Senate Legal and Constitutional Legislation Committee inquiry into the Law and Justice Legislation Amendment (Video Evidence and Other Measures) Bill 2005

Submission of the Human Rights and Equal Opportunity Commission

17 October 2005

1. The Human Rights and Equal Opportunity Commission ('the Commission') has been invited by the Senate Legal and Constitutional Legislation Committee ('the Committee') to make submissions on the Law and Justice Legislation Amendment (Video Evidence and Other Measures) Bill 2005 ('the Bill'). The Commission welcomes the opportunity to make this submission and thanks the Committee for its invitation.

2. The Commission is primarily concerned with the amendments made by the Bill to:

   - the *Crimes Act 1914* (Cth) (Crimes Act) in relation to video link evidence; and
   - the *Foreign Evidence Act 1994* (Cth) (FEA).

   The Commission shares the concerns expressed during the second reading debate that those amendments favour the prosecution over the defence in terrorism trials. This potentially violates article 14 of the *International Covenant on Civil and Political Rights* (ICCPR), which provides for the right to a fair hearing.

Outline of relevant amendments to the Crimes Act

3. Item 5 of the Bill adds part 1AE to the Crimes Act. Part 1AE sets up a new regime for the taking of video evidence in certain specified proceedings. The proceedings to which the new part applies are:

   - criminal proceedings for federal terrorism offences and related offences;[1] and
   - proceedings under the *Proceeds of Crime Act 2002* (Cth) in relation to one of those offences.[2]

4. State and territory legislation already provides for the taking of evidence by video link, including remote evidence from overseas witnesses.[3] The Bill does

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[1] See proposed s15YU(1) of the Bill which specifies the following offences: subsection 34G(5) of the *Australian Security Intelligence Organisation Act 1979* (offence to give false and misleading answers when questioned by ASIO about terrorist matters); section 49 of the *Aviation Transport Security Act 2004* (weapons on board an aircraft); section 21 of the *Charter of United Nations Act 1945* (giving an asset to a proscribed person or entity); Division 72 of the *Criminal Code* (international terrorist activities using explosive or lethal devices); Part 5.3 of the *Criminal Code* (terrorism offences); Part 5.4 of the *Criminal Code* (harm against Australians); sections 24AA and 24AB of the *Crimes Act 1914* (treachery and sabotage offences); Division 1 of Part 2 of the *Crimes (Aviation) Act 1991* (Hijacking and other acts of violence on board aircraft); section 8 of the *Crimes (Biological Weapons) Act 1976* (Restriction on inter-alia development of certain biological agents and toxins and biological weapons); the *Crimes (Foreign Incursions and Recruitment) Act 1978*; section 8 of the *Crimes (Hostages) Act 1989* and the *Crimes (Internationally Protected Persons) Act 1976.*

[2] See proposed s15YU(2).

[3] See, for example, *Evidence (Audio and Audio Visual Links) Act 1998* (NSW); *Evidence Act 1958* (Vic), Part IIA; *Evidence Act 1906* (WA), s 121; *Evidence (Audio and Audio Visual Links) Act 1999* (Tas).

not purport to exclude or limit those provisions.[4] The party seeking to adduce the particular evidence will therefore have a choice as to which regime they seek to use.

5. The Bill will apply to witnesses giving evidence within Australia as well as to those testifying from a foreign state.[5]

6. Proposed s15YV provides for the making of an order for the taking of video evidence. As with other recent procedural legislation in this area, a 'directive approach' has been taken - the discretion of the Court has been deliberately limited. This is achieved by providing that the Court 'must' (rather than 'may') direct or order that evidence be given by video link upon being satisfied of certain matters.

7. The matters of which the Court must be satisfied before making a direction or order are that:

- the prosecution or the defendant has made an application for a direction or order that a witness give evidence by video link;
- the prosecutor and defendant has given the court reasonable notice of their intention to make the application;
- the witness is available to give evidence by video link;
- certain specified video facilities are available or reasonably capable of being made available; and
- the proposed witness is not be a defendant in the proceeding

For the purposes of this submission, these five matters are referred to as the **Common Conditions**.

