

SECRET WITNESSES, SECRET INFORMATION AND SECRET EVIDENCE: AUSTRALIA'S RESPONSE TO TERRORISM

*Miiko Kumar**

INTRODUCTION

Since 2001, the Australian Parliament has enacted over forty pieces of legislation in response to terrorism.¹ The states and territories of Australia referred legislative powers to the Australian Commonwealth government to enact and codify terrorism offenses.² The offenses are aimed at individuals who engage in, train for, prepare, plan, finance, or provide support for terrorist acts. The legislation also allows for terrorist organizations to be declared illegal and individuals who are members or support a “terrorist organization” can be charged with an offense.³ These amendments to Australia’s substantive criminal law were accompanied by substantial amendments to extend powers of law enforcement agencies.⁴ Further legisla-

* Senior Lecturer, Faculty of Law, University of Sydney.

¹ From 2002 to 2007, the Australian Parliament enacted forty-four separate terrorism statutes. The most significant being the *Security Legislation Amendment (Terrorism) Act 2002* (Cth.) which created a range of terrorist offenses which includes conduct in preparation of a terrorist act. *Security Legislation Amendment (Terrorism) Act, 2002*, (Cth.). This focus on prevention was reinforced by the *Anti-terrorism Act 2005* (Cth.) which provides that an offense is committed even if “a terrorist act does not occur.” *Anti-terrorism Act, 2005*, (Cth.) available at www.nationalsecurity.gov.au.

² The terrorism offenses are contained in Australia’s Federal *Criminal Code 1995* (Cth.), part 5.3. The states and territories have enacted complimentary law enforcement powers in their own legislation. *Criminal Code, 1995*, p. 5.3 (Cth.).

³ The list of terrorist organizations is in Part 2 of the *Criminal Code Regulations 2002*. *Criminal Code Regulations, 2002*, p. 2 (Cth.). There are currently nineteen organizations listed as “terrorist organizations” on the Australian Government National Security website. See <http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/AllDocs/95FB057CA3DECF30CA256FAB001F7FBD?OpenDocument>.

⁴ In particular, the 2002 and 2003 amendments to the *Australian Security Intelligence Organisation Act 1979* (Cth.) allow for questioning of people over sixteen years of age for up to twenty-four hours (forty-eight hours if there is an interpreter) and deten-

tion was enacted to prevent the disclosure of information that could harm national security.⁵ The enormous raft of legislative reforms also included the creation of control and preventative detention orders.⁶

These substantial legislative amendments have been the focus of criticism due to concerns that they compromise the fundamental rights of citizens.⁷ Criticisms have focused on the perceived lack of balance between the need to protect national security and the protection of civil rights. For example, the Australian national intelligence agency (called the Australian Security Intelligence Office (“ASIO”)) now is able to compulsorily detain and question a person if it believes that there are reasonable grounds for believing that the person will substantially assist in the collection of intelligence in relation to a terrorism offense. This is a wide-reaching power as it only requires that “there are reasonable grounds for believing [that the questioning] will assist in the collection of intelligence,” ASIO does not have to believe that there are reasonable grounds for believing that the person actually committed an offense,⁸ and significantly their power extends to the detention of non-suspects. A person can be detained for up to one week.⁹ Importantly, these powers abolish the privilege against self-incrimination and severely compromise a person’s right to legal advice.¹⁰

tion without charge for one week. Australian Security Intelligence Organisation Act, 1979, (Cth.) [hereinafter ASIOA 1979]. The amendments added in 2004 permit Australian Federal Police to question terrorist suspects up to twenty-four hours. *Id.*

⁵ National Security Information (Criminal and Civil Proceedings) Act, 2004, (Cth.).

⁶ See Criminal Code Act, 1995, Div. 104 & 105 (Cth.). These powers were introduced in 2005.

⁷ See Andrew Palmer, *Investigating and Prosecuting Terrorism: The Counter-Terrorism Legislation and the Law of Evidence*, 27 U.N.S.W.L.J. 373 (2004); Anthony Reilly, *The Processes and Consequences of Counter-Terrorism Law in Australia: 2001-2005*, 10 FLINDERS J. OF L. REFORM 81 (2007); ANDREW LYNCH & GEORGE WILLIAMS, WHAT PRICE SECURITY? TAKING STOCK OF AUSTRALIA’S ANTI-TERROR LAW (2006).

⁸ ASIOA 1979, *supra* note 4, at § 34D.

⁹ *Id.* § 34S.

¹⁰ The right to legal representation is compromised as there is no right to have a lawyer present during questioning. And, if a lawyer is present and ASIO deems that the lawyer is disruptive, then ASIO can order the lawyer’s exclusion. Further, it is an offense for the lawyer to communicate with a third party any information relating to

Since the wave of legislative reform in response to terrorism, there have been a total of thirty-eight people who have been prosecuted or are being prosecuted for terrorism offenses under the Australian Federal Criminal Code.¹¹ From these, twenty people have been convicted of terrorism offenses and other prosecutions are ongoing.¹² Others have been abandoned.¹³

The fundamental principles that govern criminal trials are open justice, fairness to the accused, and the rights of the accused to confrontation of the evidence. These values appear to be compromised in the Australian terrorism trials. This article aims to examine the extent to which terrorism trials conducted in Australia have undermined these principles by the use of anonymous witnesses, the non-disclosure of intelligence, and the use of secret evidence in applications to restrict the liberty of the accused. Further, this article argues that this compromise demonstrates the need for Australia to adopt a bill of rights.¹⁴

The first part of this article will refer to the core values of criminal process. These values are the right to a public hearing, the right to a fair trial, and the right to confrontation. These three rights are usually contained in a nation's human rights statute. However, in the absence of such legislation, the

the detention or questioning; this offense is punishable for up to five years. *Id.* § 34ZR. ASIO can also monitor contact between a subject and their lawyer. *Id.* § 34.

¹¹ *Counter-Terrorism White Paper: Securing Australia – Protecting Our Community*, 2010, COMMONWEALTH OF AUSTRALIA, ii.

¹² *Id.*

¹³ For example, in *R v. Ul-Haque*, the prosecution was terminated after the trial judge ruled that police records of the interview were inadmissible due to the oppressive conduct by the enforcement officers. *R v. Ul-Haque* (2007) 177 A. Crim. R. 348. The judge found that the officers committed offenses of false imprisonment and kidnapping at common law. *Id.* at 368.

