AUSTRALIAN LAWYERS FOR HUMAN RIGHTS

12 October 2017

PO Box A147
Sydney South
NSW 1235
DX 585 Sydney

www.alhr.org.au

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Committee Secretary

Inquiry into the provisions of the Criminal Code Amendment (Impersonating a Commonwealth Body) Bill 2017

Australian Lawyers for Human Rights (**ALHR**) thanks you for the opportunity to provide this submission in relation to the Committee's current Inquiry into the proposed *Criminal Code Amendment (Impersonating a Commonwealth Body) Bill* 2017 (**'the Bill'**).

1. ALHR's Concerns

1.1 ALHR's primary concern is that the proposed bill will unreasonably and disproportionately violate the fundamental universal human rights to freedom of speech and freedom of expression.

1.2 Pursuant to the principle of legality, Australian legislation and judicial decisions should adhere to international human rights law and standards, unless legislation contains clear and unambiguous language otherwise. Furthermore, the Australian parliament should properly abide by its binding obligations to the international community in accordance with the seven core international human rights treaties and conventions that it has signed and ratified, according to the principle of good faith.

1.3 ALHR endorses the views of the Parliamentary Joint Committee on Human Rights (PJCHR) expressed in Guidance Note 1 of December 2014[1] as to the nature of Australia's human, civil and political rights obligations, and agree that the inclusion of human rights 'safeguards' in Commonwealth legislation is directly relevant to Australia's compliance with those obligations.

---

[1] Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Guidance Note 1*: *Drafting Statements of Compatability*, December 2014, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources> accessed 16 January 2015, see also previous *Practice Note* 1 which was replaced by the Guidance Note, available at< https://www.humanrights.gov.au/parliamentary-joint-committee-human-rights>.

1.4 Generally, behaviour should not be protected by Australian law where that behaviour itself infringes other human rights. There is no hierarchy of human rights – they are all interrelated, interdependent and indivisible. Where protection is desired for particular behaviour it will be relevant to what extent that behaviour reflects respect for the rights of others.

1.5 It is only through holding all behaviours up to the standard of international human rights that one can help improve and reform harmful and discriminatory practices.

1.6 Legislation should represent an **appropriate and proportionate response** to the harms being dealt with by the legislation, and adherence to international human rights law and standards is an important indicator of proportionality. [2]

2. The Bill exceeds its stated aim

2.1 The Explanatory Memorandum states that the Bill, if enacted, would amend the Criminal Code Act 1995 (**the Criminal Code**) "to introduce an offence which criminalises conduct amounting to a person falsely representing themselves to be, or to be acting on behalf of, or with the authority of, a Commonwealth body."[3]

The scenario involving imprisonment for up to 2 years -– 150.1 (1)

2.2 The legislation as presently drafted goes considerably beyond the aim articulated in the Explanatory Memorandum, and far beyond the existing provisions of section 148.1 (which do involve penalising 'false representation', unlike the proposed legislation, but only where the accused intended to deceive or make a false statement). The new offence would allow imprisonment for up to 2 years even where there is no intention to deceive and no *mens rea* involved other than recklessness as to whether or not others may be misled. The offence would also apply irrespective of whether or not harm has actually been caused. It applies both in relation to actual Commonwealth entities and fictitious Commonwealth entities.

2.3 The proposed section 150.1 permits imprisonment of persons who do not at any stage intend to persuade others that they are acting on behalf of a Commonwealth body – and who do not necessarily mislead anybody, particularly where the body is fictitious (as occurs in the case of political satire) - but who might be argued to be reckless in that they were aware of the risk that someone else could form that impression. This situation could often occur in various employment situations, as Submission 1 by Jeremy Gans points out, or when persons comment on government policy through satire.

2.4 ALHR submits that the Bill if passed in its present form will have a severe chilling effect upon free speech, especially upon political comment and satire where actors regularly portray politicians or government spokespeople. For example, under the proposed legislative regime would each episode of *Clarke and Dawe*, *The Chaser*, *The Juice Media's "Honest Government Ads"* or *Shaun Micallef's "Mad as Hell"* need to be prefaced by explanations that the characters are not representing the federal government to avoid any risk of all concerned being jailed for up to 5 years? That the question even needs to be asked demonstrates that the proposed legislation is an unreasonable overreach by the Executive arm of government and utterly inimical to the values of a free and democratic society.