8. Once the Common Conditions are made out, the Court **must** order that the witness be allowed give evidence by video link, unless:

- in the case of an application made by the prosecution, the defendant positively satisfies the Court that the making of the order or direction would have a substantial adverse impact upon the right of defendant to a fair hearing;[6] or
- in the case of an application made by the defendant, the prosecution positively satisfies the Court that the making of the order or direction would be inconsistent with the interests of justice.[7]

Concerns were raised in the second reading debate that the use of these different tests favours the prosecution over the defence.[8] The Commission has sought to describe and compare the two tests in the next section of this submission.

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[4] See proposed s15YZF.

[5] See page 3 of the *Explanatory Memorandum*.

[6] See proposed s15YV(1).

[7] See proposed s15YV(2).

[8] See Commonwealth, *Parliamentary Debates*, House of Representatives, 13 October 2005, pp 17-19 (The Hon Nicola Roxon MP) and pp 22-25 (The Hon Daryl Melham MP).

The two tests

Interests of justice

9. The “interests of justice” test reflects some of the existing State and Territory provisions concerning evidence by video link. For example, s5B(3) of the *Evidence (Audio and Audio Visual Links) Act* 1998 (NSW) states:

> In a proceeding in which a party opposes the making of a direction for the giving of evidence or making of a submission to the court by audio link or audio visual link from any place within New South Wales other than the courtroom or other place where the court is sitting, the court must not make the direction unless the party making the application satisfies the court that it is in the interests of the administration of justice for the court to do so. (emphasis added)

Of course, unlike the Bill the onus in the test in the NSW Act is upon the party seeking to adduce evidence by video. It is also noteworthy that the NSW Act provides (as a cumulative safeguard) that the ‘court must not make [a direction that evidence be given] if...the court is satisfied that the direction would be unfair to the party’.

10. The New South Wales Court of Criminal Appeal has made the following comments about s5B(3) in *R v Ngo* (*Ngo*):

> The phrase, “in the interests of the administration of justice” is a broad one and not susceptible to precise definition. The particular context of the use of the phrase will provide assistance as to its content. In the subject context it must include the impact on the parties and the trial of making or not making the direction. This involves assessing the impact on the fairness of the trial for the accused. It also involves the issue of the fairness to the witnesses and to the Crown. There may be many things which can be said to be relevant to the interests in the administration of justice. Some will be interests of the accused, some of a witness, some of the Crown and some of the general community or the public interest in a fair and efficient system of criminal justice. However, what appears to be required is a balancing of these interests.[9]

Relevant ‘interests of witnesses’ in the context of the NSW Act have included matters such as health concerns or fears of reprisal.[10]

11. In a different context, the High Court has similarly suggested that matters beyond the interests of the parties and matters such as ‘cost and efficiency’ will be relevant when considering the interests of justice.[11]

Substantial adverse effect

12. It is particularly difficult to predict the manner in which the ‘substantial adverse effect’ test would be applied by a Court. This is because of the ambiguous nature of the word ‘substantial’ and the absence of a definition in the Bill.

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[9] [2003] NSWCCA 82 at [124]. The defendant was refused special leave to appeal the decision of the Court of Criminal Appeal to the High Court: [2004] HCATrans 185.
[10] See *Ngo* and *R v Yates, Parry, Hyland, Powick* [2002] NSWCCA 520 at [220].
[11] *BHP Billiton Limited v Schultz* [2004] HCA 61 at [15].

13. In *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd* [12] (*2UE*) Lockhart J made the following comments in the context of the Trade Practices Act 1974 (Cth):

> The word 'substantial'is imprecise and ambiguous. Its meaning must be taken from its context. It can mean considerable or big... It can also mean not merely nominal, ephemeral or minimal...

14. As is noted in the Bills Digest, the term 'substantial adverse effect' appears in the *Freedom of Information Act 1982* (Cth) (FOI Act).[13] What may not be entirely clear from the Digest is that, in the context of that Act, the Federal Court and Administrative Appeals Tribunal have construed 'substantially' in **both** the senses discussed by Lockhart J in *2UE*.

15. In some FOI Act decisions, it has been held that the 'effect' to be shown must involve a degree of gravity that is serious or significant.[14] That line of authority further suggests that the onus of establishing the requisite effect is a heavy one (albeit not an impossible obstacle).[15] In other decisions, it has been said that one is considering whether the effect is real or of substance and not insubstantial or nominal.[16]

16. The term 'substantial adverse effect' also appears in the *National Security Information (Criminal and Civil Proceedings) Act 2004* (National Security Information Act). However, as compared to the Bill, that Act defines the term to mean 'an effect that is adverse and not insubstantial, insignificant or trivial'.[17] It is unclear why the Bill does not include a similar provision.