¹⁴ Australia does not have a national charter or bill of rights. It is noted that there are two human rights statutes in two Australian jurisdictions. The *Charter of Human Rights and Responsibilities Act 2006* (Victoria) and the *Human Rights Act 2004* (ACT) both include a right to fair and open hearing in very similar terms to Article 14 of the *International Covenant on Civil and Political Rights*. Charter of Human Rights and Responsibilities Act, 2006, (Vict.); Human Rights Act, 2004, (Austl. Cap. Terr.); International Covenant on Civil and Political Rights, 1976, (U.N.). However, these acts do not bind the Commonwealth of Australia.

rights are broadly, and vaguely, contained in Australia's common law.

The second part of this article will examine the role of secret witnesses in criminal trials generally, and specifically in two terrorism trials. It will be observed that Australian courts have generally allowed witness anonymity without considering the infringement of the accused's right to confrontation. The Australian approach in this respect will be compared with European jurisdictions. The comparison will show that the Australian position is unregulated and is in need of reform.

The third part of this article will examine the court's role in preventing disclosure of information to the accused that may harm national security. It is argued that the government's statutory regime (enacted after 2001) to weigh national security more favorably than the rights of the accused is not warranted as the pre-existing public interest immunity doctrine (developed in Australia's common law¹⁵) adequately performed that task. The result of this statutory regime has only appeared to be a "delay and disturbance" for terrorism trials.¹⁶ But, more importantly, the regime gives the right of a fair trial less importance than the protection of national security.

Finally, the article will briefly refer to the use of secret evidence to secure preventative detention or control orders which restrict the ability of the person subjected to the order from testing its evidentiary basis.

PART 1: PRINCIPLE VALUES OF CRIMINAL PROCESS

1.1 Principle of open justice

A public hearing is one of the most fundamental aspects of justice. The common law of Australia provides that proceedings may be conducted in the absence of the public only where "the

¹⁵ The law of public interest immunity is now codified in section 130 of Australia's uniform evidence legislation. See Evidence Act, 1995 (Cth.); Evidence Act 1995 (N.S.W.); Evidence Act, 2001 (Tas.); Evidence Act, 2004 (N.I.); and Evidence Act, 2008 (Vic.).

¹⁶ Anthony Whealy, *Difficulty in Obtaining a Fair Trial in Terrorism Cases*, 81 AUSTL. L.J. 743, 748 (2007).

nature or the circumstances of the particular proceedings are such that a public hearing would frustrate or render impracticable the administration of justice.”¹⁷ In such circumstances, the principle of open justice must yield to the more fundamental principle that the chief object of courts is to ensure that justice is done. The test is one of necessity, namely, whether it is “really necessary to secure the proper administration of justice” in the proceedings.¹⁸ The necessity for such measures would arise only in “reasonably necessary” circumstances, not merely where such measures would be useful or desirable¹⁹ and would save embarrassment, distress or financial loss.²⁰

The phrase “necessary to secure the proper administration of justice in the proceedings” does not mean that if the relevant order is not made, the proceedings will not be able to continue. It means that if the relevant order²¹ is not made, the result will be, or will be assumed to be, that an unacceptable consequence will flow to the administration of justice. The power to make such orders is an inherent power of a superior court and in statutory courts the power to make closed court orders is to be implied as necessary to the proper function of the court.²²

The Australian position demonstrates that the test of necessity does not confer a general discretion to balance the principle of open justice against the avoidance of harm likely to be caused by disclosure.²³ The cases have utilized a strict

¹⁷ *Mirror Newspapers Ltd. v. Waller* (1985) 1 N.S.W.L.R. 1, 13; *John Fairfax Publ'ns Pty Ltd. v. Dist. Ct. of N.S.W.* (2004) 148 A. Crim. R. 522.

¹⁸ *John Fairfax & Sons Pty Ltd. v. Police Tribunal of NSW* (1986) 5 N.S.W.L.R. 465, 476-77; *John Fairfax Group Pty Ltd. v. Local Ct. of NSW* (1991) 59 A. Crim. R. 68, 95; *John Fairfax Publ'ns Pty Ltd. v. District Ct. of NSW* (2004) 148 A. Crim. R. 522.

¹⁹ *John Fairfax Publ'ns Pty Ltd. v. Ryde Local Ct.* (2005) 152 A. Crim. R. 527, 537.

²⁰ *Attorney-General (NSW) v. Mayas Pty Ltd.* (1988) 36 A. Crim. R. 345, 347; *John Fairfax Group Pty Ltd.*, (1991) 59 A. Crim. R. at 77.

²¹ The relevant order could be an order that the court be closed to the public, and/or proceedings be the subject of a non-publication order, and/or witnesses give evidence under pseudonym and possibly with screening devices.

²² *John Fairfax Group Pty Ltd.*, (1991) 59 A. Crim. R. at 96; *BUSB v. R* (2011) N.S.W.C.C.A. 39.

²³ *John Fairfax Group Pty Ltd.*, (1991) 59 A. Crim. R. at 95; *Attorney-General (NSW) v. Nationwide News Pty Ltd.* (2007) 178 A. Crim. R. 301, 305.

approach for the categories of cases where there are exceptions to open justice. These categories are few and “strictly defined”²⁴ and “courts are loathe to expand the field.”²⁵ The well-established categories are to protect the identity of an informer,²⁶ to protect the identity of victims of blackmail,²⁷ and to protect matters of national security.²⁸ Australian courts have resisted extending these categories, for example, to prevent the publication of police evidence relating to police techniques employed to obtain confessions.²⁹

However, for terrorism trials, even though the protection of national security is a recognized common law category for a departure from open justice, the Australian Parliament has provided specific legislation to give, in a sense, double protection to permit the government to make orders in the interests of national security.³⁰

²⁴ *The Queen v. Tait* (1979) 46 F.L.R. 386, 401; *McPherson v. McPherson* (1936) A.C. 417, 200; *Russell v. Russell* (1976) 134 C.L.R. 495, 520; *John Fairfax Group Pty Ltd.*, (1991) 59 A. Crim. R. at 78; *John Fairfax Publ'ns Pty Ltd.*, (2004) 148 A. Crim. R. at 531.