2.5 The purported reason for the Bill is "to protect Australian Government entities, companies and services from certain types of misrepresentations and false statements, safeguarding the proper

---

[2] See generally Law Council of Australia, *"Anti-Terrorism Reform Project"* October 2013, <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Oct%202013%20Update%20-%20Anti-Terrorism%20Reform%20Project.pdf> .

[3] Explanatory Memorandum, par 2.

functioning of Government" so as to "ensure the public has confidence in the legitimacy of communications emanating from Commonwealth bodies".[4] ALHR submits that the Bill is not a proportionate response to the harms identified, and disproportionately impacts upon civil and human rights, free speech and democratic participation, as discussed further below.

2.6 The proposed section reads as follows:

(1) A person commits an offence if:

(a) the person engages in conduct; and

(b) the conduct results in, or is reasonably capable of resulting in, a representation that the person:

(i) is a Commonwealth body; or

(ii) is acting on behalf of, or with the authority of, a Commonwealth body; and

(c) the person is not:

(i) the Commonwealth body; or

(ii) acting on behalf of, or with the authority of, the Commonwealth body.

2.7 Section 5.6 of the Code covers offences that do not specify fault elements (such as the proposed section 150.1(1)). It provides that:

(1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.

(2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.

Note: Under subsection 5.4(4), recklessness can be established by proving intention, knowledge or recklessness.

2.8 Section 5.4 of the Code provides that:

(1) A person is reckless with respect to a circumstance if:

(a) he or she is aware of a substantial risk that the circumstance exists or will exist; and

(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

(2) A person is reckless with respect to a result if:

(a) he or she is aware of a substantial risk that the result will occur; and

(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

(3) The question whether taking a risk is unjustifiable is one of fact.

(4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

2.9 As Jeremy Gans points out in Submission 1, there are numerous situations in which employees of various private corporations and bodies, or even of local or State governments, could in good

---

[4] Explanatory Memorandum, par 5.

faith carry out conduct which could result in another person such as a customer believing that the employee is acting on behalf of a Commonwealth body. Given the general lack of understanding in the Australian community about the division between the Commonwealth and State governments, and the role of the Commonwealth in general, this is a very real concern, particularly because the draft legislation also covers Commonwealth-controlled corporations, and services provided 'on behalf of the Commonwealth' – a very wide-ranging provision.

2.10 There is absolutely no reason why such good faith conduct should be penalised where there is no adverse *mens rea* or desire to deceive on behalf of the employee. As Mr Gans notes at page 3 of his submission:

> *The fundamental problem with s150.1 is that it criminalises reasonable misunderstandings, rather than deception, in a context where reasonable misunderstandings (about the role and reach of Australia's federal government) are absolutely commonplace (and are widely recognised as such by all informed people.) Criminalising individuals who must operate within that context, regardless of their intentions or honesty, is wholly inappropriate.*
>
> *… just because unintentional misrepresentations can be 'equally capable of undermining public confidence in the integrity and authority of the Australian government' doesn't mean that they should be criminalised in the same way as intentional representations. The complexity of Australian governmental services, and widespread ignorance of their intricacies, is a national burden, rather than one that should be met by all individuals who work in governmental or quasi-governmental fields.*

2.11 In other words, it is entirely inappropriate to found an offence on the concept of 'recklessness' in situations where people such as employees are well aware that through no fault of their own others, like customers, might easily regard the employee as representing a Commonwealth body or Commonwealth-controlled corporation. Once the employee is aware of section 150.1, must the employee preface every dealing with a customer with a disclaimer about being connected with the Commonwealth, in order to avoid being in breach of the section? The idea is ludicrous. The proposed legislation discriminates against employees of corporations or businesses which might reasonably be regarded by the man in the street as having Commonwealth government connections, purely on the basis of their status as employees. This amounts to discrimination on the basis of status.

2.12 We note that Mr Gans has several suggestions as to how the drafting in the Bill could be improved so as to require appropriate *mens rea* before imposing serious criminal charges and we endorse a thorough rethinking of the drafting of the Bill as he suggests.

The scenario involving imprisonment for up to 5 years – 150.1(2)

2.13 The situation is not much better in relation to the *mens rea* element for similar conduct that can be penalised by imprisonment for up to 5 years. The fault elements here again involve recklessness. Recklessness continues to be a problematic test of *mens rea* in theory and as drafted in the Bill, particularly because of the severe penalties involved. The additional mental element required is that the accused was engaged in the conduct with the intention of obtaining a gain, causing a loss, or 'influencing the exercise of a public duty or function.'

