

DISSENTING COMMENTS BY LIBERAL SENATORS

1.1 Liberal senators wish to dissent from the conclusions and recommendations of the majority members of the committee in relation to its report on the Foreign Evidence Amendment Bill 2008.

1.2 Whilst it might be desirable to consider some changes to existing laws, Liberal Senators consider that there should be no departure from established Australian law and principles in the absence of proof of the need for change; and that the changes proposed in the Bill are the right changes. The majority report fails one or both of these tests in a number of respects

1.3 In many places, the majority report notes but effectively dismisses the evidence received from a range of respected, independent legal experts, including the Law Council of Australia. These experts did not support either the objects or the provisions of the Bill, primarily on the basis that the Bill departs from established legal principles, and does so in the absence of demonstrated justification. Despite this, the majority report repeatedly notes and accepts, without any express or rigorous probative inquiry, evidence provided by the Attorney-General's Department.

Established legal principles and laws of evidence

1.4 In particular, the Law Council argued that the introduction of a procedure for adducing foreign material that *appears to consist of a business record* is contrary to Australian law. Furthermore, the Bill provides for this evidence to be admissible, despite any other Commonwealth, state or territory rules of evidence, including those jurisdictions' exclusionary evidence rules. These rules provide safeguards which are neither replicated nor replaced within the Bill.

1.5 While there might be difficulties associated with gathering evidence overseas, these difficulties do not justify creating a special rule for the admission into evidence of foreign business records. Australian law intentionally establishes high evidentiary standards so as to protect the rights of individuals in the administration of justice. The Bill lowers these standards for foreign business records when the evidence presented by the NSW Council for Civil Liberties suggests that to the contrary there is heightened cause for concern.¹

¹ NSW Council for Civil Liberties, *Submission 1*, p. 8.

Judicial discretions

1.6 Liberal senators are not persuaded that the 'four-pronged' test embodied in the Bill protects individual rights vis-a-vis domestic business records under Australian laws. Individual rights are of fundamental concern to Liberal senators, who consider rules rather than discretions the most appropriate means of safeguarding individual rights. Accordingly, a test which relies on two subjective exercises of power is neither sufficient nor satisfactory.

1.7 As noted, by the Law Council of Australia, Australian law has always divided the rules of admissibility between rules and discretion, precisely because judicial discretion is 'inevitably uncertain, subjective and it depends on the judicial officer involved'.² Liberal senators do not consider discretion an equivalent or appropriate substitute for rules of evidence and cannot condone the Bill's radical departure from established Australian law.

Reversal of onus and prima facie admissibility

1.8 Several submissions and witnesses queried the reliability and probity of foreign business records, and two provisions of the Bill effectively require the non-adducing party, often the less resourced Accused, to prove that such evidence does not meet evidentiary thresholds. This is contrary to established principles of law, which have been in existence for hundreds of years.

1.9 The committee was told that these provisions – subclause 24(4) and 22(3) – will enable a wide range of foreign material, including material that does not fit the broad definition of 'business records' and which might have been obtained contrary to Australian principles of justice, to be adduced as evidence.

1.10 Furthermore, according to the Law Council of Australia, the reversal of onus dilutes the principles of evidence law designed to protect against the use of material that is unreliable, irrelevant or unfairly prejudicial to the defendant. The Council could not identify any rationale for this reversal and highlighted its prejudicial effects:

...the party in possession of the evidence is usually in a better position to address those factual issues. That is certainly true when the prosecution adduces evidence of foreign business records. The prosecution will have the record and will usually have greater resources than the defence. It will be very difficult for the defence to demonstrate that an apparent business record is unreliable on the face of the document and the defence will confront great hurdles in obtaining other evidence to establish lack of reliability.³

² Mr Stephen Odgers SC, Law Council of Australia, *Committee Hansard*, Canberra, 20 February 2009, pp 1-2, 3 & 6.

³ Law Council of Australia, *Submission 3*, p. 9.

1.11 Liberal senators agree with the majority members of the committee that the adducing party continue to bear the onus of proving reliability and probity of foreign business records to be adduced as evidence in Australian proceedings. However, Liberal senators consider that the Bill requires more than this amendment.

Prima facie admissibility

1.12 The effect of certain provisions of the Bill is to render foreign business records *prima facie* admissible. Not only does this create a lower threshold for those kinds of evidence, it ignores the fact that, as noted by the Law Council of Australia, foreign jurisdictions do not necessarily collect evidence in a manner which would be acceptable in Australian jurisdictions.

1.13 The department waived off these comments, telling the committee that:

...it is appropriate that evidence taken in accordance with the procedures in a foreign country's legal system be considered as testimony, notwithstanding that it does not comply with Australian formalities concerning the taking of evidence.⁴

1.14 Liberal senators acknowledge cited examples of situations in which evidence taken overseas would not comply with Australian 'formalities', including references to evidence obtained under torture or through the misconduct of law enforcement officers. Submissions particularly noted the Guantanamo Bay Rules.⁵

1.15 Liberal senators do not consider Australia's high evidentiary standards as mere 'formalities'. They exist to protect the rights of individuals in the administration of justice, even more justifiably when the evidence in question stems from questionable sources. The Bill recognises a lower level of probity for foreign business records than currently exists for domestic business records. Liberal senators reject the need for this approach.

Retrospective provisions

1.16 The majority report concludes that certain items in the Bill are not retrospective provisions. However, evidence to the committee from the Law Council of Australia and the NSW Council for Civil Liberties flagged this as a legal concern. The issue merits further scrutiny, if not by this committee then by the Australian Law Reform Commission.

Conclusion

1.17 The majority cites pragmatism as the reason for its recommendations. Pragmatism falls significantly short of sufficient justification of either the need for

⁴ Attorney-General's Department, Answers to Questions on Notice, p. 7 (received 24 February 2009). Also, see Attorney-General's Department, *Submission 4*, p. 5.

⁵ For example, see Mr David McLeod, *Submission 2*

these provisions or their appropriateness. Furthermore, Liberal senators are not convinced of the supposed urgency for this Bill. Although the department declined to comment, Liberal senators note discussion in the House of Representatives on introduction of the Bill,⁶ and agree with the Law Council of Australia that introducing a new regime which departs from Australian law is not a justifiable response to investigative difficulties experienced in a high profile prosecution (arising from Operation Wickenby).⁷ Given the contentious nature of this Bill, Liberal senators consider that the Bill as it stands should not be passed by the Senate.

Recommendation 1

1.18 Liberal senators recommend that the government withdraw the Foreign Evidence Amendment Bill 2008 and refer it to the Australian Law Reform Commission for examination. If the government does not accept this recommendation, Liberal senators recommend that the Senate reject the Bill.

Senator Guy Barnett

Senator Mary Jo Fisher

Senator Russell Trood

Deputy Chair

6 *House Hansard*, 5 February 2009, pp 533-548.

7 Law Council of Australia, *Submission 3*, p. 5.