

PJCIS Inquiry into the Foreign Influence Transparency Scheme Bill 2017

Attorney-General's Department Response to Questions on Notice

Public Hearing – 18 June 2018

Derivative use immunity

Question (pages 2-3, Proof Transcript)

CHAIR: I will start with a fairly granular question. I refer to part 4, division 3, section 47(2) of the bill. I'm just following up on a question that I put to the Law Council today where they put a concern regarding the abrogation of self-incrimination where only a use immunity applies in section 47(2). But in your response to submissions you say that it also establishes a use immunity and a derivative use immunity. Could you give us more detail on that and why you hold that position where the Law Council disagrees?

Ms Harmer: I might ask Ms Inverarity to comment.

Ms Inverarity: Section 47 in our view does provide a derivative use immunity. A derivative use immunity clause restricts any self-incriminating information or documents provided by a person from being used to investigate unlawful conduct by him or her. Subsection 47(2) provides that information given or the document or copy produced will not be admissible in evidence against the individual in criminal and civil proceedings, except for proceedings where it's alleged that they've provided false or misleading information or for perjury-type offences. So that has the effect that any document that the person is required to produce can't be used against them in any other criminal proceedings. Our understanding is that the provision that's included in the bill is the standard derivative use immunity provision that the Office of Parliamentary Counsel use when establishing such immunities. The discussion that I've just referred to is set out in the explanatory memorandum to section 47; so I guess we're not entirely sure which part of that provision doesn't have the effect that we understand a derivative use immunity has.

CHAIR: Perhaps, when you get a chance to read their evidence today, you could follow up with an answer; that would be helpful.

Ms Inverarity: We're certainly happy to look at the evidence and see if there's anything further we can provide in that regard.

Ms Harmer: I think it's more the case that we may be at cross-purposes and we cannot see the interpretation that has been ascribed in this instance and we think the explanatory memorandum makes quite clear the type of immunity that's being created.

Answer:

The Law Council of Australia has advised the Committee that section 47 of the Foreign Influence Transparency Scheme Bill (FITS Bill) contains only a use immunity, not a derivative use immunity (page 22, proof transcript). The department disagrees with this conclusion.

The following extract from paragraph 9.5.6 of the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers clarifies the meaning of a derivative use immunity.

‘Derivative use’ immunity protects a person who is required to give self-incriminating evidence from that evidence being used to gather other evidence against that person

Principle

The effect of a ‘derivative use’ immunity provision is that any information or evidence given that would tend to incriminate the person may not be used to gather other evidence against that person. The derivative use immunity builds on, and therefore cannot exist separately to, use immunity.

Discussion

By way of example, if Person A provides a document that would tend to indicate that he had committed a particular offence, that document cannot be used to gather further evidence against him, but it may be used to investigate other persons.

As this type of immunity prevents evidence from being used to gather other evidence against that person, the ‘derivative use’ immunity provides a broader protection than the ‘use’ immunity.

An example of legislation providing a ‘derivative use’ immunity can be found at section 140XG of the *Migration Act 1958*.

Section 140XG of the *Migration Act 1958* is extracted below.

140XG Self-incrimination

- (1) A person is not excused from producing a record or document under paragraph 140XC(1)(d), or subsection 140XF(1), on the ground that the production of the record or document might tend to incriminate the person or expose the person to a penalty.
- (2) However, in the case of an individual, none of the following are admissible in evidence against the individual in criminal proceedings:
 - (a) the record or document produced;
 - (b) producing the record or document;
 - (c) any information, document or thing obtained as a direct or indirect consequence of producing the record or document;except in proceedings for an offence against section 137.1 or 137.2 of the *Criminal Code* (false or misleading information or documents) in relation to the information or document.

Paragraph 47(2)(c) of the FITS Bill, and paragraph 140XG(2)(c) of the Migration Act, provide a derivative use immunity in that *no information, document or thing obtained as a direct or indirect consequence of giving the information or producing the document or copy is admissible in evidence against the individual in criminal proceedings* (other than offences relating to false or misleading information).

Section 47 of the FITS Bill explicitly protects the individual from such information or documents being used in evidence against the person in civil proceedings.