 8 December 2005, just three weeks after the Act came into force. The central question in that case was whether the Special Immigration Appeals Commission (SIAC), in determining to certify an individual as a suspected international terrorist for the purposes of deportation or detention, could receive and rely upon evidence which had, or might have been, procured through torture.⁷⁴ It was accepted by all parties that where the torture was performed by or with the connivance of British authorities, such evidence was barred. The legal controversy pertained to evidence sourced from elsewhere. SIAC itself had held that such evidence was admissible and that the fact or possibility of torture merely affected the weight given to it — a decision later affirmed by the Court of Appeal.⁷⁵ The relevant legislation did not address the issue, and while the Home Secretary stated that he had no intention of relying on such evidence in proceedings before SIAC or the Administrative Court charged with issuing control orders, he maintained that its admission was not precluded by law. This apparent reluctance to emphatically close the door to evidence tainted by torture not only challenged the appellant's case but attracted the intervention of 17 human rights and legal organisations.

Their Lordships were most definite in their opinion that the common law has long been opposed to the use of evidence obtained by torture.⁷⁶ This was established on grounds which may fairly be described as a mixture of history, pragmatism and principle. Torture was seen to produce unreliable evidence,⁷⁷ and the use of such evidence may be seen as condoning the barbaric practices by which it was acquired — with damaging effect upon the integrity of the judicial process.⁷⁸ These findings were further confirmed by a consideration of instruments of international law prohibiting the use of, or reliance upon, torture methods to procure evidence.⁷⁹ Thus, the Home Secretary's assertion that the admission of such evidence was not barred met with considerable

⁷³ [2006] 1 All ER 575.

⁷⁴ It is worth noting that their Lordships, in contrast with the behaviour which the Constitution would be expected to produce in the High Court of Australia, did not draw particularly sharp distinctions between SIAC as an executive body and the judicial courts. Rather, they assumed that it should be governed by the same sorts of considerations and 'standards of justice which have traditionally characterised the proceedings of English courts': *ibid*, at [95] per Lord Hoffmann.

⁷⁵ [2005] 1 WLR 414.

⁷⁶ [2006] 1 All ER 575 at [52] per Lord Bingham of Cornhill, [70] per Lord Nicholls of Birkenhead, [97] per Lord Hoffman, [112]–[113] per Lord Hope of Craighead, [129], [137] per Lord Rodger of Earlsferry, [152] per Lord Carswell, [164] per Lord Brown of Eaton-under-Heywood.

⁷⁷ *Ibid*, at [17] per Lord Bingham of Cornhill, [112] per Lord Hope of Craighead, [130] per Lord Rodger of Earlsferry, [147] per Lord Carswell, [161] per Lord Brown of Eaton-under-Heywood.

⁷⁸ *Ibid*, at [17]–[21], [52] per Lord Bingham of Cornhill, [69] per Lord Nicholls of Birkenhead, [82], [87], [91], [95] per Lord Hoffman, [112] per Lord Hope of Craighead, [137] per Lord Rodger of Earlsferry, [149]–[150] per Lord Carswell, [165] per Lord Brown of Eaton-under-Heywood.

⁷⁹ *Ibid*, at [24]–[44] per Lord Bingham of Cornhill, [84] per Lord Hoffman, [80], [119]–[120] per Lord Hope of Craighead, [162] per Lord Brown of Eaton-under-Heywood.

opposition. The court was of the view that mere silence in the legislation could not sustain the suggestion of lawful admission by the government. Lord Bingham confessed to being:

startled, even a little dismayed, at the suggestion (and the acceptance by the Court of Appeal majority) that this deeply-rooted tradition and an international obligation solemnly and explicitly undertaken can be overridden by a statute and a procedural rule which make no mention of torture at all.⁸⁰

The consensus was that if use of questionable evidence was to be condoned, then parliament's approval needed to be absolutely explicit.⁸¹ Their Lordships, clearly mindful of the difficulties and uncertainties attaching to the use of foreign evidence, were of the opinion that when evidence was plausibly challenged, the relevant court should inquire into the circumstances of its collection. Three Law Lords said that unless able to satisfy itself that there was no risk the evidence had been obtained by torture, the court should refuse to admit it.⁸² The other four members of the bench were slightly more flexible. They agreed that the evidence should not be admitted if the court concluded, on the balance of probabilities, that it was tainted by torture, but were prepared to allow its admission where the court was in doubt, though the evidence should be weighed accordingly under those circumstances.⁸³

The result in *A v Secretary of State for the Home Department* is relevant to our consideration of the same issue here in Australia. The decision is heartening in its round condemnation of torture and the use by courts of evidence obtained by such practices. However, the court's focus upon the 'principle of legality' — the rule that any parliamentary negation of human rights must be expressed in very clear terms — requires specific consideration of the different legislative context in Australia. Leaving aside those States still governed by the common law on this question,⁸⁴ the Uniform Evidence Act, as cited earlier, clearly countenances the admission of improperly obtained evidence if the relevant court thinks the benefit of doing so outweighs the detriment. But this could hardly be said to amount to a legislative direction as to how evidence obtained by torture is to be dealt with. It is surely possible to distinguish the broad notion of improperly or illegally obtained evidence from the gross violations of human rights through torture. The impropriety and illegality involved in the collection of evidence may be considered to be minor in some instances, explaining the willingness of the legislature to leave admissibility to the discretion of the courts on a case by case basis. But the negation of human rights involved in admission of evidence obtained by torture must surely be expressed in the clearest of terms. That was certainly the view of their Lordships. For instance, Lord Hope stated:

⁸⁰ Ibid, at [51].

