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Senate Legal and Constitutional Affairs Committee

Dear Mr Watling,

Submission – Inquiry into the Criminal Code Amendment (Impersonating a Commonwealth Body) Bill 2017

Thank you for your invitation to make a submission on this bill.

I am an academic at Melbourne Law School, specialising in all aspects of criminal justice. I am also the author of *Modern Criminal Law of Australia* (2nd ed, Cambridge, 2017), which focusses on statutory criminal law, including the federal *Criminal Code*.

I have two concerns about the Criminal Code Amendment (Impersonating Commonwealth Body) Bill 2017. One concerns its **substance**, the other concerns its **drafting**.

The substance of proposed s150.1

The Bill's stated purpose is as follows (from the second reading speech):

> *This bill seeks to address a possible gap in our criminal law, which means that impersonating a Commonwealth entity, company or service may not be appropriately prosecuted. It is already a criminal offence to impersonate a Commonwealth official. It is less clear whether the current offences cover a person pretending to be, or acting on behalf of, a Commonwealth body—which is why we have taken action.*

The existing offences of impersonating a Commonwealth public official (s148.1 of the Code) are as follows:

> *(1) A person other than a Commonwealth public official commits an offence if:*
>
> *(a) on a particular occasion, the person impersonates another person in that other person's capacity as a Commonwealth public official; and*
>
> *(b) the first-mentioned person does so knowing it to be in circumstances when the official is likely to be on duty; and*
>
> *(c) the first-mentioned person does so with intent to deceive.*
>
> *Penalty: Imprisonment for 2 years.*
>
> *(2) A person other than a Commonwealth public official commits an offence if:*
>
> *(a) the person **falsely represents** himself or herself to be a Commonwealth public official in a particular capacity; and*
>
> *(b) the person does so in the course of doing an act, or attending a place, in the assumed capacity of such an official.*
>
> *Penalty: Imprisonment for 2 years.*

These offences require that the prosecution prove that the accused **intended** (i.e. meant) to deceive or make a false statement. The Bill's modest purpose could have been achieved simply by inserting the words 'or body' after 'official' throughout existing s.148.1.

Instead, the Bill creates a new offence:

> *(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;*

Proposed s.150.1 is not merely an extension of s148.1 to Commonwealth **bodies**. Rather, it is significantly broader than s148.1 in six important ways:

First, it does not require that the accused 'impersonate' or 'represent' anything. Rather, it applies if the accused but merely does anything at all that would or reasonably could 'result' in a representation. For example, it would cover an accused whose conduct merely gives another person (or could give another person) a particular impression.

Second, it does not require a 'false' representation, but rather merely that someone is reasonably capable of getting the wrong idea.

Third, it does not require intentional or knowing falsehood or deception, but rather (by operation of s5.6 of the Code) only that the accused was aware of a substantial (and unjustified) risk that someone else would or reasonably could get the wrong idea.

Fourth, it does not require the wrong impression that the accused actually is a Commonwealth body, but rather that the accused is merely acting on behalf of, or the authority of, a Commonwealth body. (by contrast, s148.1 is limited to misrepresentations about the 'capacity' the accused is acting in.)

Fifth, it does not require that the Commonwealth body be a body established by or under a law of the Commonwealth (a Commonwealth 'entity' as defined in the Code), but also extends to any corporation that the Commonwealth controls (a 'Commonwealth company', as defined in the *Public Governance, Performance and Accountability Act 2013*) or any 'service, benefit, program or facility' for anyone in the public 'provided by or on behalf of the Commonwealth', whether or not under a law.

Sixth, it does not require that the Commonwealth body be real; rather, it is enough that someone could reasonably believe that such a body exists (see sub-ss (3) & (4)). (By contrast, s148.1 only covers fictitious 'capacities' of Commonwealth public officials, not fictitious officials.)

These extensions are especially significant in combination. Rather than only criminalising people who deliberately impersonate a Commonwealth body, proposed s150.1 criminalises any person who is simply aware of a substantial risk that someone else would or could reasonably have the impression that the person is acting on behalf of a real or fictitious Commonwealth body, Commonwealth-controlled corporation or Commonwealth provided service, benefit, program or facility. For example:

- an employee of the National Australia Bank who realises that a customer (e.g. a foreign tourist) could reasonably think the bank was owned or run by the Australian government.
- an employee of a state government agency (e.g. WorkCover) who realises that a recipient of the agency's services could reasonably think the agency was a federal government agency
- a doctor who realises that a patient could reasonably think that she was acting on behalf of Medicare, or that the doctor was providing a service 'on behalf of the Commonwealth'
- an employee or owner of Australia Zoo who realises that a visitor could reasonably think that the zoo was controlled by the Australian government.

Etc. Any of these people could, if prosecuted, face imprisonment for up to 2 years, or even 5 years (if, as is likely, the person happens to be involved in a commercial or government-facing activity.)

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.