²⁵ *Raybos Australia Pty Ltd. v. Jones* (1985) 2 N.S.W.L.R. 47, 55. While the categories are strictly defined at common law, they are not absolute and may be extended to categories “closely analogous” to the existing categories. In *R v. Kwok*, the NSW Court of Criminal Appeal held that non-publication orders may be made in respect of complainants in cases of placing people in sexual servitude. *R v. Kwok* (2005) 158 A. Crim. R. 160. The position of victims of such offenses was regarded as closely analogous to victims of blackmail. *Id.* at 168.

²⁶ *Marks v. Beyfus* (1890) 25 Q.B.D. 494, 498; *Cain v. Glass* (1985) 3 N.S.W.L.R. 230; *Witness v. Marsden* (2000) 49 N.S.W.L.R. 429; *Attorney-General (NSW) v. Stuart* (1994) 75 A. Crim. R. 8.

²⁷ *R v. Socialist Worker Printers & Publishers Ltd.*; *Ex parte Att'y Gen.* (1975) 1 Q.B. 637.

²⁸ See generally *Mirror Newspapers Ltd. v. Waller* (1985) 1 N.S.W.L.R. 1, 19D (Hunt, J.); *John Fairfax Group Pty Ltd.*, 59 A. Crim. R. at 81.; *John Fairfax Publ'ns Pty Ltd.*, (2004) 148 A. Crim. R. at 536.

²⁹ *In re Application by Chief Comm'r of Police (Vic) for Leave to Appeal* (2004) 9 V.R. 275; *New South Wales Comm'r of Police v. Nationwide News Pty Ltd.* (2007) N.S.W.C.A. 366.

³⁰ The *Criminal Code Act 1995* (Cth.) allows the court to close the court and make non-publication orders or access orders in respect of the court record/file “if satisfied that it is in the interest of the security or defense of the Commonwealth.” *Criminal Code*, 1995, § 93.2 (Cth.).

1.2 Right to a fair trial

An accused's right to a fair trial can be found in the common law of Australia. The right to a fair trial and the power of the court to stay proceedings to prevent an unfair trial was considered by the High Court of Australia in *Dietrich v. The Queen*.³¹ It has been observed that Australian jurisprudence recognizes a "principle of a fair trial" rather than a codified right to a fair trial which is based on the inherent power of a court to control its process and prevent an abuse of its processes.³²

Australia does not have a human rights instrument that is present in many common law countries in the world, such as the United States, United Kingdom, Canada, New Zealand, and South Africa. There has been debate about whether Australia should enact such legislation.³³ However, the Australian government has recently reported on "Australia's Human Rights Framework" and it appears that the government has now decided against such a course.³⁴ This is unfortunate.

In the Australian terrorism trials to date, it appears that the fairness to the accused has been a dominant consideration.

³¹ *Dietrich v. The Queen* (1992) 64 A. Crim. R. 176. This is a case where the High Court stayed proceedings for an unrepresented accused, on trial for a serious criminal matter, as his trial would be unfair without legal representation. *Id.* at 377.

³² James Spigelman, *The Truth Can Cost Too Much: The Principle of a Fair Trial*, 78 AUSTL. L.J. 29, 30-31 (2004).

³³ See, e.g., Brian Galligan, *Rights Protection: the Bill of Rights Debate and rights protection in Australia's states and territories*, 28 ADEL. L. REV. (2007); Michael McHugh, Does Australia Need a Bill of Rights? (speech presented to the NSW Bar Association, Sydney, Aug. 8, 2007) available at http://www.nswbar.asn.au/docs/resources/lectures/bill_rights.pdf; Gerard Brennan, Constitution, Good Government and Human Rights (speech delivered at the Human Rights Law Resource Centre, Mar. 12, 2008, Melbourne) available at www.hrlrc.org.au; Michael Kirby, The National Debate About a Charter of Rights and Responsibilities – Answering Some of the Critics (speech presented at the Law Institute of Victoria President's Luncheon, Melbourne, Aug. 21, 2008).

³⁴ Commonwealth of Australia, *Australia's Human Rights Framework* (Canberra, 2010) available at <http://www.ag.gov.au/humanrightsframework>. On June 2, 2010, the federal government introduced the *Human Rights (Parliamentary Scrutiny) Bill 2010* which establishes a Joint Parliamentary Committee on Human Rights to examine and report to Parliament on the compatibility of legislation with Australia's international human rights obligations. This bill makes it clear that the adoption of a bill of human rights is not on the Australia government's agenda.

Some examples of potential prejudice identified in these trials have been:³⁵

- A danger that the jury would be prejudiced against Muslims.³⁶
- A danger that the security in the court room may cause an unfair trial.³⁷
- A danger that the publicity from the convictions in overseas terrorist trials may prejudice the defendants' trial.³⁸
- A danger that the publication of proceedings in one state may prejudice proceedings in another state.³⁹

1.3 Right to confrontation

The right of an accused to confront his or her accusers is recognized as “one of the most important rights of the accused.”⁴⁰ In Australia, the right is not in the form of a specific constitutional right such as the United States’ Sixth Amendment nor does Australia have a statute that provides a “right to examine witnesses” such as Article 6 of the European Convention.⁴¹

³⁵ But note that these examples have not resulted in a finding of an unfair trial.

³⁶ The trial judge in *R v. Lodhi* has written about this problem. See Whealy, *supra* note 16, at 744. A direction was given to the jury in waiting and actual jury.

³⁷ *R v. Benbrika* [No. 12] (2007) V.S.C. 524 (the judge removed a perspex screen in the dock due to unfairness).

³⁸ *R v. Elomar* [No. 27] (2009) N.S.W.S.C. 985 (the judge refused an application to discharge the jury in respect of the publicity from the convictions of a terrorist trial in England).

³⁹ *R v. Benbrika* [No. 19] (2008) V.S.C. 48.

⁴⁰ References are found in Australian cases such as: *Whitehorn v. The Queen* (1983) 152 C.L.R. 657, [2] (Murphy, J.); *R v. McHardie* (1983) 10 A. Crim. R. 51, 57 (“[T]he procedure of a normal criminal jury trial provides for the presentation of the Crown case in the presence and hearing of the accused, and includes the right of the accused to test the evidence by cross-examination, either by himself, or by his legal representative.”). See generally Ian Dennis, *The Right to Confront Witnesses: Meanings, Myths and Human Rights*, 4 CRIM. L. REV. 255, (2010).

⁴¹ Note that the *Victorian Charter* and *Human Rights Act (ACT)* both contain provisions relating to the right to examine witnesses.

