

The Senate

Legal and Constitutional Affairs
Legislation Committee

Criminal Code Amendment (Impersonating a
Commonwealth Body) Bill 2017 [Provisions]

November 2017

© Commonwealth of Australia 2017
ISBN 978-1-76010-678-2

This work is licensed under the Creative Commons Attribution-NonCommercial-NoDerivs 3.0 Australia License.



The details of this licence are available on the Creative Commons website: <http://creativecommons.org/licenses/by-nc-nd/3.0/au/>.

This document was produced by the Senate Legal and Constitutional Affairs Committee secretariat and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

Members of the committee

Members

Senator the Hon Ian Macdonald (LNP, QLD) (Chair)

Senator Louise Pratt (ALP, WA) (Deputy Chair)

Senator David Fawcett (LP, SA)

Senator Nick McKim (AG, TAS)

Senator Jane Hume (LP, VIC)

Senator Murray Watt (ALP, QLD)

Secretariat

Mr Tim Watling, Committee Secretary

Ms Pothida Youhorn, Principal Research Officer

Ms Alexandria Moore, Administrative Officer

Suite S1.61

Parliament House

CANBERRA ACT 2600

Telephone: (02) 6277 3560

Fax: (02) 6277 5794

Email: legcon.sen@aph.gov.au

Table of Contents

Members of the committee	iii
Recommendations	vii
Chapter 1	1
Introduction	1
Purpose of the bill.....	1
Financial implications of the proposed measures.....	2
Reports of other committees.....	2
Compatibility with human rights.....	2
Conduct of the inquiry.....	2
Structure of this report.....	2
Acknowledgements	2
Chapter 2	3
Key issues	3
Primary offence	3
Aggravated offence	5
Exemption.....	6
Injunction.....	7
Committee view.....	8
Dissenting Report of the Australian Greens	9
Conclusion	10
Appendix 1	11

Recommendations

Recommendation 1

2.24 The committee recommends that the bill be passed.

Chapter 1

Introduction

1.1 On 14 September 2017 the Senate referred the provisions of the Criminal Code Amendment (Impersonating a Commonwealth Body) Bill 2017 (the bill) to the Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 13 November 2017.¹ In referring the bill to the committee, the Selection of Bills Committee noted that:

The criminal law has a significant impact on the rights and obligations of the Australian people, including potentially the ability to see them deprived of their liberty.

It is appropriate and responsible for the Senate to properly examine the impact of proposed criminal laws.²

Purpose of the bill

1.2 In his second reading speech, the Minister for Justice and Minister Assisting the Prime Minister for Counter-Terrorism, the Hon Michael Keenan MP, explained the purpose of the bill:

It is essential to a well-functioning democracy that the public have trust in the legitimacy of statements made by government agencies. That trust will inevitably be eroded if people are able, with impunity, to represent themselves as communicating on behalf of government, without any authorisation.

...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.³

1.3 This bill introduces new offences and a new injunction power which would 'prohibit and prevent conduct amounting to false representation of a Commonwealth body'.⁴ Specifically, the bill amends the *Criminal Code Act 1995* (the Act) to:

- criminalise conduct where a person falsely represents themselves to be, or to be acting on behalf of, or with the authority of, a Commonwealth entity or service; and

1 *Journals of the Senate*, No. 63, 14 September 2017, p. 2007.

2 Selection of Bills Committee, *Report No. 11 of 2017*, 14 September 2017, p. 1 and appendix 3.

3 The Hon. Michael Keenan MP, Minister for Justice and Minister Assisting the Prime Minister for Counter-Terrorism, *House of Representatives Hansard*, 13 September 2017, pp. 10178–10179.

4 Explanatory Memorandum, p. 2.

- provide a new injunction power allowing authorised persons to apply to the relevant court to seek an injunction to restrain that conduct.⁵

Financial implications of the proposed measures

1.4 The Explanatory Memorandum includes a statement that the proposed amendments will have no financial impact.⁶

Reports of other committees

1.5 Both the Senate Standing Committee for the Scrutiny of Bills and the Joint Parliamentary Committee on Human Rights noted that the bill did not raise any Scrutiny or human rights concerns.⁷

Compatibility with human rights

1.6 The Explanatory Memorandum states that the bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.⁸

Conduct of the inquiry

1.7 Details of this inquiry were advertised on the committee's website, including a call for submissions to be received by 13 October 2017.⁹ The committee also wrote directly to some individuals and organisations inviting them to make submissions. The committee received seven submissions, which are listed at appendix 1 of this report.