17. Regardless of how 'substantial' is ultimately construed (if proposed s15YV passes in its present form), it is important to recognise that the Bill contemplates that the defendant will be subjected to a degree of disadvantage which exceeds that would be tolerated under existing Australian procedural safeguards. It specifically countenances that there will be some infringement of the defendant's right to a fair hearing, something which has been considered fundamental in the Australian criminal justice system. As the following passage from *Ngo* indicates, this involves a significant step away from the safeguards which have until now been placed upon the use of video link evidence:

> Making a direction that the evidence of an accusing witness be received by audiovisual link external to the courtroom must, by its very nature, involve unfairness to an accused because it deprives him or her of a face-to-face confrontation with the witness. The provision cannot mean *any* unfairness, however small. The Court must consider the degree and effect of the unfairness. In a criminal trial, the best measure is whether the making of a direction will cause the trial to be an unfair one to the accused. An accused person has the fundamental right to a fair trial. A direction should not be made if it would mean that an accused could *not* have a fair trial.[18]

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[12] (1982) 62 FLR 437 at 444. See also *Tillmans Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 42 FLR 331.
[13] See at p11.
[14] See *Harris v Australian Broadcasting Commission* (1983) 5 ALD 545 at 556-7 and *Re Healy and Australian National University* (unreported, 23 May 1985).
[15] *Re Dyki and Commissioner of Taxation* 12 AAR 544 at 549.
[16] *Marco Ascic v Australian Federal Police* (1986) 11 ALN N184 per Muirhead J.
[17] See s 7.
[18] [2003] NSWCCA 82 at [108].

Summary of differences between the two tests

18. It will be apparent from the above that there is considerable uncertainty regarding the manner in which the two tests in proposed s15YV would be applied (were the Bill to pass in its current form). However, the following points are tolerably clear:

(a) The 'substantial adverse effect' test, which applies if the defence seeks to oppose a prosecution application to adduce video evidence, will not be satisfied by the defence merely demonstrating some degree of disadvantage to the accused – any disadvantage must be of a sufficient degree to affect the fairness of the hearing itself.

(b) The 'substantial adverse effect' test contemplates **at least some** adverse effects on the defendant's right to a fair hearing. Indeed, in the absence of a more narrow definition, it would be open to a Court to find that it **contemplates adverse effects which are 'considerable or big'**.

(c) In contrast, the 'interests of justice test', which applies if the prosecution seeks to oppose a defence application to adduce video evidence, is a more flexible test. In particular, it does not specify as an enlivening condition any particular level of disadvantage to the prosecution.

19. During the second reading debates, the Commonwealth Attorney-General emphasised the fact that the 'interests of justice test' will require any unfairness to the prosecution to be balanced against the interests of the defendant in adducing video link evidence:

> …the interests of justice test for the defendant applications… 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.[19]

20. However, with respect, the position is somewhat more complex than the Attorney there suggested for the following reasons:

(a) If an accused person seeks a direction or order for the giving of video evidence and satisfies the Common Conditions, their application may be opposed by the prosecution on the basis of a broad range of considerations. These will extend beyond the interests of the defence and the prosecution. Rather the interests of justice test would appear to allow consideration of matters 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.

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[19] Second Reading Speech, Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill (Cth) 2005, *Parliamentary Debates*, House of Representatives, 13 October 2005, p 26 (Philip Ruddock MP, Commonwealth Attorney-General).

(b) In contrast, the **only** relevant consideration where the prosecution makes such an application (and satisfies the Common Conditions) is the effect on the right of the accused to a fair hearing. The defence may not seek to rely upon any of the wider grounds referred to in (a).

21. Having regard to these matters, the Commission considers that it is likely that the prosecution will be favoured by the use of different tests in s15YV. That is, it is the Commission's view that it will be comparatively more difficult for a defendant to successfully challenge a direction or order sought by the prosecution and easier for the prosecution to successfully challenge a direction or order sought by the defendant.