The importance of confrontation of witnesses is found in the common law, usually in cases concerning the admissibility of hearsay evidence.⁴² In Australia, the right has been limited by allowing evidence to be admissible as an exception to the hearsay rule,⁴³ use of remote access and screens to give evidence, and pseudonym orders. The ability to confront witnesses has been subjected to these limits in the various terrorism trials by the use of anonymous witnesses.

PART 2: THE USE OF SECRET WITNESSES IN AUSTRALIA

2.1 Departures from open justice for witness protection

There are varying protective orders that can be made in respect of witnesses that give evidence in a trial. These orders limit disclosure of information and/or evidence to the parties and/or public. Such orders can limit the accused's right to confront witnesses. The court can depart from the principle of open justice by making orders to close the court, by prohibiting publication of evidence or access to information; by ordering that a witness gives evidence with a screen or via encrypted video-link or closed circuit television from a remote point to prevent the public and possibly also the accused from identifying the witness;⁴⁴ and/or making pseudonym orders.⁴⁵ Pseudonym orders can be made in circumstances where the accused is either aware or unaware of the true identity of the witness. The power of the court to depart from the principle of open justice and make the orders described above is on the basis that such or-

⁴² *Lee v. The Queen* (1998) 195 C.L.R. 594, 602 ("Confrontation and the opportunity for cross examination is of central significance to the common law adversarial system of trial.").

⁴³ *See R v. Darmody* (2010) V.S.C.A. 41.

⁴⁴ *R v. Ngo* (2003) 57 N.S.W.L.R. 55.

⁴⁵ *Witness v. Marsden* (2000) 49 N.S.W.L.R. 429; *R v. Savvas* (1989) 43 A. Crim. R. 331.

ders are necessary in the interests of justice⁴⁶ or the power to make such orders may be in specific legislation.⁴⁷

2.2 Use of public interest immunity to suppress information about witness identity

The doctrine of public interest immunity protects the disclosure of information (or prevents the admission of evidence) that relates to a matter of state. The court determines whether the public interest in the disclosure of the information is outweighed by the public interest in maintaining secrecy or confidentiality. The public interest in maintaining secrecy is demonstrated by proving that disclosure would injure some aspect of the public interest. For public interest immunity to apply, the harm to the public interest must outweigh the public interest in disclosure. Public interest immunity has been utilized by the state to claim that certain information not be disclosed to the defense;⁴⁸ or, that certain information not be tendered into evidence;⁴⁹ or, that the identity of a witness (including the physical appearance and name) not be disclosed to the public and/or the accused;⁵⁰ or, to seek closed court orders or other forms of suppression orders.⁵¹

It is clear that public interest immunity protects the identity of an informer who is not a witness.⁵² An illustration of this

⁴⁶ *John Fairfax & Sons Pty Ltd. v. Police Tribunal of NSW* (1986) 5 N.S.W.L.R. 465, 476-77; *John Fairfax Group Pty Ltd. v. Local Ct. of NSW* (1991) 59 A. Crim. R. 68, 95; *John Fairfax Publ'ns Pty Ltd. v. District Ct. of NSW* (2004) 148 A. Crim. R. 522.

⁴⁷ For example, section 93.2 of the *Criminal Code Act of 1995*, allows the court to close the court, make non-publication, or access orders in respect to the court record/file "if satisfied that it is in the interest of the security or defense of the Commonwealth." *Criminal Code Act, 1995* (Cth.), § 93.2, (consolidated up to Act No.127 of 2010) [Austl.].

⁴⁸ *Cain v. Glass* (No. 2) (1985) 3 N.S.W.L.R. 230.

⁴⁹ *R v. Smith* (1996) 86 A. Crim. R. 308. A claim of public interest immunity was made in respect of the identities of police informers. *Id.* The court ordered that their true identities should be protected from the public and the accused by the use of pseudonyms and that there be no publication of the evidence which identified them. *Id.*

⁵⁰ *Id.*

⁵¹ *N.S.W. Comm'r of Police v. Nationwide News Pty. Ltd.* (2007) 70 N.S.W.L.R. 643, [33].

⁵² *Marks v. Beyfus* (1890) L.R. 25 Q.B.D. 494.

principle can be seen in the case of *Cain v. Glass*,⁵³ where forty-two defendants were involved in a joint committal hearing⁵⁴ for charges of murder and affray in respect of seven deaths. All but one of the defendants was a member of a motorcycle organization. The defendants sought police records that contained material identifying confidential police informants (who were not witnesses in the committal). The police successfully prevented the defendants from accessing the records on the basis of public interest immunity as the records would identify informers. The public interest in suppressing the information was found to be greater than the public interest for disclosure.⁵⁵

There is a distinction between the court ordering suppression of a witness' identity only to the public and the court ordering the suppression of a witness' identity to both the public and the accused (and possibly also to his or her lawyers). Both orders are departures from the principal of open justice; however, the non-disclosure of a witness's identity to the accused could restrict the accused's right to confront the anonymous witness by way of cross examination which could impact the accused's right to a fair trial.

In Australian law, there are some cases where the principle of open justice and doctrine of public interest immunity have been confused. For example, in determining whether public interest immunity applies to protect informers, judicial officers have weighed the desirability of open justice with the need to protect sources of police information.⁵⁶ This is not the

⁵³ *Cain*, 3 N.S.W.L.R. at 230.

⁵⁴ A committal hearing is a preliminary hearing to determine whether the matter will proceed to a criminal trial. This committal involved 42 defendants. *Id.* at 238.

⁵⁵ *Id.* at 243D (Priestley, J.). Justice McHugh found that, at common law, there was "no question of weighing competing public interests" when a claim is made for the name of an informer. *Id.* at 248A. However, the judicial approach is now a balancing test as set out in Australia's uniform evidence legislation at section 130. See Evidence Act 1995 (Cth.), § 130; Evidence Act 1995 (N.S.W.); Evidence Act 2001 (Tas.); Evidence Act, 2004 (N.I.); Evidence Act, 2008 (Vic.).