Structure of this report

1.8 This report consists of two chapters:

- This chapter provides a brief background of the bill, as well as the administrative details of the inquiry.
- Chapter 2 outlines the provisions of the bill in more detail, and discusses the support for, and concerns raised by, submitters about the proposed amendments.

Acknowledgements

1.9 The committee thanks all organisations and individuals that made submissions to this inquiry.

5 Explanatory Memorandum, p. 2.

6 Explanatory Memorandum, p. 2.

7 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12 of 2017*, 18 October 2017, p. 17; and Parliamentary Joint Committee on Human Rights, *Report 11 of 2017*, 17 October 2017, p. 60.

8 Explanatory Memorandum, p. 3.

9 The committee's website can be found at www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs.

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).¹

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.'² 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.³

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).⁴ The EM concluded that, to the extent that these rights might be limited, 'those limitations are reasonable, necessary and proportionate.'⁵

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.⁶

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.'⁷ 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.⁸

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.'⁹ 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.¹⁰

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.¹¹ ALHR argued that the proposed legislation could have a 'chilling effect' on free speech, or more specifically, on political commentary and satire.¹²

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:

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.

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.¹³

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.¹⁴

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.¹⁵

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.¹⁶ 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.¹⁷

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

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.¹⁸ 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.¹⁹

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.²⁰ Finally, ALHR noted that the intention requirements are not clear, and recommended amendment so that any unintended consequences are not as far reaching.²¹

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.'²² 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.²³ 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.'²⁴

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'.²⁵ Dr Nanni and ALHR noted that neither the common law nor the bill provides guidance as to what might constitute 'genuine' satire.²⁶ 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.²⁷ 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.²⁸

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.²⁹

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

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...'³³ 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

Dissenting Report of the Australian Greens

1.1 The committee's inquiry into the Criminal Code Amendment (Impersonating a Commonwealth Body) Bill 2017 (the bill) received 8 submissions with the majority raising concerns about this bill.

1.2 Despite the concerns raised by submitters, the report recommends that this bill be passed. However, the Australian Greens believe that this bill is an unacceptable limitation on freedom of expression and could potentially have a chilling effect on political communication and satire.

1.3 This bill introduces new offences and a new injunction power to prohibit and prevent conduct amounting to false representation of a Commonwealth body. While there are valid reasons to prohibit and prevent false representation of a Commonwealth body this bill does not appear to provide protections for satirical, artistic and educational purposes.

1.4 Australian Lawyers for Human Rights submitted that:

'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.'¹

1.5 The bill does not provide guidance as to what might be 'genuine' satire. Mr Giordano Nanni, of Juice Media submitted that there is a 'dearth' of case law on what satire means in Australia. This is concerning given that this bill proposes a penalty of up to five years imprisonment.²

1.6 Mr Jeremy Gans submitted that a fundamental flaw of the Bill 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.)'³

1.7 Proposed section 150.1 is deeply concerning in that it could lead to the imprisonment of a person who does not necessarily mislead anyone, but where it could be argued they were reckless that someone could form the impression that they were acting on behalf of a Commonwealth body.

1 Australian Lawyers for Human Rights, Submission 6, pg. 3, 2.5.

2 Dr Giordano Nanni, Submission 3

3 Mr Jeremy Gans, Submission 1, pg 3

Conclusion

1.8 The Australian Greens are concerned that the Chair has not appropriately responded to and addressed the concerns raised by the submitters regarding this bill.

1.9 The amendments proposed are unnecessary, have not been sufficiently justified, will unreasonably fetter freedom of political expression and silence many satirists.

Recommendation 1

1.10 The Australian Greens recommend that this bill be opposed by the Senate.

Senator Nick McKim

Australian Greens

Appendix 1

Public Submissions

- 1 Mr Jeremy Gans
- 2 Legal Services Commission of South Australia
- 3 Dr Giordano Nanni
- 4 Name Withheld
- 5 Ms Felicity Ruby
- 6 Australian Lawyers for Human Rights
- 7 Electronic Frontiers Australia

