

Coalition Senators' Dissenting report

Position of Victoria and Western Australia

1.1 The Coalition is unable to support a recommendation that the NVR Bills proceed in their current form given the status of Victoria and Western Australia as non-referring states.

1.2 As outlined at paragraphs 2.2 to 2.6 of the main report, the evidence presented by RTOs and others strongly supports a national approach to regulation and auditing, having regard to the number of organisations that provide training across state and territory borders. Coalition senators are also satisfied that every State and Territory sees the merit of nationally consistent regulation and auditing of the VET sector.

1.3 However, the evidence presented to the committee is that the NVR Bills have the potential to undermine national regulation. While Victoria and Western Australia have indicated they are prepared to introduce mirror legislation in their state parliaments to give effect to this aspiration¹, Western Australia has advised that it is unable to do so on the basis the NVR Bill as currently drafted:

Our position on this bill is that the December 2009 agreement made by our Premier at COAG on the regulation of VET has as yet not been sufficiently reflected in the bill as it currently stands. The Commonwealth legislation being considered by this committee falls short of that agreement and the state is, therefore, not able to keep its side of the agreement until it is honoured in the legislation.²

1.4 The committee was informed that Western Australia was given assurances that the national system would not result in the transfer of regulatory responsibility for state-owned RTOs:

The Commonwealth Bill does not reflect the assurances given to our Premier from the then Prime Minister at the COAG meeting in December 2009 that these reforms would not result in the regulatory take-over of State owned public providers, including Western Australian TAFE Colleges.³

1.5 The committee was further advised that this assurance was central to Western Australia's commitment to a system of national regulation:

...from the discussion that occurred at COAG, there was a clear understanding from officials who were attending and the Premier that that undertakings had been made: that the WA TAFE providers would not be

¹ Communiqué for the Council of Australia Governments' Meeting, 7 December 2009, p. 5, http://www.coag.gov.au/coag_meeting_outcomes/archive.cfm.

² Mr Mark Brown, Director, Department of Education Services, Western Australian Government, *Proof Hansard*, 9 March 2011, p. 2.

³ The Hon Peter Collier MLC, Minister for Energy; Training and Workforce Development; Indigenous Affairs, *Submission 16*, p. 1.

party to the national VET regulation arrangements. It was on this basis that the Premier agreed to the recommendations made at the meeting.⁴

1.6 Western Australia has recommend that the Commonwealth attempt to address these concerns through amendments to the draft legislation to ensure the state retains responsibility for state-owned RTOs:

Western Australia considers that the Commonwealth Bill must be amended to expressly exclude its State owned public providers from the Commonwealth legislation or provide that the regulation of these providers must be delegated back to the Western Australian Regulator.⁵

1.7 As outlined at paragraphs 4.1 to 4.17 of the main report, Victoria also advised the committee of several concerns with the draft legislation. Among the matters that Victoria raised is the concern that the NVR Bills will undermine consumer protections for VET students in Victoria.⁶ The state also advised that it is concerned that the Bills will create uncertainty for the administration of TAFE Colleges in Victoria:

If Victorian TAFE Institutes have to become NVR registered training organisations (which appears to be the effect of the NVR Bill), then they may gain immunity, under clause 9(3)(a) of the NVR Bill, from the Victorian laws governing administration of State TAFE institutes outlined above.

Such an outcome would be fundamentally inconsistent with the status of TAFE Institutes as public authorities of the State. Whist this may not be an outcome intended by the drafters of the NVR Bill, it is nonetheless a fundamental flaw that must be corrected before the NVR Bill can become law.⁷

1.8 Victoria also noted its concerns regarding potential implications for the regulation of apprenticeships:

By exempting apprenticeship laws from override for some States but not Victoria, the clear implication of the Bill is that Victorian apprenticeship laws, at least to the extent that they may affect NVR registered providers, are to be overridden. Again, no equivalent arrangements will be established by the NVR Bill to replace the State laws it displaces. This appears to create a substantial regulatory gap.⁸

1.9 DEEWR argued that the bill would not interfere with the management of TAFE providers and apprenticeships, however it seems that Victoria is not satisfied on this point at present.

⁴ Mr Mark Brown, Western Australian Government, *Proof Hansard*, 9 March 2011, p. 3.

⁵ The Hon Peter Collier MLC, Minister for Energy; Training and Workforce Development; Indigenous Affairs, *Submission 16*, p. 1.

⁶ Government of Victoria, *Submission 18*, p. 3.

⁷ Government of Victoria, *Submission 18*, p. 3.

⁸ Government of Victoria, *Submission 18*, pp. 4-5.