⁵⁶ *R v. Smith* (1996) 86 A. Crim. R. 308, 313. In this case the Magistrate incorrectly weighed the desirability of open justice with the need to protect sources of police information. The NSW appellate court stated that the correct approach was to weigh the public interest in preserving confidentiality against the public interest in the defendant

focus of public interest immunity. A claim of public interest immunity requires a court to undertake a balancing exercise by considering the desirability of the information being disclosed (to assist the litigant in his/her case) against the public interest in maintaining confidentiality of the information (to protect a particular government interest). In another case, the government submitted that the evidence about confidential police methodology (given in open court) should not be subsequently published due to public interest immunity. The government submitted that the public interest in preserving confidentiality of the information should be balanced against the public interest in open justice.⁵⁷ Again, this is not the correct test to determine a departure from the open justice principle, and the submission was rejected by the court that heard it.⁵⁸

2.3 Anonymous witnesses in trials

The development of Australian law in respect to anonymous witnesses has not received the same scrutiny as it has in countries such as United Kingdom,⁵⁹ New Zealand,⁶⁰ and the United States.⁶¹ There is not a unified approach in Australian

accessing the information, and the making of a pseudonym order needed to be necessary for the administration of justice. *Id.* at 314.

⁵⁷ *Att'y Gen. (N.S.W.) v. Nationwide News Pty. Ltd.* (2007) 178 A. Crim. R. 301 (rejecting the argument made by the N.S.W. Commissioner of Police).

⁵⁸ *See id.*

⁵⁹ *R v. Davis* (2008) 1 A.C. 1128. The House of Lords overturned a conviction on the basis that the sole and decisive evidence to prove the conviction was from three anonymous witnesses. The legislature responded to this decision with a statutory framework to permit anonymous witnesses. *Id.*

⁶⁰ *R v. Hughes* [1986] 2 N.Z.L.R. 129. The New Zealand Court of Appeals held that the right of the accused to know the true identity of undercover police witnesses was so fundamental to the criminal trial that it could not be dispensed with. The government responded with legislation to permit undercover officers to testify under an assumed name provided that the Police Commissioner produces a certificate that the officer has no criminal convictions. Additionally, notice must be given of any adverse comments to the officer's credibility. Evidence Act, 1908 (N.Z.), § 13A (repealed by § 215 of Evidence Act, 2006 (2006 No. 69)).

⁶¹ *Alvarado v. Superior Court*, 60 Cal. Rptr. 2d 854 (1997). The Superior Court of California concluded that the identities of the witnesses had to be disclosed to ensure "effective investigation and cross-examination of the witness." *Id.* at 861. The Confrontation Clause was heavily relied on.

law as to when anonymous testimony can be used. This point is made clearly by David Lusty in his article on anonymous witnesses. Lusty, in 2002, stated that there were “two diametrically opposed interpretations” on witness anonymity.⁶² This situation remains unchanged. Further, Australian law has not developed to devise safeguards for when anonymous testimony can be used. In fact, the issue has not been considered by Australia’s High Court, but rather the issue has been dealt with differently at the state level.

There are two main cases dealing with anonymous witnesses in New South Wales. In *R v Ngo*, two witnesses were called to prove the identification of the accused.⁶³ The accused, himself involved in politics, was on trial for the murder of a politician. Both witnesses gave evidence under pseudonym and via video link. The accused was prevented from seeing the faces of the witnesses. The trial judge ordered that the testimony be adduced via video link as he was satisfied that “the fears of the witnesses were genuine and that they would probably not give evidence if required to do so in the courtroom in the presence of the accused. He concluded that it was in the interests of the administration of justice to make the order.”⁶⁴ One of the grounds of appeal relied on by Mr. Ngo was that “since issues of identity were involved, [he] should be entitled to see the witnesses because otherwise he would not have the opportunity to properly contest that evidence.”⁶⁵ Mr. Ngo argued that as he was

prevented from seeing the witnesses’ faces, he could not instruct counsel as to whether he recognized them; and if he did, whether there were any matters which might affect their reliability or credibility. This was all the more so because the jury believed that the appellant could see the witnesses. The jury would assess the reliability of the witnesses on the as-

⁶² David Lusty, *Anonymous Accusers: An Historical & Comparative Analysis of Secret Witnesses in Criminal Trials*, 24 SYDNEY L. REV. 361, 404 (2002).

⁶³ *R v Ngo* (2003) 57 N.S.W.L.R. 55 at [13].

⁶⁴ *Id.* at [58].

⁶⁵ *Id.* at [60].

sumption that there was no basis to challenge their credibility.⁶⁶

The NSW Court of Criminal Appeal dismissed the appeal and found that the trial judge was entitled to conclude that the witnesses had genuine fears for their own safety and that of their family which would “prevent or impede them from giving adequate evidence in court.”⁶⁷ Further, they “would probably not give evidence if required to do so face to face with the appellant in the courtroom.”⁶⁸ However, the decision considers the general right of confrontation but does not consider specifically whether the accused’s right to confrontation is infringed in the circumstances of the case.

The right to confrontation was considered by the NSW Court of Criminal Appeal in *BUSB v R*, where ASIO witnesses sought to give evidence under pseudonym, in closed court, and in a way that they could not be seen by the accused.⁶⁹ The accused argued that the screening order prevented “full and effective cross-examination.”⁷⁰ The appellate court found that the trial judge exercised his discretion correctly in granting the screening order by considering the risk to national security if the accused viewed the witnesses’ faces and the impact of the orders on the accused’s fair trial.⁷¹ The court considered that the inability to see the ASIO witnesses for the purpose of cross examination was not significant.⁷² The right to a fair trial was not impinged by the law enforcement officers giving evidence anonymously as their evidence was “corroborative rather than critical evidence”⁷³ and each case will vary depending on its circumstances.⁷⁴ Further, the test of necessity was met because if the order were not made there would be a risk to ASIO offic-

⁶⁶ *Id.* at [69].

⁶⁷ *Id.* at [106].

⁶⁸ *Id.*

⁶⁹ *BUSB v R* (2011) N.S.W.C.C.A. 39. The accused was on trial for shooting a police officer and firearm offenses. *Id.* at [6].

⁷⁰ *Id.* at [37].

⁷¹ *Id.* at [55]-[86].

⁷² *Id.* at [81].

⁷³ *Id.* at [82].