Relevant Human Rights principles

22. The right to a fair and public hearing is provided for in article 14(1) of the ICCPR which states (in part):

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law…

23. The right to a fair hearing under Article 14(1) is not limited to criminal matters. Rather, it guarantees certain rights to parties in "suits at law". Those rights include, for example, 'equality of arms, the respect of adversarial proceedings… and the swiftness of the procedure at all stages'.[20]

24. Paragraphs (2) to (7) of Article 14 set out a series of more specific guarantees for criminal trials and appeals. They relevantly include the following right:

> (3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: …
>
> (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him…

25. The Human Rights Committee has discussed that requirement in General Comment 13, where it was said:

> Subparagraph 3 (e) states that the accused shall be entitled to examine or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. This provision is designed to guarantee to the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution. [21]

[20] Weissbrodt D, *The Right to a Fair Trial: Articles 8, 10 and 11 of the Universal Declaration of Human Rights* (Kluwer Law International, The Hague, The Netherlands: 2001) at 125.

[21] Human Rights Committee, *General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14)*: 3/04/84.

In other words, article 14(3)(e) is not concerned with the right to call and examine witnesses per se; it is rather concerned with the equality of rights to call and examine witnesses as between the defence and the prosecution.[22]

26. The Human Rights Committee is yet to consider whether the use of video evidence in criminal matters is compatible with the guarantees under articles 14(1) and (3)(e) of the ICCPR. However, the House of Lords considered that issue in *Regina v Camberwell Green Youth Court; ex parte D*[23] where the comparable provisions of the *European Convention on Human Rights*[24] were in issue. The legislation in question in that case created a special video evidence regime for child witnesses. It was subject to an 'interests of justice' exception, which (unlike the Bill) applied equally to witnesses for the prosecution and defence. Their Lordships held that the use of video-link evidence did not, in itself, violate the guarantees in the Convention. Nevertheless, their Lordships did appear to accept that the right to a fair hearing might be violated by the use of such evidence in particular circumstances. For example, an assault charge in which the defence was self defence, where it might be important for defence counsel to see the witness in person and gain an impression of how threatening she or he could be, especially when angry.[25]

Application to the Bill and recommended amendment of s15YV

27. Consistent with the view expressed by the House of Lords, the Commission considers that the use of video evidence does not, in itself, raise issues under article 14.

28. However, the use of such evidence in the circumstances of a particular case may give rise to such issues (the example given in *Camberwell* being one such instance). It is possible to envisage other matters where close physical observation of a witness will be crucial. For, example:

- where it becomes apparent from close observation of a witness that their ability to perceive a particular event may be in doubt; or
- where the credibility of a particular witness is central to the outcome of a matter, elevating the importance of the opportunity to observe their demeanour in person.

29. In those circumstances, the Court should have a flexible discretion to avoid the violation of the right of an accused to a fair hearing. Regrettably, the Bill contemplates at least some infringement of that right and may (depending

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[22] See S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd Ed, Oxford University Press), pp 446-47.
[23] [2005] UKHL 4.
[24] Article 6(3)(d) which provides:

> 3. Everyone charged with a criminal offence has the following minimum rights: …
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

[25] See Baroness Hale at [46]. See also Lord Brown at [68].

upon the interpretation given to 'substantial') envisage violations which are characterised as considerable or large.

30. The Bill is also objectionable for the imbalance it creates between the ability of the prosecution and defence to call video evidence. For the reasons outlined above, the Commission is of the view that the current provisions of s15YV favour the prosecution. This violates the principle of 'equality of arms', which is fundamental to articles 14(1) and (3)(e).

31. These deficiencies could be remedied by replacing s15YV with the following section:

> (1) In a proceeding, the court must:
> (a) direct; or
> (b) by order, allow;
> a witness to give evidence by video link if:
> (c) both:
> (i) the prosecutor or defendant in the proceeding applies for the direction or order; and
> (ii) the court is satisfied that the prosecutor or defendant in the proceeding gave the court reasonable notice of his or her intention to make the application; and
> (d) the witness is not a defendant in the proceeding; and
> (e) the witness is available, or will reasonably be available, to give evidence by video link; and
> (f) the facilities required by section 15YY are available or can reasonably be made available;
> unless the court is satisfied that it would be inconsistent with the interests of justice for the evidence to be given by video link.
>
> (2) For the purposes of this section, it will be inconsistent with the interests of justice for evidence to be given by video link if the giving of the direction or the making of the order would, having regard to the circumstances of the proceedings as a whole, violate the right of the accused to a fair hearing.