⁸¹ Ibid, at [51] per Lord Bingham of Cornhill, [96] per Lord Hoffman, [114] per Lord Hope of Craighead, [137] per Lord Rodger of Earlsferry.

⁸² Ibid, at [56] per Lord Bingham of Cornhill, [80] per Lord Nicholls of Birkenhead, [98] per Lord Hoffman.

⁸³ Ibid, at [116]–[121] per Hope of Craighead, [145] per Lord Roger of Earlsferry, [155]–[157] per Lord Carswell, [172] per Lord Brown of Eaton-under-Heywood.

⁸⁴ Only Queensland and South Australia have no equivalent provision on point. In Victoria, see Evidence Act 1958 (Vic) ss 5, 9D, 9J; and in Western Australia see Evidence Act 1906 (WA) s 112.

Rule 44(3) of the Special Immigration Appeals Commission (Procedure) Rule 2003 provides that the Commission may receive evidence that would not be admissible in a court of law. But I consider, in agreement with all your Lordships, that this rule is incompatible with the fundamental nature of the objection to the admission of statements obtained by the use of torture, wherever it was administered, and that it does not extend to them.⁸⁵

Further, the attempt by the House of Lords to stipulate how a court should approach evidence that may be tainted by torture lends significant support to calls for a clear direction to local courts against the admission of such evidence. In sentencing Jack Thomas for the offence of intentionally receiving funds from a terrorist organisation under s 10, Justice Cummins in the Supreme Court of Victoria said that had the accused's interview with authorities been tainted by torture, he would 'unhesitatingly have rejected it'.⁸⁶ His Honour's other remarks, which culminated with the assertion that 'courts of this country never will receive evidence derived from torture',⁸⁷ were similarly reassuring but it has to be recognised that in some cases the picture may not be so clear as it was in the Thomas trial. The Law Lords suggested how a court might respond to concerns over the integrity of evidence, but they did not manage to articulate a single rule — and they were not reaching their decision in the context of a double standard narrowing the court's discretion to prevent the prosecution adducing foreign testimony.

That last point is, once again, crucial to appreciating the inadequacy of the present discretion of Australian courts to exclude improperly obtained evidence. While the Senate Committee itself expressed concerns about torture during its hearings, ultimately a majority of its members preferred to leave the matter to the discretion of the courts, without an express legislative statement.⁸⁸ However, their comfort in doing so must be seen in the context of the recommendations made by the committee for amendment of the Act. It clearly believed the changes it proposed to the Bill would enable fears over tainted evidence to be satisfactorily allayed.

4 Outcomes of the committee process

The Senate Committee firmly supported the aims of the Bill — an unsurprising result in the absence of any submission taking a contrary position. From the time of the Bill's introduction to the House of Representatives, attention had been exclusively confined to the propriety of its methods and adequacy of its safeguards, rather than the broad issues of need and purpose. As to the concerns raised, the committee was not wholly satisfied with the Bill and was clearly persuaded by the non-government submissions that argued the case for amendment of key provisions.

⁸⁵ *A v Secretary of State for the Home Department* [2006] 1 All ER 575 at [114]. See also Lord Rodger at [138].

⁸⁶ *DPP (Cth) v Thomas* [2006] VSC 120 (unreported, 31 March 2006, BC200601691) at [9].

⁸⁷ *Ibid.*, at [8].

⁸⁸ Senate Legal and Constitutional Committee, Parliament of Australia, Provisions of the Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill 2005 (2005), p 38. Only Senator Stott Despoja agreed that the Act should also insert a clause making it clear that evidence tainted by torture was not to be used in Australian courts: p 39.