1.10 Victoria's submission to the committee echoes the view expressed by Western Australia that the draft legislation does not reflect a best practice approach to national regulation:

Victoria seeks to limit the scope of the NVR through the NVR Bill to only those providers based in referring States. Non-referring States should retain responsibility for the regulation of all VET providers based in their jurisdiction, including providers that operate interstate and/or offer services to international students. Victoria has consistently supported a nationally consistent approach to the regulation of the VET sector. In place of a practical approach to national regulation agreed by all 6 jurisdictions, the Commonwealth's use of its powers to override States' constitutional responsibility for education, is inappropriate and undermines the Federation.⁹

1.11 Victoria has also recommended the Commonwealth seek to address the concerns through amending the NVR Bill to clarify that the legislation does not affect the authority of non-referring States to manage TAFE institutes and regulate apprenticeships, and to allow non-referring state to exempt certain laws from the operation of the NVR legislation.¹⁰ Victoria also submitted the following alternative to amending the legislation:

if the Commonwealth is not prepared to confer such a power on a non-referring state, the Bill could be amended to enable the Commonwealth Minister to exempt specified state laws from the override.¹¹

Conclusion

1.12 Coalition senators feel strongly that more work needs to be done by DEEWR to draft legislation which meets the requirements of the two non-referring states so that a truly nationally consistent VET regulator process can be presented to the Parliament. On the basis of the evidence heard, the Coalition will not support a recommendation that the Bill be approved for passage in its present form.

Recommendation 1

1.13 Coalition senators recommend the NVR Bill not be passed in its current form.

Recommendation 2

1.14 Coalition senators recommend that the NVR Bill be amended to address concerns regarding the regulation of state-owned RTOs and RTOs based in non-referring states, and concerns regarding consumer protection safeguards for students.

⁹ Government of Victoria, *Submission 18*, pp. 5 – 6.

¹⁰ Government of Victoria, *Submission 18*, p. 6.

¹¹ Government of Victoria, *Submission 18*, p. 6.

Recommendation 3

1.15 Coalition senators recommend that the Bill be amended to state that the legislation will not interfere with the management in non-referring states of TAFE providers and apprenticeships.

Intergovernmental agreements and parliamentary scrutiny

1.16 As outlined in paragraphs 1.9 to 1.12 of the committee's report, the creation of a national approach to VET is underpinned by intergovernmental negotiations and an agreement that there be a referral of powers to the Commonwealth by states and territories. As already noted, this agreement is far from unanimous: there appear to be significant sticking points with Victoria and Western Australia about exactly how the new system should work.

1.17 However, Coalition Senators are also concerned about the way in which the objective of national VET regulation is being pursued. The committee has outlined, at paragraphs 1.24 to 1.31 of its report, the constitutional and legal mechanism being used to create the National VET Regulator.

1.18 Coalition senators are concerned about three features of the process in particular:

- The attempt to tie the hands of the parliament, preventing it from improving legislation it has been asked to enact;
- The suggestion that legislation should be enacted on the basis of an intergovernmental agreement, when the agreement has not been signed and is not public; and
- A poor process for consulting on the exposure draft of legislation, including failure to present it to parliamentary committees for consideration.

Parliamentary scrutiny

1.19 We note the advice given by the Minister to the Scrutiny of Bills committee, and confirmed during this inquiry, that:

If there is amendment of the Commonwealth Bill, then the NSW referral will not support the enactment of that amended Bill. This will be the case even if only a small number of amendments are made. Any amendments to the text of the main Bill, other than purely editorial changes, will therefore delay or prevent the establishment of the [National VET Regulator].¹²

1.20 The government is saying to parliament that, even though the views of legislators were never sought, the bills cannot be revised without causing the initial referral of powers by New South Wales to fail. However, parliamentary consideration of legislation is a cornerstone of our democratic system.

¹² Senator Evans, quoted in Senate Standing Committee for the Scrutiny of Bills, *Second Report of 2011*, p. 61.

1.21 The Scrutiny of Bills committee highlighted an unusually large number of problems with this bill, in what was one of its longer reports on legislation before the Senate. As of the time of this report, several of those concerns had not allayed by the government.

1.22 While it is clear that there is widespread support for a national approach to VET, documented in paragraphs 2.1 to 2.6 of the committee's report, it was equally clear that there is a host of difficulties with the legislation. The committee's report enumerates many of these, and we generally concur with the identification of those issues.

1.23 However, the committee found itself being given the same message as was given to Scrutiny of Bills committee:

A State text referral will not support a Commonwealth law that departs in substance from the terms of the text referred. This means that the Commonwealth and the State must agree on the terms of the text before it is referred to the Commonwealth by the State.¹³

1.24 Coalition Senators do not believe that this is an adequate argument to pass legislation when so many technical and policy issues have been identified.

