

# Chapter 2

## Key issues

2.1 This chapter outlines the provisions of the Criminal Code Amendment (Impersonating a Commonwealth Body) Bill 2017 (the bill) and discusses the issues raised by submitters about the proposed amendments. The views and recommendation of the Legal and Constitutional Affairs Legislation Committee (the committee) will also be discussed.

### Primary offence

2.2 The bill introduces an offence where a person engages in conduct that results in, or is reasonably capable of resulting in, a false representation that the person is a Commonwealth body, or is acting on behalf of, or with the authority of, a Commonwealth body (proposed subsection 150.1(1)). The maximum penalty for this offence is two years imprisonment, which the Explanatory Memorandum (EM) notes is the same penalty for the current offences of impersonating a Commonwealth public official in subsections 148.1(1) and 148.1(2) of the *Criminal Code Act 1995* (the Act).<sup>1</sup>

2.3 The EM explains that the fault element for this offence is recklessness which it states 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.'<sup>2</sup> Examples provided in the EM of conduct that may be captured by this offence include:

- 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 a publication in the name of a Commonwealth body.<sup>3</sup>

2.4 The EM notes that the bill engages the right to freedom of expression and the right to a fair and public hearing in both civil and criminal proceedings—expressed respectively in Articles 19 and 14 of the International Covenant on Civil and Political Rights (ICCPR).<sup>4</sup> The EM concluded that, to the extent that these rights might be limited, 'those limitations are reasonable, necessary and proportionate.'<sup>5</sup>

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1 Explanatory Memorandum, p. 6.

2 Explanatory Memorandum, p. 7.

3 Explanatory Memorandum, p. 7.

4 Explanatory Memorandum, p. 4.

5 Explanatory Memorandum, p. 5.

2.5 The Legal Services Commission of South Australia commented that it is aware of the harm caused by scams where the caller claims to represent a Commonwealth body and consequently noted its support for the proposed legislation.<sup>6</sup>

2.6 A number of submitters also expressed their support for an offence relating to impersonating the Commonwealth government, but raised concern that the bill goes beyond its stated intention and 'could also be used to suppress work of a satirical nature.'<sup>7</sup> Electronic Frontiers Australia (EFA) noted the importance satire plays in Australian society:

Satire particularly is an essential element of public discourse and can be a powerful tool for highlighting issues and in holding governments to account.

Any attempt by government to suppress satirical expression is by definition an attack of freedom of expression, and may breach the implied right to political speech, one of the few constitutional civil liberties protections available to Australians.<sup>8</sup>

2.7 Australian Lawyers for Human Rights (ALHR) also raised human rights concerns, arguing that 'the legislation as drafted provides neither a proportionate, necessary or reasonable response to the perceived harms.'<sup>9</sup> ALHR provide the following explanation:

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.<sup>10</sup>

2.8 ALHR also noted that the proposed offence would apply where there is no intention to deceive, and regardless of whether or not harm had been caused or where there is an actual or fictitious Commonwealth entity.<sup>11</sup> ALHR argued that the proposed legislation could have a 'chilling effect' on free speech, or more specifically, on political commentary and satire.<sup>12</sup>

2.9 Professor Jeremy Gans from the University of Melbourne's Law School voiced similar concerns, noting that the bill significantly broadens the existing offence in section 148.1 of the Act and explained why the fault element was problematic:

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6 Legal Services Commission of South Australia, *Submission 2*, p. 1.

7 Dr Giordano Nanni, *Submission 3*, p. 1; and Ms Felicity Ruby, *Submission 5*, p. 1.

8 Electronic Frontiers Australia, *Submission 7*, p. 2.

9 Australian Lawyers for Human Rights, *Submission 6*, p. 5.

10 Australian Lawyers for Human Rights, *Submission 6*, p. 5.

11 Australian Lawyers for Human Rights, *Submission 6*, p. 2.

12 Australian Lawyers for Human Rights, *Submission 6*, p. 2.

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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.<sup>13</sup>