⁷⁴ *Id.* at [83].

ers and to national security.⁷⁵ Significantly, the court did not consider the power to make anonymity orders as the accused conceded that the court had the power to make such orders.⁷⁶

The issue of whether a court has the power to make anonymity orders has been the subject of two differing approaches in two other Australian states—Queensland and Victoria. In a Queensland decision, the Queensland Court of Appeal held that undercover police officers could not give evidence under pseudonym.⁷⁷ It held that there was no common law principle to permit the use of pseudonyms and “it was a basic right of an accused person to know the true identity of his accuser.”⁷⁸ However, in Victoria, its appeal court held that evidence from two undercover police officers could be given anonymously based on the extension of the principles of public interest immunity as undercover officers were analogous to informers. Justice Brooking, who wrote the lead judgment in the Victorian decision, held that “a claim for immunity should not be confined to undercover police operatives and that it extends to other witnesses whose personal safety may be endangered by the disclosure of their identity.”⁷⁹ The correctness of Brooking J’s reasoning has been doubted due to the fact that the informer rule has only protected the anonymity of non-testifying informers.⁸⁰

Most jurisdictions in Australia have now passed legislation to enable law enforcement officers to give evidence anonymously.⁸¹ The main types of witnesses who fall within this category are undercover or surveillance law enforcement officers.⁸² However, there is no specific legislation, like the English legislation, to deal with witnesses who wish to give evidence ano-

⁷⁵ *Id.* at [17], [86].

⁷⁶ *Id.* at [41].

⁷⁷ *R v. Stipendiary Magistrate at Southport ex parte Gibson* (1993) 2 Qd. R. 687.

⁷⁸ *Id.* at 692 (Williams, J.).

⁷⁹ *Jarvie v. Magistrates’ Court of Victoria* (1995) 1 V.R. 84, 99, (Brooking, J.).

⁸⁰ Lusty, *supra* note 62, at 406.

⁸¹ *See, e.g.*, Law Enforcement and National Security (Assumed Identities) Act, 1998 (N.S.W); Crimes Act, § 15YV (1914) (Cth.).

⁸² To the author’s knowledge, these provisions have not been tested by the courts.

nymously, especially in circumstances where they are fearful or intimidated.⁸³

This issue has not been resolved by Australian courts in relation to making orders for anonymity of witnesses whose personal safety is threatened—but are not part of a witness protection program or are not a police operative. Another issue to be tested by the High Court of Australia is the power to make such orders and the extent to which the use of anonymous witnesses offends the accused's right to a fair trial.

2.4 Anonymous witnesses in terrorism trials

Anonymous witnesses were used in the trial of Faheem Lodhi who was the first person to be convicted of committing an act in preparation of a terrorist offense.⁸⁴ Lodhi was charged with: collecting certain documents which were connected with preparation for a terrorist act, and knowing that connection; doing a certain act in preparation for a terrorist act; possessing a certain thing connected with preparation for a terrorist act, and knowing that connection. The documents in the first charge were maps of the Australian electricity supply grid. The act in the second charge was seeking information from a chemical supply company about the availability of materials capable of being used to make explosives or incendiary devices. The thing in the third charge was a document setting out the ingredients for and the method of making poisons, explosives, detonators, incendiary devices, etcetera.⁸⁵

The trial judge made orders that the court be closed at certain times. Such orders were granted under legislation, which gave the court the power to close the court if “[it was] satisfied that it is in the interest of the security or defence of the Com-

⁸³ Of course, there are witness protection programs; however they have obvious limitations.

⁸⁴ R v. Lodhi (2006) 65 N.S.W.L.R. 573 at [2].

⁸⁵ The charges were laid under sections 101.5, 101.6, and 101.4 respectively of the Commonwealth Criminal Code 1995. R v. Lodhi (2006) 65 N.S.W.L.R. 573 at [2].

monwealth.”⁸⁶ The judge also made orders that the ASIO officers give evidence under pseudonym.⁸⁷ Further, the ASIO officers were screened off from the accused.⁸⁸ The defense only appealed against the order for closing the court based on the cumulative effect of a number of closed court orders having the effect of influencing the jury to such an extent that there would be a risk of unfair prejudice.⁸⁹ The appeal was rejected.⁹⁰ It is noted that witness anonymity did not appear to be objected to.

The second example of an anonymous witness in a terrorism trial is a Victorian case.⁹¹ In a joint trial of twelve accused for various terrorist offenses, an undercover police officer who it was said infiltrated the terrorist organization to which, on the prosecution case, all of the accused belonged, gave evidence anonymously.⁹² The undercover officer was identified by number, and the court ordered that he give his evidence via video link.⁹³ The court also ordered that the video image of his face be pixilated.⁹⁴ The trial judge applied *Jarvie v. Magistrates' Court of Victoria* to find that it was in the public interest that the undercover officer give his evidence anonymously.⁹⁵ It is interesting that the trial judge referred to the importance of the confrontation principle and the rule of law.⁹⁶ But, the judge did not consider at all the impact of the lack of confrontation on the fairness of the trial. This may be due to the fact that all defense counsel did not object to the orders, except they preferred that the jury see the officer's face. The potential preju-

⁸⁶ Criminal Code Act § 93.2 (1995); *see also* Crimes Act § 85B (1914) (Cth.) (allowing the court to close the court if “satisfied that such a course is expedient in the interest of the defence of the Commonwealth.”).

⁸⁷ *R v. Lodhi* (2006) 65 N.S.W.L.R. 573 at [4].

⁸⁸ *Id.* at [4]. The ASIO officers gave evidence via video link. Everyone in the court room had access to a screen. However, the accused's screen was blank (the jury were not aware of this fact).

⁸⁹ *Id.* at [17].

⁹⁰ *Id.*

⁹¹ *R v. Benbrika* (Ruling 23) (2008) V.S.C. 137.

⁹² *Id.* at [1].

⁹³ *Id.* at [9].

⁹⁴ *Id.* at [10].

⁹⁵ *Id.* at [12].

⁹⁶ *Id.* at [12-13].

dice that could be caused to the defendants by the officer being at a remote location—faceless and nameless—is due to the inability of the defence to effectively cross-examine. Cross examination could be disadvantaged by the inability to see the witness or to know any background facts about the witness. Further, it is not clear whether the judge confirmed—or was required to do so—that there were no convictions or adverse comments about the officer’s credibility. As it happened, in this trial, the video equipment malfunctioned and did not create a pixilated image therefore the officer’s evidence was taken by audio only.⁹⁷

2.5 Comparison with European positions

In the English case of *R v. Davis*, the House of Lords overturned Davis’ conviction due to him having an unfair trial in circumstances where his conviction was based on evidence from anonymous witnesses who were also the sole and decisive evidence of his guilt.⁹⁸ The English Parliament responded to this case with legislation that now provides that anonymous witnesses can be called if three conditions are met. First, the order is necessary to protect the witness, prevent serious damage to property, or real harm to the public interest.⁹⁹ Secondly, the provisions of the order are consistent with the defendant receiving a fair trial.¹⁰⁰ Finally, it is important in the interests of justice that the witness testifies and that the witness would not

⁹⁷ *Id.* at [18-19].

