

Evidence laws fall in the rush to embrace the Anti-Terrorism Bill

The federal government's Anti-Terrorism Bill includes changes to the laws of evidence during the trial of suspected terrorists. Andrew Lynch writes that the proposals deserve close examination if Australia wants to retain the integrity of its courts and justice system.*

The spectre of torture has arrived in Australia and few seem to have noticed it.

Last week the Senate's Legal and Constitutional Legislation Committee heard submissions about the *Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill 2005*. Despite the bland name, the Bill seeks to introduce very significant changes to the way in which terrorist suspects will be tried in this country. Its central purpose is to allow a court to take evidence from witnesses via video link and also foreign evidence not delivered "live" but in the form of written statements, video or audio material.

That basic purpose is commendable in trying to overcome the difficulty of courts accessing evidence when trying a crime like terrorism, which often involves international networks. But the devil is in the detail. The processes which the Bill would require of federal courts have the potential to inhibit the defendant's right to a fair trial and also to damage the integrity of those courts in administering justice.

The government is seeking to stack the odds against the defendant in a terrorist trial by making it extremely difficult for him or her to argue against the prosecution calling forth video link or foreign evidence. Note that the onus is not upon the party seeking to utilise video evidence but that which seeks to prevent it – quite the contrary to how State and Territory courts presently approach the same question.

This seems odd as it should fall to the party attempting to rely on such evidence to satisfy the Court of its integrity, not the other way around. In particular, a defendant seeking to oppose such an application by the prosecutor will, if only for practical reasons, not necessarily be in a strong position to expose the technical defects in the evidence being adduced.

But the unique features don't stop there. Essentially, the defendant would have to show that the evidence 'would have a substantial adverse effect' on their right to a fair hearing. This is a much higher standard than that which the prosecution has to meet when it seeks to block a defendant from using the same kind of evidence. They simply have to convince the Court that denying the evidence is in the 'interests of justice'. That test involves the Court in balancing the positions of the parties and the conduct of the trial overall. It gives much more oxygen to the prosecution in objecting to an application from the other side than the defendant has.

Attorney-General Philip Ruddock has played down the extent of this difference but it is manifestly obvious that the bar is being set higher for the defendant. If you want an idea as to how hard the 'substantial adverse effect' standard is designed to be, consider that the standard set for the defendant to oppose video evidence by children in sex abuse cases under Commonwealth law is simply to convince the Court that it is not in the 'interests of justice'.

A suspected sex offender has better chances of preventing video testimony from an abused child than a suspected terrorist has of stopping the Court from accessing evidence in the same way. And there are much graver reasons against use of this kind of evidence in terrorism cases.

This is where torture comes in. How can we be sure that evidence used to convict somebody of a terrorist offence and which has been brought in from overseas wasn't procured through torture? The Bill makes no mention of this concern – not even directing the Court to exercise its discretion to refuse such evidence unless it can be satisfied that torture has not played a part. Nor does the Bill recognise that torture is openly employed in some countries and so evidence obtained from a prisoner or accused held in those places should be dismissed as a matter of course.

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

However, given the importance of that issue, it is arguable that the safeguard could be strengthened by removing the discretionary aspects of section 15YW. At present, the Court need neither appoint an observer (subsection 1) nor require a report if one is appointed (subsection 7). Reasons of convenience and practicality may well underlie the present approach, but it would be preferable for the legislation to require an observer in respect of all section 15YV directions or orders and for that person to make a report to the court as a matter of course.

In short, the problems outlined above could easily be resolved by amending the proposed Part 1AE to be inserted into the *Crimes Act* to include:

- The use of a single standard governing the courts' discretion to allow evidence via video link – regardless of which party makes the application, and
- The mandatory requirement for a court appointed observer who is to deliver a report on the conditions under which evidence was given at the place of the witness.

The changes to the *Foreign Evidence Act* should also include an express ground for the court to refuse an application for use of foreign evidence where the court is not satisfied that the evidence in question was not obtained through the use of torture or inhuman and degrading treatment or extraordinary rendition (effectively torture by proxy).

We should all be worried about the kind of evidence that might find its way into Australian courts if the Bill goes through without more express restrictions. The case for amendment of the Bill is made stronger by the fact that the House of Lords is right now considering a case challenging the use of evidence gained by torture under English law.

Preventing the use of such evidence will ensure a fair trial for the accused and satisfy Australia's international obligations. But this is also about protecting the courts themselves.

While it is important courts have access to all relevant evidence, it is vital that such evidence is reliable and that the fairness of the trial process is beyond reproach so the public can have confidence in the conviction of terrorists under the Australian court system. There is nothing to be gained by finding the innocent guilty and much to be lost by doing so.

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