2.10 Professor Gans provided the following examples of conduct which may be captured by the new offence:

- 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'; and
- an employee or owner of Australia Zoo who realises that a visitor could reasonably think that the zoo was controlled by the Australian government.<sup>14</sup>

2.11 Despite the concerns raised by submitters the committee notes that the Joint Committee on Human Rights (Human Rights Committee) reported that this bill did not raise human rights concerns.<sup>15</sup>

### **Aggravated offence**

2.12 The bill also introduces an aggravated offence where a person falsely represents that the person is a Commonwealth body, acts on behalf of or with the authority of, a Commonwealth body; and with the intention of obtaining a gain, causing a loss, or influencing the exercise of a public duty or function (proposed subsection 150.1(2)). The EM explains that the fault element is recklessness for the same reasons as outlined in the primary offence.<sup>16</sup> The maximum penalty for this offence is five years imprisonment, which the EM notes is the same penalty for the current aggravated offences of impersonating a Commonwealth public official in subsections 148.1(3) and 148.2(3) of the Act.<sup>17</sup>

2.13 Submitters generally raised the same concerns with the aggravated offence as with the primary offence. ALHR explained that the additional element to be proved to

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13 Professor Jeremy Gans, Melbourne Law School, University of Melbourne, *Submission 1*, p. 3.

14 Professor Jeremy Gans, Melbourne Law School, University of Melbourne, *Submission 1*, p. 3.

15 Parliamentary Joint Committee on Human Rights, *Report 11 of 2017*, 17 October 2017, p. 60.

16 Explanatory Memorandum, p. 7.

17 Explanatory Memorandum, p. 7.

make out the aggravated offence 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.<sup>18</sup> ALHR outlined why it considered each of the additional elements to be problematic:

- in the case of 'obtaining a gain' this might capture theatrical performances or television productions, which are of a satirical or artistic nature, and is carried out for a payment;
- in relation to 'causing a loss', ALHR questioned whether, for example, satirical speech opposing federal government policy and resulting in an overseas investor pulling out of a proposed Australian acquisition, would amount to a 'loss' for the purposes of the Act; and
- in the case of 'influencing the exercise of a public duty or function', ALHR outlined that many artistic and satiric works, as well as some academic works, are produced with the intention of influencing public policy.<sup>19</sup>

2.14 In all cases, ALHR argued that the satirical, artistic and academic work is a fundamental principal of Australian democracy 'that cannot and should not be cast aside so ambiguously and flippantly', and moreover, does not warrant the imposition of such penalties.<sup>20</sup> Finally, ALHR noted that the intention requirements are not clear, and recommended amendment so that any unintended consequences are not as far reaching.<sup>21</sup>

### **Exemption**

2.15 The proposed new offences contain an exemption, namely that '**conduct** does not include conduct engaged in solely for genuine satirical, academic or artistic purposes.'<sup>22</sup> Apart from restating the proposed provision, the EM does not provide any further information about the intended operation of this proposed subsection.

2.16 A number of submitters expressed concern with the way the exemption had been drafted.<sup>23</sup> As pointed out by Professor Gans and ALHR, the exemption is a definition of the word 'conduct' rather than a substantive provision, which, it was argued, 'is not a sound drafting basis for a substantive exemption.'<sup>24</sup>

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18 Australian Lawyers for Human Rights, *Submission 6*, p. 4.

19 Australian Lawyers for Human Rights, *Submission 6*, pp. 4–5.

20 Australian Lawyers for Human Rights, *Submission 6*, p. 5.

21 Australian Lawyers for Human Rights, *Submission 6*, p. 5.

22 Subsection 150.1(7) of the bill.

23 Professor Jeremy Gans, Melbourne Law School, University of Melbourne, *Submission 1*, p. 5; Mr Giordano Nanni, *Submission 3*, p. 1; Name Withheld, *Submission 4*, p. 1; Felicity Ruby, *Submission 5*, p. 1; Australian Lawyers for Human Rights, *Submission 6*, p. 6; and Electronic Frontiers Australia, *Submission 7*, p. 2.