⁹⁸ [2008] UKHL 36. Davis was convicted of the murder of two men at a New Year’s Eve party. There were three witnesses who positively identified Davis as the murderer, but they claimed to be in fear of their lives from Davis. In order to ensure the witnesses’ safety and to make sure they testified, the judge ordered that the witnesses give evidence under a pseudonym; any identifying particulars were to be withheld from Davis and his lawyers; Davis’ counsel was not allowed to ask any question that might enable the witnesses to be identified; the witnesses were to give evidence behind screens (to be seen by judge and jury but not by Davis); and, the witnesses’ natural voices were to be heard only by the judge and jury (Davis and his counsel were to hear them through mechanical distortion). *Id.* at [3].

⁹⁹ Coroners and Justice Act, 2009, part 3, c.2 § 88(3), 2009 (Eng.).

¹⁰⁰ *Id.* at § 88(4).

testify if the order was not made or there would be real harm to the public interest if the witness testified without one.¹⁰¹

The jurisprudence of the European Court of Human Rights has developed three safeguards to admit anonymous testimony. First, the anonymous testimony should only be received if it is “strictly necessary.”¹⁰² Second, it should not form the “sole or decisive” basis for any conviction.¹⁰³ Third, there must be sufficient counter-balancing measures in place.¹⁰⁴

The English position does not protect the accused’s rights as far as the Strasbourg jurisprudence. However, both these positions are in sharp contrast to the lack of any safeguards or preliminary conditions regarding the admissibility of anonymous testimony in Australian courts. This issue is ripe for development in Australian law.

PART 3: SECRET INFORMATION

The Australian Federal Government enacted the National Security Information (Criminal and Civil) Proceeding Act 2004. The object of this Act is to prevent disclosure of information in federal criminal proceedings and civil proceedings “where the disclosure is likely to prejudice national security, except to the extent that preventing the disclosure would seriously interfere with the administration of justice.”¹⁰⁵ Prior to this legislation, non-disclosure of information due to reasons of national security was dealt with by the doctrine of public interest immunity.¹⁰⁶

¹⁰¹ *Id.* at § 88(5).

¹⁰² *Van Mechelen v. Netherlands* (1998) 25 E.H.R.R. 647 at [47].

¹⁰³ *Al-Khawaja v. United Kingdom* (2009) 49 E.H.R.R. 1 at [H1]. This decision has been appealed to the Grand Chamber of the European Court of Human Rights and was argued in May 2010. At the time of writing, the judgment of the Grand Chamber has not been delivered.

¹⁰⁴ *See Kostovski v. Netherlands* (1989) 12 E.H.R.R. 434; *Doorson v. Netherlands* (1996) 22 E.H.R.R. 330; *Van Mechelen v. Netherlands* (1998) 25 E.H.R.R. 647; *Al-Khawaja v. United Kingdom* (2009) 49 E.H.R.R. 1.

¹⁰⁵ National Security Information (Criminal and Civil) Proceeding Act § 3 (2004) (Cth.) available at http://www.austlii.edu.au/au/legis/cth/consol_act/nsiacpa2004575/.

¹⁰⁶ *See* Part 2.2 of this article for an explanation of this doctrine. The law of public interest immunity is codified in section 130 of Australia’s uniform evidence legislation. *See* Evidence Act, 1995 (Cth.); Evidence Act 1995 (N.S.W.); Evidence Act, 2001 (Tas.); Evidence Act, 2004 (N.I.); and Evidence Act, 2008 (Vic.).

Now the legislation sets out a complicated procedure for dealing with the disclosure of information which may harm national security. The first step in criminal proceedings is that a defendant or prosecutor must notify the Federal Attorney General if they know or believe that they or a witness will disclose information that relates to national security or may affect national security.¹⁰⁷ The Attorney General can then issue a certificate which is conclusive evidence that disclosure of the information is likely to prejudice national security.¹⁰⁸ The judge then determines in a closed hearing whether the information is to be disclosed. The defendant can be prevented from attending this hearing.¹⁰⁹ Further, the Attorney General may require that the defendant's lawyer be ordered to leave the court if they do not have security clearance at the required level.¹¹⁰

In the closed hearing, the judge will consider the risk of prejudice to national security if disclosure is allowed and whether non-disclosure would "have a substantial adverse effect on the defendant's right to receive a fair hearing."¹¹¹ The judge must give "greatest weight" to the risk of prejudice to national security.¹¹² A judge can allow or prevent disclosure of the information, permit disclosure in the form of a redacted copy or summary as suggested by the Attorney General, or as ordered by the court.¹¹³

It could be argued that the judge's discretion in determining disclosure is ineffective as a judge will view the Attorney General's certificate as conclusive evidence of the risk to national security. However, this argument has been judicially rejected.¹¹⁴ The legislation has been comprehensively criticized by Justice Whealy, who heard two major Australian terrorism

¹⁰⁷ National Security Information (Criminal and Civil) Proceeding Act § 24-25 (2004) (Cth.).

¹⁰⁸ *Id.* § 26-28.

¹⁰⁹ *Id.* § 29(3).

¹¹⁰ *Id.*

¹¹¹ *Id.* § 31(7).

¹¹² *Id.* § 31(8).

¹¹³ *Id.* § 31.