2.14 Insofar as the intention of obtaining a gain is concerned, where clear fraud is involved this would already be covered by criminal provisions relating to fraud. But would this provision also catch satiric or artistic works that are carried out for payment, such as theatrical performances or television productions? It is by no means clear and this needs to be clarified. Presumably this is not the intention and that needs to be stated. However, if it is in fact the intention then ALHR holds profound concern about the protection of freedom of speech and the freedom of expression in Australia and would strongly encourage the Committee to critique this aspect of

the bill.

2.15 Similarly, many artistic and satiric works are intended to influence public policy and could easily be caught within the scope of conduct intended to influence "the exercise of a public duty or function". ALHR submits that to influence the manner in which public functions are exercised is a normal aim of all political opposition and political comment. Engaging in influencing the exercise of a public duty or function through lawful and legitimate means such as public communications including academic, satirical and artistic works is arguably a fundamental and indispensable principle of Australian democracy that cannot and should not be cast aside so ambiguously and flippantly. For example, we as human rights lawyers constantly try to influence the exercise of public functions so that they are carried out in a manner consistent with human rights. The criteria of 'influencing public policy' does not of itself warrant the imposition of such extreme penalties.

2.16 The issue of intent to 'cause a loss' is also problematic. Whose loss is involved? What if satirical speech opposing federal government policy were intended to result in an overseas investor pulling out of a proposed Australian acquisition? Would this amount to 'loss' for the purposes of the legislation? If so, this provision would basically impose imprisonment for a whole range of satirical political speech.

2.17 We submit that the *mens rea* requirements are inadequately expressed and need to be considerably revised in order to avoid far-reaching and anti-democratic unintended consequences.

3. Human rights breached by the proposed Bill

3.1 The Statement of Compatibility within the Explanatory Memorandum identifies the following rights under the *International Covenant on Civil and Political Rights* (**ICCPR**) as potentially impacted, arguing however that the impact is proportionate, necessary and reasonable in the circumstances. These are:

- the right to freedom of expression, as contained in Article 19 of the ICCPR (and Article 18 of the Universal Declaration of Human Rights), and
- the right to a fair and public hearing in both civil and criminal proceedings, as contained in Article 14 of the ICCPR.

3.2 Australia is a contracting party to the ICCPR which was signed by the Australian government on 18 December 1972 and ratified on 13 August 1980. Pursuant to Article 26 of the 1969 Vienna Convention on the Law of Treaties, Australia is obliged to the international community to implement, uphold, protect and respect all of the rights contained in the ICCPR including the right to freedom of expression and the right to a fair and public hearing in both civil and criminal proceedings.

3.3 We submit that the legislation as drafted provides neither a proportionate, necessary or reasonable response to the perceived harms. The Bill sets a very concerning and very undesirable precedent of criminalising 'reckless' behaviour that is in no way intended to cause harm, and quite irrespective of whether or not harm has actually been caused. Given that it might result in incarceration for non-malignant behaviour which actually causes no harm, it is potentially in breach of Article 9 of the ICCPR and Article 3 of the Universal Declaration of Human Rights (**UDHR**) which protect the right to liberty. We remind the Committee that Australia had a significant role in drafting the UDHR and in its adoption by the United Nations General Assembly on 10 December 1948. This is a proud history that Australia has in upholding basic human rights and we should be vigilant to guard against their infringement by the government of the day. ALHR submits that the Australian electorate should not allow the government of the day to dispense with and dispose of fundamental human rights so frivolously

as appears to be the intention of the Bill.

3.4 Not only does the legislation clearly and severely impact on freedom of expression under Article 19 and the fundamental rights of individuals to take part in the conduct of public affairs as provided for by Article 25 of the ICCPR, but also, as argued above appears to promote potential discrimination on the basis of status, in breach of Article 26 of the ICCPR. Discrimination on the basis of status infringes Article 7 of the UDHR which enshrines the right to equal protection against discrimination.

3.5 The proposed legislation also impacts on the right to work, under Article 6 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), and to the enjoyment of just and favourable conditions of work under Article 7 of the ICESCR, both rights coming under Article 23 of the UDHR.

3.6 The exemption covering satire, academic and artistic purposes is drafted much too narrowly, especially in the light of the excessive penalties that can apply.