32. The Commission's suggested use of the interests of justice test contemplates a certain degree of permissible unfairness to the accused (see passage from *Ngo* above). However, it is implicit in that test (and made clear in the Commission's suggested 15YV(2)) that such unfairness should not place Australia in breach of its obligations under article 14(1) of the ICCPR.

33. The suggestion that s15YV(2) include the words 'having regard to the circumstances of the proceedings as a whole' is intended to clarify that the making of the order is not to be considered in isolation. The Court should rather be required to consider whether the making of an order could operate in combination with other factors to create an unfair hearing.

34. A possible example of an order creating unfairness in combination with other factors might arise where orders are made under the proposed video link provisions and the National Security Information Act. As this Committee would be aware, the National Security Information Act has altered some of the usual rules of criminal procedure in matters to which the Bill applies. It provides for a regime to protect security sensitive information, including through non-disclosure orders and orders allowing the use of redacted

evidence.[26] As noted above, the operative provisions of the National Security Information Act also require consideration of whether any such order would have a substantial adverse effect on the defendant's right to receive a fair hearing, including in particular on the conduct of his or her defence.[27] Were the Bill to become law, it is possible that it would be the **cumulative effect** of orders made under the two sets of provisions (rather than the orders in isolation) which gave rise to an unfair hearing.

35. For example, the inability of defence Counsel to closely observe a witness' demeanour in a matter where the witness' credibility is a central issue may not be sufficient to conclude that the use of video link evidence will lead to an unfair hearing. However, if defence counsel is also denied access to security sensitive documents which impeach credibility (following the making of an order under the National Security Information Act), the cumulative obstacles placed upon the defence may result in the hearing being unfair.

36. The Commission considers it is preferable that the Court be specifically directed in s15YV(2) to take those possibilities into account in deciding whether to permit the use of video evidence by the prosecution. This Committee may also feel that it is appropriate to consider recommending a similar amendment to the National Security Information Act.

Evidence obtained through the use of torture

37. It is notorious that some states have tortured people who have been detained in connection with actual or suspected terrorist activities.[28] That is of concern in

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[26] See Part 3, Divisions 2 and 3 of the Act.

[27] See s 31(7).

[28] See the example given on p 6 of the Bills Digest. See also generally *A & Ors v Secretary of State for the Home Department* [2004] EWCA Civ 1123 in which the UK Court of Appeal (Civil Division) was asked to advise as to whether evidence obtained from a third party (not a defendant/respondent) in contravention of article 3 of the ECHR (which is in the same terms as article 7 of the ICCPR) by officials of a third country could be relied upon by the Secretary of State for the Home Department in court proceedings.
Lord Justice Pill opined that, while the English common law would not necessarily operate to render evidence obtained in contravention of article 3 inadmissible, reliance on evidence by the Secretary of State for the Home Department may in some circumstances amount to an abuse of state power. Such evidence would be therefore rendered inadmissible under the 'abuse of process jurisdiction' of the court: [128]-[137]. However, this was not such a case: [138].
Lord Justice Laws considered that under the common law, issues about the means by which such evidence was obtained go to weight and not the admissibility of evidence, unless the evidence in contravention of article 3 had been obtained by the UK (or its servants acting at its behest). In the latter case the evidence would be inadmissible, the Secretary of State not being entitled to rely upon its abuse of power: [249]-[250]). His Lordship considered the position under common law as being consistent with the UK's obligations under article 6 of the ECHR (which is similar in its terms to article 14(3)(e) of the ICCPR): [263].
Lord Justice Neuberger considered that the evidence would be admissible under the English common law, unless the torture was carried out by or on behalf of the contrivance of the UK government ([424]). However, as a matter of practice, such evidence is not likely to be accorded any weight by a court ([425]). His Lordship suggested that the evidence may also be able to be excluded under the common law on the basis that its prejudicial effect would outweigh its probative value, though no such argument was put before the court: [426], [429]. His Lordship further considered that, while 'there was a formidable argument' that the common law should exclude statements obtained by torture if it could be shown that there was an 'ordinary' customary rule in international law to that effect, such a finding

the context of the Bill, given that the Bill provides for the witness to be giving evidence at locations outside the control of any Australian government.