24 Australian Lawyers for Human Rights, *Submission 6*, p. 6; see also Professor Jeremy Gans, Melbourne Law School, The University of Melbourne, *Submission 1*, p. 5.

2.17 Additionally, submitters questioned the ambiguity of the words 'genuine' and 'solely'.<sup>25</sup> Dr Nanni and ALHR noted that neither the common law nor the bill provides guidance as to what might constitute 'genuine' satire.<sup>26</sup> Furthermore, the term 'solely' is also problematic as the creator could produce works for satire, academic or artistic purposes, but may also have other motivations.<sup>27</sup> Ms Felicity Ruby commented that works such as 'The Chaser' may not 'solely' be for satire, but also to stimulate debate and discussion, and questioned whether such works would be an offence under the proposed new offences.<sup>28</sup>

2.18 ALHR recommended that the exemption be drafted similarly to the exemption in section 18D of the *Racial Discrimination Act 1975* and provided the following drafting example:

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.<sup>29</sup>

2.19 Other submitters suggested that the bill should contain 'an explicit and un-ambiguous exemption for satire.'<sup>30</sup> It was also suggested that the exemption could be strengthened by removing the word 'genuine' from the definition of 'conduct',<sup>31</sup> or by removing both 'genuine' and 'solely' from the definition of conduct.<sup>32</sup>

## Injunction

2.20 The bill also proposes to introduce new section 150.5 which provides for the use of injunctions to enforce the new provisions. As explained in the EM, the

25 Mr Giordano Nanni, *Submission 3*, p. 1; Name Withheld, *Submission 4*, p. 1; Felicity Ruby, *Submission 5*, p. 1; Australian Lawyers for Human Rights, *Submission 6*, p. 6; and Electronic Frontiers Australia, *Submission 7*, p. 2.

26 Mr Giordano Nanni, *Submission 3*, p. 1; and Australian Lawyers for Human Rights, *Submission 6*, p. 6.

27 Mr Giordano Nanni, *Submission 3*, p. 1; and Australian Lawyers for Human Rights, *Submission 6*, p. 6.

28 Ms Felicity Ruby, *Submission 5*, p. 1.

29 Australian Lawyers for Human Rights, *Submission 6*, pp. 6–7.

30 Dr Giordano Nanni, *Submission 3*, p. 1. See also Electronic Frontiers Australia, *Submission 7*, p. 2; Name Withheld, *Submission 4*, p. 1; and Ms Felicity Ruby, *Submission 5*, p. 1.

31 Electronic Frontiers Australia, *Submission 7*, p. 2.

32 Dr Giordano Nanni, *Submission 3*, p. 1.

injunction power will allow authorised persons 'to apply to a relevant court for an injunction to prevent a person from engaging in conduct in contravention of the new offences...'<sup>33</sup> The committee notes that submitters did not specifically raise this proposed provision as an area of concern.

### **Committee view**

2.21 The committee believes that it is important for the Australian public to have confidence that all communication purporting to be from Commonwealth bodies is indeed from a Commonwealth body. The committee notes the potential gap in current legislation, which provides that it is an offence to impersonate a Commonwealth official, but leaves unclear whether a person who impersonates a Commonwealth body, or acting on behalf of a Commonwealth body, commits an offence.

2.22 The committee has carefully considered the information provided by submitters—that the proposed offence may violate Australia's human rights obligations, that the offence may go beyond its stated intention, that there may be unintended consequences such as limiting freedom of speech and political satire, and that the exemption should be unambiguous.

2.23 The committee has weighed these concerns with the fact that the proposed offences almost mirror the current offences for impersonating a Commonwealth official, including the form in which the proposed exemption has been articulated. Additionally, the committee notes that both the Senate Standing Committee for the Scrutiny of Bills, and the Human Rights Committee, reported that it had no scrutiny or human rights concerns. Ultimately, the committee is of the view that the bill is both proportionate and necessary and therefore recommends that the bill be passed.

### **Recommendation 1**

**2.24 The committee recommends that the bill be passed.**

**Senator the Hon Ian Macdonald**

**Chair**