(a) First of all, the exemption is not a substantive provision but merely an exclusive definition of 'conduct' which, as Mr Gans points out in Submission #1, is not a sound drafting basis for a substantive exemption.

(b) "Conduct" is defined as not including "conduct engaged in solely for genuine satirical, academic or artistic purposes." But what counts as "genuine" satire – or even as "satire"- is not a matter that is established in common law in Australia, and the Bill provides no guidance. What is non-genuine satire? How does one establish that one's satire is 'genuine'? These provisions raise more questions than they solve.

(c) Furthermore, the qualification that the conduct be "solely" for the exempt purpose is also problematic: what if the work is satirical (or academic or artistic) but the creator also has other, or additional, motivations? Given that any conduct can convey multiple messages to different audiences, it is likely to be virtually impossible for anyone to prove that their conduct had a sole purpose or a sole message.

Given the potential for such lazy legislative drafting to seriously infringe on fundamental democratic freedoms, it is ALHR's submission that all of these questions and ambiguities must be clarified before the Bill is put to a vote in the parliament.

3.7 When one contrasts the proposed exemptions with the width of the 'free speech' exemptions in section 18D of the *Racial Discrimination Act 1975* (Cth) it is clear that the exemptions are not proportionate to the penalties that the Bill imposes. We recommend that the exemptions be substantially enhanced along the lines of those in section 18D. For example, an additional subsection to Section 150.1 could be included to read along similar lines as follows:

> *Section 150.1 does not render unlawful anything said or done reasonably and in good faith (whether or not carried out for profit, and whether or not resulting in any loss to any person):*
>
> *(a) in the performance, exhibition or distribution of an artistic and/or political work, including any comedic or satirical work; or*
>
> *(b) in the course of any statement, publication, discussion or debate made or held for any genuine political or artistic purpose or any other genuine purpose in the public interest; or*

(c) in making or publishing a fair and accurate report of any of the above matters.

3.8 We fear that the Bill as presently drafted is so excessive in its scope and in the penalties imposed as to have a severely chilling effect upon free speech, and particularly constitutionally-protected free political speech, including satire and artistic works. This effect is potentially in breach of Article 27 of the UDHR which provides that "everyone has the right freely to participate in the cultural life of the community [and] to enjoy the arts…". It diminishes our democracy.

Conclusion

Satire and political comment are a fundamental part of any democracy. The importance of larrikinism and "taking the mickey" out of the government of the day are an indispensable part of the Australian culture and our heritage. Every week Australians sit down to watch their favourite comedians make humorous political comment as a way to engage public participation in our political system which is a fundamental and indispensable part of Australian democracy. Television shows like *Clarke & Dawe, Mad as Hell, The Chaser* and online content like *The Juice Media's* "Honest Government Ads" are a potent expression of the free spirit of Australia and our democracy. They should not be traded away so carelessly by overreaching and poorly drafted legislation such as the proposed Bill.

Any legislation which impinges upon human rights must be narrowly framed, proportionate to the relevant harm, and provide an appropriate contextual response which minimises the overall impact upon all human rights. The drafting of the Bill far exceeds its stated aims and has the potential to criminalise normal employee and artistic behaviour and to chill the exercise of free speech including political comment.

ALHR submits that the Bill should not be passed in its current form. ALHR submits that the Minister should provide some clear examples of why such a Bill is necessary and what particular mischief it aims to confront because neither the Explanatory Memorandum nor the Second Reading Speech provide any such important information for such profound impositions on the freedom of speech.

If the committee thinks the Bill should be put to the parliament for a vote, then it is ALHR's submission that the Bill must be considerably revised to require appropriate *mens rea* (of intending to mislead or deceive) before imposing criminal sanctions.

Finally, ALHR submits to the Committee that we should not take our democratic rights, freedoms and privileges for granted. We must be vigilant and protect them from unreasonable and excessive incursion by the Executive arm of government. It is the duty of the Committee members and all Australians to protect our democracy especially in circumstances where Australia is the only western liberal democracy bereft of a bill of rights or federal charter of rights.

Indeed, Australians do not have an express legally protected right to freedom of speech and/or expression, which makes the contents of the proposed Bill all the more troubling.

ALHR is happy to provide any further information or clarification in relation to the above if the Committee so requires.

If you would like to discuss any aspect of this submission, please email me at:

Yours faithfully

Benedict Coyne
President
Australian Lawyers for Human Rights

ALHR

ALHR was established in 1993 and is a national association of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.