¹¹⁴ R v. Lodhi, N.S.W.S.C. Feb. 7, 2006 (Whealy, J.) (unreported), *appeal dismissed*, Lodhi v. R (2007) 179 A. Crim. R. 470.

trials. Justice Whealy critiques the statutory regime as it affects the “efficient running of a criminal trial”; imposes “highly unusual obligations” on lawyers and court staff as they must obtain national security clearances; exposes lawyers to imprisonment of up to two years if they fail to notify the Attorney General of information that may affect national security; and, finally, is the cause of “delay and disturbance to the trial process [which] is perhaps the most significant potential problem created by the legislation.”¹¹⁵

Another issue raised by Justice Whealy is that special counsel has not been appointed within the confines of the National Security legislation, and it may be a “useful weapon in the armoury of a trial judge in a situation where there is a clash between national security claim and a suggestion that the defence will be substantially prejudiced or interfered with in the conduct of the case.”¹¹⁶

In the two large terrorism trials in Australia, claims by the government under the secrecy legislation were upheld. It is noted that the defense was compromised in not being able to argue how the disclosure of the information could assist their case (as in all public interest immunity claims); however, the danger with this particular statutory regime is that suppression of information is given greater weight than the accused’s right to a fair trial. At this point in time, there has been no appointment of special counsel in these types of applications.¹¹⁷

PART 4: SECRET EVIDENCE

Secret evidence is routinely used in applications to close Australian courts or suppress evidence. Secret evidence is also used to claim public interest immunity. The secret evidence is usually a confidential statement that is viewed only by the judge and the party seeking the orders. The orders are sought

¹¹⁵ Whealy, *supra* note 16, at 748.

¹¹⁶ *Id.* at 750.

¹¹⁷ Special counsel are used in public interest immunity claims in the United Kingdom and Canada. The special counsel represent the interests of the accused but do not disclose to the accused the secret information that is the subject of the public interest immunity claim or the evidence to support the claim being made.

in either a closed or open court. The use of secret evidence in these types of applications does not directly impact a person's liberty; however, the non-disclosure of information to the accused could impact their defense.

Perhaps the most disturbing of the amendments after September 11 are the powers of the Australian Government to make control orders with the use of evidence which is only viewed by the government and the court. An Australian federal court may make control orders which restrict the movements of the person subjected to the order. A control order is made if the court is satisfied either that making the order would substantially assist in preventing a terrorist act or the person subject to the order has provided training to or received training from a terrorist organization. Proof is on the balance of probabilities.¹¹⁸ Such applications can be made on an ex parte basis and supported by evidence which is not disclosed to the affected person or their lawyer.¹¹⁹ This is problematic as the evidence is untested and not answered by the person who is subjected to the control order. The only document that the subject receives is the actual order which restricts their liberty.

Preventative detention can be made for up to fourteen days.¹²⁰ Preventative detention is initially made by the Australian Federal Police and is continued by issuing authorities. It aims to detain a person to prevent the commission of a terrorist act expected to occur within the next fourteen days or preserve evidence of a terrorist act which has occurred within the last twenty-eight days. Preventative detention is administrative, whereas control orders are judicial. Preventative detention has non-disclosure requirements that are designed to ensure that the order is kept a secret, and an order can be based on untested secret information.

¹¹⁸ Control orders are dealt with in Australian Federal Criminal Code Act, 1995, Div. 104 (Cth.). Only two control orders have been issued (Joseph Thomas and David Hicks), but both orders have expired.

¹¹⁹ This point was observed by Justice Kirby in *Thomas v. Mowbray*, (2007) 233 C.L.R. 307.

¹²⁰ Criminal Code Act, 1995, Div. 105 (Cth.). To date, a preventative detention order has not been issued.

CONCLUSION

This article's aim was to introduce three aspects of Australian procedure relevant to terrorism. These three procedural aspects have the potential to significantly constrain the core values of criminal process: openness, fairness, and the right of confrontation.

In respect of the first constraint, anonymous witnesses, Australian courts appear to allow anonymity based on public interest considerations. Such reasoning has been applied specifically to allow anonymity for an undercover intelligence officer in one terrorist trial.¹²¹ The correctness of relying on the doctrine of public interest immunity to suppress identity and restrict the openness of the court has been the subject of criticism and is contrasted with the application of the common law in another Australian jurisdiction.¹²² The use of anonymous witnesses based on public interest immunity grounds is a misapplication of the law. The correctness of this position requires appellate testing.¹²³ It is also noted that the use of anonymous witnesses in terrorism trials to date has received a level of acceptance without consideration of the overseas jurisprudence on confrontation. Further, the Australian examples demonstrate that the prosecution is able to rely on secret witnesses without the court scrutinizing the grounds for relying on anonymity.¹²⁴

In the two terrorist trials discussed in this article, anonymous witnesses were received without objection from the defense. Both cases illustrate that the seriousness of the offense may be permitting an acceptance of secret witnesses without putting the government to proof for the need for secre-

¹²¹ *R v. Benbrika* (Ruling 23) (2008) V.S.C. 137.

¹²² *Lusty*, *supra* note 62, 406-08; *see also* *R v. Stipendiary Magistrate at Southport ex parte Gibson* (1993) 2 Qd. R. 687 (the Queensland decision that rejected this approach).

¹²³ As discussed, in *BUSB v. R*, (2011) N.S.W.C.C.A. 39, the appellant accepted that the court had the power to make orders to protect the anonymity of the witness and therefore the NSW appeal court did not consider the conflicting Australian authorities on this issue.

¹²⁴ For example, see the requirements placed on the use of anonymous witnesses in the English legislation at Part 2.5 of this article.

cy. It appears that those representing the defense are simply accepting the government's claim for anonymity without making submissions about the impact on fairness due to the lack of confrontation. The acceptance of this method for adducing evidence is a cause for concern, especially in circumstances where the court does not consider any of the matters that are contained in the English legislation and the Strasburg jurisprudence. In addition, it appears that the defense is not provided with information that may impact the credibility of the secret witness. At a minimum, the prosecution or law enforcement agency should provide certification of the anonymous witness' prior convictions or other matters that could affect their credibility. The urgent need for Australia's adoption of a human rights act becomes clear when examining the development of the law about anonymous witnesses in other common law jurisdictions. This is because the law relating to the use of secret witnesses has been developed in other common law jurisdictions by reference to their legislated right of confrontation contained in a bill of rights.

The non-disclosure of information based on the likely harm to national security is not a new criminal procedure. However, Australia's position is very novel as it legislates that the harm to national security is to be given greater weighting than the rights of the accused. This has the potential to create unfairness. In addition, the disruptions placed on the trial caused by applications under the legislation, together with the extra burdens placed on the lawyers in the proceedings, do not justify the government's codification and modification of the doctrine of public interest immunity. Finally, Australia's use of secret evidence to obtain control and preventative detention orders is the most alarming part of Australia's legislative regime in response to terrorism. The use of secret evidence to restrict citizens' rights represents the greatest infringement of the fundamental rights of open justice, fairness, and confrontation.