

Tabling Statement. Dissenting Report

This Report is substantially in line with the recommendations of previous reviews of averment provisions which have been part of the Customs Act since 1901. It is in line with the Australian Law Reform Commission's (1992) conclusion that ...'there is a need for averments in customs prosecutions in certain circumstances, principally where the evidence is located overseas, where the averment deals with formal or non-controversial matters, and where matters are such that they could easily be disposed of by the defendant without unfairness' and recommends a number of measures, most in line with the ALRC's 1992 and 2002 recommendations to ensure that averments are not abused. On these matters the Committee was unanimous.

Where I have the misfortune of dissenting from my colleagues on the committee is in regard to recommendation 6 which attacks what it describes as 'the reprehensible handling of the investigation and failed prosecution' of Mr Tomson by the Australian Customs Service and recommends the payment of compensation to him.

In my view neither our terms of reference, nor the evidence we received and the processes we followed justify that firm conclusion. Nor in my opinion does it justify the attacks made on the Australian Customs Service (para 6.2-6.4) the Director of Public Prosecutions (para 3.74) the Australian Government Solicitor (which had carriage of the prosecution) and the Acting Commonwealth Solicitor General (para 3.70) in the Report.

The fact that a prosecution fails does not itself justify criticism of it being brought. This week's Sunday Age Agenda headline story, '*Most rapes come down to his word against hers, No wonder only 15% are ever reported*' highlights this. To quote barrister James Montgomery's response to criticism that verdicts of 'not guilty' leave a stain on women complainants ...'a verdict

of ‘not guilty just means you can’t prove the case “beyond reasonable doubt”, not, I don’t believe you. We start with the presumption of innocence and if you don’t know which person to believe you have to acquit’ ... even if you think the complainant is probably telling the truth.

So the real question we should have looked at dispassionately was whether the Australian Customs Service had proper cause to get this case up to the barrier and to use averments in doing so.

The Committee has drawn attention to certain factors (Report 3.62) but here are also some compelling facts that the majority seems to have overlooked in coming to their conclusion it did not. These include:

(a) Mr Tomson, then known as Vilaysack, had a prior conviction for importing undeclared commercial quantities of clothing.

(Exhibit 6);

(b) he was importing clothing which trade opinion suggested was significantly undervalued and which was worth less than the cloth content alone. (Exhibit 6 and evidence given in court);

(c) the importations were under a wide variety of different names to avoid customs attention (Exhibit 6, page 6);

(d) different values appeared on different overseas documents for the same goods;

(e) the matters averred were principally in respect of formal matters or matters relating to facts overseas in three countries where the cost and difficulties of compelling the attendance of witnesses would have been substantial;

(f) the way the matter proceeded followed advice by the independent Director of Public Prosecutions (Exhibit 6 pg 3 and Appendix E);

(g) the decision to prosecute and to use averments was made not by Australian Customs Service but by the Australian Government Solicitor (Exhibit 6 pag3) in accordance with the advice of the DPP;

(h) delay was occasioned not only by the those responsible for the prosecution but also by actions taken by the defendant and his legal advisers and by listing delays in the court; and

(i) the Acting Solicitor-General provided an opinion that the averments were not the significant factor in the establishment of the prosecutions case (Report 3.74).

In lieu of the Committee's final conclusion which I believe has overreached, I have recommended that there be an independent assessment of the case for payment of compensation to Mr Tomson to be conducted against the criteria applied generally to determine eligibility for Commonwealth ex gratia payments.

Duncan Kerr MP