1.25 The committee was not presented with any reason why New South Wales in particular needed to be the jurisdiction that made the initial referral. Since any state can do this, there should be ample opportunities in the sittings of the various state parliaments to give prompt effect to referral legislation once the bills have been revised. Accordingly, we do not believe that revising the current bills, even if such revision were to render the New South Wales referral invalid, will cause undue delay in implementing a national approach to VET.

An intergovernmental agreement?

1.26 As the committee's report notes, the creation of a National VET Regulator under the current bills is the result of a COAG agreement reached in December 2009. However, the situation at present is far from clear. There is now only 'in principle' support for an IGA on the National VET Regulator, and that agreement does not include two jurisdictions. The draft agreement is not public; the committee sought a copy, but it was not provided.

1.27 The problem was highlighted by the debate over the lack of an objects clause in the main bill. As the committee notes in its report at 2.16 to 2.20, a number of stakeholders thought the bill should have an objects clause, and contrasted it with the Exposure Draft of the Tertiary Education Quality and Standards Agency Bill, which has such a clause. Here is what the committee's report goes on to document about the government's response on this:

The Department responded saying that there were differences between the processes leading to the establishment of TEQSA and the National VET Regulator, in particular that the latter is relying on a referral of state powers and therefore is negotiated with the states:

¹³ DEEWR, Answers to Questions on Notice, 7 March 2011 (received 17 March 2011), p. 2.

As a result there is an intergovernmental agreement with the states and territories, and in that intergovernmental agreement a set of objectives is set out... In the case of this piece of legislation, it was thought unnecessary to do that when the objects would be set out in the intergovernmental agreement.¹⁴

1.28 But there is no agreed intergovernmental agreement. The Department's response is effectively referring to a confidential, draft document: a document the committee could not scrutinise. Likewise, the stakeholders concerned about the lack of an objects clause can also not see this draft agreement. Even if the draft was public, neither they, nor this committee, nor the Parliament itself can be sure that it won't change after the bill has been passed.

1.29 In our view, this puts Parliament in a ridiculous situation. It is told that it cannot revise the bills in any way without invalidating the New South Wales referral of powers. Yet it is being asked to support the scheme in the absence of a signed agreement between jurisdictions, and indeed in the absence of even a public *draft* of that agreement. It is being asked to endorse the creation of what appears to be a house of cards that could collapse at any point, leaving the Commonwealth supporting a National VET Regulator that only has full jurisdiction in one state.

A poor consultation process

1.30 Far from acting as an argument to pass the bill unaltered, the situation that has arisen with the New South Wales referral of powers highlights the need for reform of parliamentary consideration of legislation in the context of intergovernmental agreements.

1.31 We believe the process needs to be changed to give Commonwealth Parliamentary committees the opportunity to consider the exposure drafts of the bills prior to their passage through a state parliament, not afterwards. This could have been achieved in late 2010 by giving Scrutiny of Bills and the Senate Education, Employment and Workplace Relations Legislation committees an opportunity to consider the bills at the same time they were being provided to other stakeholders.

1.32 Furthermore, the government should have known that there would be problems, because of the significant number of points at which the bills and Explanatory Memorandum are not consistent with the *Guide to framing Commonwealth offences, civil penalties and enforcement powers*.¹⁵ Coalition Senators take up this point further below.

1.33 We also note that the process for stakeholder consideration of the exposure draft appeared to be very brief. It did not appear to involve stakeholders with a broader view of legal issues, but only those directly involved in the VET sector. Given the scope of the legislation and the unusual assemblage of powers it contains, consultation with a broader range of interests would have been desirable.

¹⁴ Ms Quagliata, DEEWR, *Proof Committee Hansard*, 7 March 2011, p. 41.

¹⁵ Attorney-General's Department, *A guide to framing Commonwealth offences, civil penalties and enforcement powers*.

Coalition Senators' view

1.34 Coalition Senators agree with the committee's Recommendation 2, that exposure drafts of legislation be made available for examination by parliamentary committees prior to their adoption as text-based referrals of power by state legislatures. However the problems that have emerged with the National VET Regulator legislation mean that we do not think the current bills should be exempted from such scrutiny. Accordingly, we cannot agree with the committee's Recommendation 1, which recommends that the bills be passed in their current form. The parliament currently has the opportunity to get the bills right. If that means the referral of powers needs to be re-done by a state jurisdiction, then a short delay is preferable to second-rate legislation.

Recommendation 4

1.35 Coalition senators recommend that intergovernmental schemes of referred powers be created after the signing of an intergovernmental agreement, not before, and that the agreement-making process be appropriately transparent.

Recommendation 5

1.36 Coalition Senators recommend that the bill be amended to address the concerns identified by both this committee, and by the Scrutiny of Bills committee, and that if necessary, this be followed by a new referral of powers by a state.