38. Australia has an obligation under article 7 of the ICCPR[29] to proscribe the use of evidence obtained through torture or cruel, inhuman or degrading treatment or punishment. The Human Rights Committee has described that obligation in the following terms:

> It is important for the discouragement of violations under article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment.[30]

39. The *Convention Against Torture* (CAT)[31] includes a similar obligation. Article 15 provides:

> Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

40. In *PE v France*,[32] the Committee Against Torture held that article 15 obliged a state to 'ascertain whether or not statements constituting part of the evidence of a procedure for which it is competent have been made as a result of torture.' The Committee also indicated that this obligation applies to evidence obtained from witnesses in other states.

41. There are differences between Australian jurisdictions in relation to evidence obtained through torture in criminal matters. In the Uniform Evidence Law jurisdictions (the federal courts, the Australian Capital Territory, New South Wales and Tasmania) there is a general exclusionary provision for evidence which is obtained 'improperly or in contravention of Australian law'. Such evidence, which would include evidence obtained by torture or other cruel or inhuman treatment as well as evidence obtained through a wide range of lesser improprieties, is to be excluded unless the prosecution can establish 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.[33] In jurisdictions where the common law remains, the defendant bears the onus of proving that the evidence has been improperly obtained

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was impossible, no such argument having been developed before the court: [436]-[437]. In relation to article 6 of the ECHR, his Lordship considered that 'I do not think that a [person] can be said to have had a fair trial within ECHR Article 6(1), if evidence obtained by torture is used against him': [467]. Consequently, his Lordship considered that the *Human Rights Act 1988* (UK) would require the inadmissibility of all statements made under torture: [473].
Note that this case is currently on appeal to the House of Lords.

[29] Which provides '[n]o-one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.

[30] Human Rights Committee, *General Comment 20:Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7)*: 10/03/92, ¶12.

[31] *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, [1989] ATS 21 (entered into force for Australia 7 September 1989).

[32] Convention Against Torture Communication No 193/2001, UN Doc CAT/C/29/D/193/2001.

[33] See, for example, s138 of the *Evidence Act 1995* (NSW).

through such methods **and** that the balancing test requires the exclusion of that evidence.[34]

42. One would expect that evidence obtained through torture and similar means would, as a practical matter, be excluded under either test. However, 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. The general common law and statutory discretions would continue to apply to evidence obtained via lesser forms of impropriety. In the Commission's view, this will more clearly satisfy Australia's obligations under article 7 of the ICCPR and article 15 of CAT.

43. However, there remains the problem of how the parties and the Court can determine whether any such treatment has taken place where the witness is located outside Australia.

44. The Bill attempts to deal with that issue through the use of 'observers'. The court is to have the discretion (under proposed s15YW) to make the giving of video evidence conditional on a specified observer being physically present at the place where evidence is to be given.[35] The observer can be directed to give the court a report on what they observed in relation to the giving of evidence by the witness. That report can then be used by the Court in determining admissibility.[36] The specified observer can be an Australian diplomat or consular officer, or any other person.[37] The court must not specify a person as an observer unless the Court is satisfied that the person is independent of the parties, in a position to give a report to the Court about what they observe in relation to the giving of evidence, reasonably available to observe the giving of evidence and appropriate.[38] It is specifically provided that the 'mere fact' that the person is an Australian diplomat or consular officer does not mean that they are not independent of the prosecutor.

45. The Commission has a number of concerns regarding these provisions. First, 15YW does not specify the matters a Court must consider when determining whether to make the presence of an observer a condition of receiving video evidence. This will make a refusal to exercise that widely drafted discretion more difficult to challenge. It would also be preferable if the defence was able to insist upon the use of an observer, at least in certain circumstances.

46. More fundamentally, the observer provisions will not facilitate scrutiny of the treatment of the witness away from the location where evidence is being given (which may be of particular concern where the witness is being detained). As was held in *PE v France*, Australia is under a positive obligation to ascertain

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[34] *Bunning v Cross* (1978) 141 CLR 54.
[35] See proposed s15YW(1).
[36] See proposed s15YW(7).
[37] See proposed s15YW(4).
[38] See proposed s15YW(5).

whether any evidence given under the Bill is made as a result of torture or other cruel or inhuman treatment. The Commission would recommend that proposed s15YW be expanded to allow the Court to seek information on a wider range of matters including, where relevant, conditions of detention.