In particular, the committee recommended that the main source of objection to the Bill, the double standard found in s 15YV of the Crimes Act and s 25A of the FEA be removed and:

amended to ensure that the same standard governs the court's discretion to allow evidence via video link or foreign evidence, regardless of which party makes the application. The committee considers that the appropriate standard is whether allowing the evidence would be inconsistent with the interests of justice. The committee further recommends that, in line with the suggestion by HREOC, the court should be required to consider the circumstances of the proceedings as a whole for the purposes of determining whether it will be inconsistent with the interests of justices.⁸⁹

Although the committee acknowledged the advice from the Attorney-General's Department and the CDPP to the contrary, it accepted that the differing standards potentially impacted upon the defendant's right to a fair trial.⁹⁰ Additionally, it felt that the double standard posed a risk to public confidence in the court system in respect of criminal trials of terrorists — a concern which also had an international dimension:

it is important to ensure that persons convicted of such offences receive — and are seen to receive — a fair trial, and that the Australian court system is not left open to criticism in relation to such convictions.⁹¹

In relation to the observer provisions in s 15YW of the Crimes Act, the committee essentially supported the provisions, opining that it is important that the court retain discretion in the appointment of observers. They felt that this discretion was sufficient to allay concerns regarding the independence of the observer. They agreed with the submissions asserting that s 15YW(7) unnecessarily limits the observer's role, and recommended the amendment of this provision to allow the court to request an observer to report on a wider range of circumstances relating to the evidence given by a witness.⁹²

Although the committee suggested that the government might consider including a provision in the FEA for the appointment of an independent observer, they were unsure how this might operate in practice.⁹³ Indeed, such a safeguard is clearly not feasible in respect of evidence that has been gathered at some earlier time, most likely before its relevance to domestic proceedings could even have been known. But the committee's optimism that some kind of check upon the quality of evidence being adduced might be put in place was not insignificant. It might fairly be said that this belief was important in persuading the committee that there was no need to make explicit provision in the amendments to prohibit the use of evidence that was procured under the application of torture.

It was noted at the conclusion of the preceding section that the committee favoured leaving in place the discretion of the courts to rule that evidence which is tainted by torture is inadmissible or unreliable under the normal rules

⁸⁹ Ibid, pp 36–7.

⁹⁰ The committee felt this was particularly likely when the provisions operated in conjunction with the National Security Information Act: *ibid*, p 36.

⁹¹ Ibid.

⁹² Ibid, p 37.

⁹³ Ibid, pp 37–8.

of evidence, without further legislative guidance or prohibition.⁹⁴ However, the rejection of calls for a clear legislative prohibition on the admissibility of any evidence obtained by torture must be understood in light of the other committee recommendations. The employment of a single standard governing the court's discretion over applications by the parties to use video link or foreign evidence, and a beefed up role for observers in respect of each (but particularly video link), working in combination with the existing rules of evidence, would arguably present a solid protection against the use of torture evidence in Australian courts. The fact that the committee's recommendations — very few, but very central as they were — did not receive the approval of the Attorney-General, and that the Act was passed without modification consistent with them, means that the failure to address the torture issue remains a serious deficiency.

The single amendment after the committee process was to add a definition of 'substantial adverse effect' to the amendments of both the Crimes Act and the FEA. The definition accords with that suggested in the oral hearings by the Attorney-General's Department.⁹⁵ While this is useful and important, and seems to be referable to the concerns raised in the Senate inquiry, the absence of any amendment in line with the committee's primary recommendations is disappointing, to say the least.

5 Conclusion

This article has sought to draw attention to two things. First, it has considered the provisions of the Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Act and argued that its defining features are problematic developments in Australian criminal justice. The employment of a differential standard for the exclusion of video link or foreign evidence represents an unjustified attempt to restrict judicial discretion in a way that clearly benefits the prosecution over the accused. In so doing, it risks breaching various commitments to fair trial principles, which the Commonwealth has acquired under international law. It also exposes the courts to a public perception of having been loaded against the interests of the accused — not just offensive to the notions of equality which underpin the rule of law, but also a dreadful ethical liability at a time when Western democracies need to play to their strengths. These matters are in addition to the injustice that may well occur through the operation of these provisions in any individual case. The Act also displays a worrying absence of concern over the possibility that the offshore evidence reaching Australian courts may be tainted by torture. Its focus on promoting use of this evidence and its silence on the dangers is a deeply worrying indication that the government is prioritising the attainment of a conviction over the integrity of the judicial process in terrorism cases.

Second, this discussion has been conducted through an examination of the arguments raised in the law-making process itself. The conduct of the Senate

⁹⁴ Ibid, p 38.

⁹⁵ 'Substantial adverse effect' is now clarified to mean 'an effect that is adverse and not insubstantial, insignificant or trivial': Crimes Act s 15YV; Foreign Evidence Act 1994 (Cth) s 25A.

inquiry and its eventual recommendations provide a measure of reassurance about the level of deliberation that is possible in the legislative arm of government. Sadly, the rejection of the committee's considered proposals for redrafting of the amendments and the passage of the Act in virtually its original form provide a bitter tonic to optimism over the committee's bi-partisan receptiveness to concerns from non-government actors. The episode ultimately serves as merely yet another illustration of executive dominance.

But while the changes wrought by this Act received little media attention and even less public awareness, they remain ones which challenge the central aspects of what we expect of the judicial system in this country. Just what their effect will be upon the courts and individuals who are called upon to engage with them remains a question for a future day. But in the meantime, we might conclude that the Act is a sound demonstration of the modern trend of national security law-making. Legislating in fear is marked by deafness to any voices of moderation and an enthusiastic departure from principles of justice previously regarded as bedrock.