Entry, search and seizure powers

1.37 As outlined at paragraph 3.45 of the main report, the NVR Bill would equip the National VET Regulator with significant investigatory powers, including the powers to enter and search premises under warrant, question persons on the premises and to seize documents. The Senate Standing Committee for the Scrutiny of Bills has sought justification from the Minister for aspects of these powers, concerned that clauses 62, 70, 71 and 85 may trespass on personal rights and liberties.¹⁶

1.38 It is of significant concern that following the Minister's advice the Scrutiny Committee remains of the view that the provisions do not contain sufficient safeguards or accountability measures.¹⁷ As outlined at paragraphs 3.45 to 3.54 of the

¹⁶ Senate Standing Committee for the Scrutiny of Bills, *Second Report of 2011*, p. 59. 1. Clause 62 permits authorised officers acting for the National VET Regulator to request a person who is or was connected with an RTO to provide the regulator documents or things. Under clause 64, failure to do so is an offence. Similarly, subclause 71(2) permits an authorised officer acting pursuant to a warrant to require persons on the premises to answer any questions and produce any documents. Under subclause 72(3) failure to do so is an offence. Clause 68 provides authorised officers enforcement powers, including the power to seize evidential material not specified in the warrant where the officer 'believes on reasonable grounds that it is necessary to seize the thing in order to prevent its concealment, loss or destruction'. Clause 70 permits an authorised officer to use reasonable and necessary force in executing the warrant. Clause 85 permits the use of monitoring warrants.

¹⁷ Senate Standing Committee for the Scrutiny of Bills, *Second Report of 2011*, pp. 72 – 81.

committee's report, similar concerns are shared by several stakeholders in the VET sector.

1.39 The Scrutiny Committee has provided a number of options to bring the enforcement powers in line with best practice while still ensuring a robust regulatory response to RTO non-compliance with the regulatory framework. The options are:

- Amending clause 62 to limit the power to request documents to certain kind of documents or to list factors to be taken into account when considering the exercise of the power; and¹⁸
- Amending clause 70 to include additional accountability measures for the use of force, such as a requirement that any use of force be recorded by video or that the provision does not authorise damage to any property, except in limited circumstances.¹⁹

1.40 Additionally, stakeholders have also proposed measures to ensure the enforcement powers are appropriately exercised. For example, the ACCI recommended the powers be revised to reflect the powers in the *Fair Work Act 2009*.²⁰

Coalition Senators' view

1.41 It is accepted that the National VET Regulator requires investigatory powers to respond to concerns that an RTO is operating outside the regulatory framework. However, as the Scrutiny Committee and stakeholders have pointed out, such powers must be exercised within appropriate boundaries and with due regard for personal rights and liberties.

1.42 Coalition senators believe that the entry, search and seizure powers in Part 5 of the NVR Bill should be moderated to ensure they operate appropriately. The powers should be revised to respond to the concerns identified by the Scrutiny Committee. The Fair Work Act should be investigated further as a possible model for appropriate safeguards.

Recommendation 6

1.43 Coalition Senators recommend that the bill be amended to ensure that the National VET Regulator's powers are exercised appropriately and with due regard for personal rights and liberties, and that the Fair Work Act be investigated as a possible model for exercise of entry, search and seizure powers.

Enterprise RTOs

1.44 In its report at paragraph 2.32, the committee notes how the 'AEU and TAFE Directors suggested that the VET framework should include a reference to the concept "that VET providers have as a main or proper or primary or significant purpose the

¹⁸ Senate Standing Committee for the Scrutiny of Bills, *Second Report of 2011*, p. 74.

¹⁹ Senate Standing Committee for the Scrutiny of Bills, *Second Report of 2011*, p. 77.

²⁰ ACCI, Answers to Questions on Notice, 7 March 2011 (received 10 March 2011), pp. 4 – 13.

provision of VET".²¹ The committee also notes that the ACCI was critical of any proposal that might undermine the role of Enterprise RTOs.

1.45 As the committee notes in paragraph 2.29, Enterprise RTOs include some of Australia's largest and leading employers in both the public and private sector, including the Commonwealth's own leading agency on public sector training and development, the Australian Public Service Commission.

1.46 Enterprise RTOs not only provide valuable access to training for large numbers of Australian employees, but also act as models for all Australian employers, demonstrating the need to take training seriously and to commit to ensuring it is provided to high standards. Coalition Senators emphatically reject any proposals that would risk undermining the efforts of Enterprise RTOs to ensure high quality training for their own employees.

Senator Chris Back
Deputy Chair

Senator Michaelia Cash

²¹ AEU and TAFE Directors Association, *Submission 11*, p. 1.