47. The Commission recognises that these matters will frequently involve sensitivity on the part of other states where evidence is being taken. The Commission also recognises that it may not always be possible to obtain the broader information which the Commission suggests should be sought. However, in those circumstances, the Commission is of the view the evidence should not be received. Australia is otherwise putting itself in a position where it cannot meet its obligations under article 7 of the ICCPR and article 15 of CAT.

Amendments to the *Foreign Evidence Act 1994* (Cth)

48. The Bill amends the FEA so as to impose a bifurcated test similar to that proposed for video-link evidence.

49. The FEA provides for an 'evidence on commission' procedure, under which the Attorney-General can request a foreign state to take testimony (defined as 'foreign material') for use in an Australian Court.

50. Such evidence can take the form of video or audio recordings or transcript.[39]

51. Section 25 of the FEA provides:

> (1) The court may direct that foreign material not be adduced as evidence if it appears to the court's satisfaction that, having regard to the interests of the parties to the proceeding, justice would be better served if the foreign material were not adduced as evidence.
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> (2) Without limiting the matters that the court may take into account in deciding whether to give such a direction, it must take into account:
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> (a) the extent to which the foreign material provides evidence that would not otherwise be available; and
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> (b) the probative value of the foreign material with respect to any issue that is likely to be determined in the proceeding; and
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> (c) the extent to which statements contained in the foreign material could, at the time they were made, be challenged by questioning the persons who made them; and
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> (d) whether exclusion of the foreign material would cause undue expense or delay; and
>
> (e) whether exclusion of the foreign material would unfairly prejudice any party to the proceeding.

52. Under the Bill, it is proposed that the Court will not be able to make a direction under s25(1) where:

- the proceedings involve the terrorism offences referred to above or proceeds of crime proceedings related to those terrorism offences; and
- the prosecution is seeking to adduce the foreign material.

Instead, the following discretion will apply:

> the court may direct that the foreign material not be adduced as evidence in the proceeding if the court is satisfied that adducing the foreign material would have a

[39] See s23 FEA.

substantial adverse effect on the right of a defendant in the proceeding to receive a fair hearing (see proposed s25A).

53. Section 25(1) is to continue to apply to if the defendant is seeking to adduce foreign material in such proceedings.

54. The Explanatory Memorandum suggests that the above amendments will apply where it is not possible for evidence to be given by video link.[40]

55. The Commission considers the concerns expressed above in relation to the video link provisions apply equally to the proposed amendments to the FEA. Indeed, the disparity between the two tests is highlighted by s25(2) of the FEA, which suggests that a wide range of matters beyond fairness may be invoked by the prosecution to resist a defendant's attempt to adduce foreign material.

56. Should there be a desire to narrow the Court's discretion in this area, then it might best be achieved by providing for 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 (in a similar form to the Commission's suggested version of s15YV(2)).

57. The amendments to the FEA also raise the issue of obtaining evidence via torture. However, unlike the amendments to the Crimes Act, there has been no attempt to provide for that possibility through the mechanism of an observer. For the reasons outlined above, the Court should be able to impose such conditions on the receipt of evidence under the FEA. The inclusion of that power is particularly important if limitations are to be placed upon the Court's power to refuse to allow such evidence to be adduced.

Conclusion

58. The Commission is concerned that the amendments made by the Bill to the Crimes Act and FEA favour the prosecution over the defence in terrorism trials. This potentially violates article 14 of the ICCPR, which provides for the right to a fair hearing. The Commission is also concerned that the Bill does not provide sufficient safeguards to ensure Australian Courts exclude evidence obtained through torture. To address those concerns, the Commission has recommended:

- amendments to proposed s 15YV of the Crimes Act and s5A of the FEA so as to apply the same tests to applications made by the prosecution and defence. That approach is more consistent with the principle of equality of arms;
- the expansion of the 'observer' provisions in proposed s15YW of the Crimes Act and the addition of similar provisions to the FEA; and

[40] Explanatory Memorandum, Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill 2005 (Cth), 12.

- an absolute prohibition on the use of evidence obtained by torture or other cruel or inhumane treatment.

Human Rights and Equal Opportunity Commission
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