

PJCIS Inquiry into the Foreign Influence Transparency Scheme Bill 2017

Attorney-General's Department

Response to Law Council of Australia Supplementary Submission 4.3

RESPONSE TO SUBMISSION 4.3

On 20 June 2018 the Parliamentary Joint Committee on Intelligence and Security (the Committee) requested that the department provide a response to issues raised in submission 4.3.

Answer

The redrafted offences proposed by the Law Council of Australia in Submission 4.3 do not align with the policy intention for the offences, and raise various criminal law policy issues. These are summarised below.

- It is not the current policy intention to apply knowledge to any parts of the elements at paragraphs 57(1)(c) and (d). Under the Attorney-General's proposed amendments, the fault element of intention applies to the conduct element at paragraph 57(1)(c) (other than to the extent that absolute liability applies) and recklessness applies to the circumstance at paragraph 57(1)(d).
- It is unnecessary to state the fault element of recklessness in paragraph 57(2)(a), as this element is a circumstance and the fault element of recklessness will automatically apply due to the operation of section 5.6 of the *Criminal Code Act 1995*.
 - In fact, including the words suggested by the Law Council could have the effect of fundamentally changing the nature of the physical element in paragraph 57(2)(a).
 - Currently, the prosecution would need to prove the fact that the person was required to apply for registration or renew registration (as the physical element) and that the person was reckless as to this (as the fault element).
 - If the words proposed by the Law Council were included, the effect would be that the prosecution needs to prove only that the person was reckless as to whether they were required to apply for or renew registration (as the physical element). The prosecution would not need to prove the fact that the person was required to apply for or renew registration.
 - The same issue arises with the Law Council's suggested changes to paragraph 57(2)(d).
 - This is a technical point, but can be the consequence of stating the fault element in the manner suggested by the Law Council, rather than allowing the default fault elements to apply in accordance with section 5.6 of the Criminal Code.
- The policy intention is specifically to provide for offences that apply where a person is reckless as to whether he or she is required to apply for or renew registration. Deleting subsection 57(3A), as suggested by the Law Council, is contrary to this policy intention.
- In relation to absolute liability, the justification for this provision is set out in the department's earlier submission (Submission 5.5, at page 5, extracted below). The

department notes that absolute liability does not apply to the entirety of paragraphs 57(1)(c), (2)(c), (3)(c) and (3A)(c). Absolute liability only applies to the part of the element that requires the activity to be undertaken after the end of the period. The prosecution will be required to prove the fault element of intention for the remainder of the relevant paragraphs.

The department considers absolute liability to be appropriate. Absolute liability only applies to the part of the physical element which requires the activity the person undertakes on behalf of the foreign to be undertaken after the end of the period. These facts also forms part of the element at paragraph 57(1)(a) of the offence, for which the prosecution must already prove the fault element of knowledge.

If absolute liability did not apply to the part of the physical element at paragraph 57(1)(c) which requires the activity the person undertakes on behalf of the foreign to be undertaken after the end of the period then the prosecution would need to prove knowledge and recklessness in relation to the same fact, which would be anomalous.

The department notes that in all cases, the prosecution is still required to prove the relevant fact and fault element. The application of absolute liability simply ensures the prosecution does not need to prove two fault elements, or does not need to prove the fault element twice for different paragraphs of the offence.

This will be explained in the Supplementary Explanatory Memorandum.

- The defence proposed by the Law Council (at subsection 57(3) of the draft) does not align with the policy intention for the provisions and may be redundant. If the defence is made out then it does not seem that the person's failure to register or renew was intentional or reckless (as required by the elements of the offence). If the person had taken reasonable steps to provide the information then these fault elements would be challenging to prove.
 - The department notes that the offences at section 57 would only apply if the person went on to engage in a registrable activity after the point at which he or she was required to register or renew. In all cases, the person must be reckless as to this element. Therefore, the proposed defence should not be included to excuse a person from liability.
- Similar issues arise for the Law Council's proposed amendments to section 57A. These amendments do not align with the policy intention for these offences.