The Explanatory Memorandum seeks to justify the broad scope of proposed s150.1 as follows:

> *This threshold captures conduct where a person does not necessarily intend to create the relevant representation, or does not necessarily believe the circumstance to be false, but where they are aware that there is a substantial risk that such a representation will occur, or that the circumstance is false, and it is unjustifiable for them to take that risk. This threshold is necessary to ensure the offence covers false representations that, whilst not intentional, are equally capable of undermining public confidence in the integrity and authority of the Australian Government and are made in circumstances where the accused is aware of a substantial risk of misrepresentation.*

But, 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.

I imagine that s150.1's purpose is not to criminalise all such misunderstandings, but rather to provide a civil remedy – the regulatory scheme in Part 7 of the *Regulatory Powers (Standard Provisions) Act 2014* – that allows Commonwealth bodies to seek to ameliorate misunderstandings that may arise. That's a fair purpose. But it doesn't necessitate the breadth of the proposed criminal offence. Rather, that regulatory could be achieved by a separate civil provision in the same terms as s150.1, which is declared to be enforceable under Part 7of the RP(SP)A. Section 150.1 could then be defined with appropriate fault elements equivalent to s148.1 and reserved for situations where prosecution and criminal punishment are actually appropriate.

The drafting of proposed s150.1

Putting aside the overbreadth of proposed s150.1, the provision is also quite oddly and indifferently drafted, in at least two respects.

First, seemingly in an effort to conform to the default fault element provisions of s5.6 of the Criminal Code, the provision is extremely convoluted:

(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;

This provision separates the crime into all 'conduct' (including omissions to act, in the unlikely event that there is a legal duty to act as required by s4.3 of the Code), and two particular circumstances - an actual result (a representation) or a possible result (a reasonably open representation.) I imagine this separation was designed to fit so that s5.6 of the Code would automatically supply the required default fault elements (intent for conduct, recklessness for the rest.)

But the result is bizarrely complex. Consider, for instance, the four examples provided in the Explanatory Memorandum:

- *writing of a letter on the letterhead (or purported letterhead) of a Commonwealth body*
- *sending an electronic communication (including an email or text message) imputed to be from or on behalf of a Commonwealth body*
- *taking out an advertisement in the name of a Commonwealth body, or*
- *issuing of a publication in the name of a Commonwealth body.*

Is the letter/email/advertisement/publication 'conduct' (with a requirement of intent) or a resulting 'representation' (with a requirement of recklessness) or a reasonably open representation (also with a requirement of recklessness)? Fancy having to direct a jury on these matters!

Even accepting the need to criminalise all reckless misunderstandings about Commonwealth bodies, there is absolutely no need for this statutory complexity (and, in particular, the unnecessary use of the clumsy phrase 'engage in conduct', which was introduced 16 years ago in a failed attempt to negotiate the Code's requirements for liability for omissions.) Rather, the simple phrase 'makes a representation' is more than sufficient. Using this phrase allows two better drafting alternatives:

Instead of relying on default fault elements from s5.6, the fault element of recklessness could be provided for expressly as follows:

*(1) A person commits an offence if the person **recklessly**:*

(a) makes a representation; and

(b) the representation is:

(i) that the person is a Commonwealth body;

(ii) that the person is acting on behalf of a Commonwealth body;

(iii) that the person is acting under the authority of a Commonwealth body; or

(iv) reasonably capable of being a representation as to any of these facts; and

(c) the person is not a Commonwealth body, or acting on behalf of, or under the authority of, such a body.

Alternatively, if Parliament wished to utilise the default scheme in the Code (which requires intent for the accused's actions), then it could simply enact the following:

> *(1) A person commits an offence if the person:*
>
> *(a) makes a representation; and*
>
> *(b) the representation is:*
>
> *(i) that the person is a Commonwealth body;*
>
> *(ii) that the person is acting on behalf of a Commonwealth body;*
>
> *(iii) that the person is acting under the authority of a Commonwealth body; or*
>
> *(iv) reasonably capable of being a representation as to any of these facts; and*
>
> *(c) the person is not a Commonwealth body, or acting on behalf of, or under the authority of, such a body.*

Under s5.6, intent would be the fault element for (a) and recklessness would be the fault element for paras (b) and (c).

These alternatives are, in my view, much more straightforward than the currently proposed s150.1. If there was some need to representations by omission, a separate provision could provide that 'making a representation' includes 'omitting to do or say anything in circumstances that result in a representation or would be reasonably capable of resulting in a representation.'

Second, proposed s150.1(7) sets out the following peculiar provision:

> ***conduct*** *does not include conduct engaged in solely for genuine satirical, academic or artistic purposes.*

This is just lazy drafting. Conduct engaged in solely for genuine satirical, academic or artistic purposes is still conduct, and to say otherwise is silly, confusing and (perhaps) ambiguous as to which party will bear the evidential burden on this issue. Instead, why not provide a straightforward exception, e.g.:

> *This section does not apply to conduct engaged in solely for genuine satirical, academic or artistic purposes.*

This is clearly an important exception and should not be buried away in a weird definition.

I am happy to provide any further clarification if needed.

Yours Sincerely,

Jeremy Gans