PJCIS Review of the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017

Additional questions

Attorney-General's Department responses

1. Does the definition of 'Commonwealth officer' at proposed section 121.1 include members of Parliament who are not Ministers of State?

- *If yes, why was the decision made to divert from the ALRC's proposal that the term 'Commonwealth officer' for the purpose of the general secrecy offence should only apply to the Executive branch (see Secrecy Laws and Open Government in Australia, paragraph 6.51 and Recommendation 6-1)? Could this be made clear in the Bill or Explanatory Memorandum? What consideration has been given to the interaction with parliamentary privilege?*
- *If no, what offence-specific defence(s) would be available to a member of Parliament who dealt with 'inherently harmful information' as part of their duties? Refer to examples in previous written question 40, responded to in supplementary submission 6.1.*

The department's view is that the definition of 'Commonwealth officer' at proposed section 121.1 does not cover members of Parliament who are not members of the Executive Government.

In relation to which defences would be available to a member of parliament, the department agrees that the defence at subsection 122.5(1) would not be available to a member of Parliament and apologises for this error in the department's supplementary submission.

This issue could be addressed by amending the defence in subsection 122.5(1) so that it is available to any person who deals with information in their capacity as a *public official*, as defined in the Dictionary to the Criminal Code, rather than to *Commonwealth officers*, as defined in section 121.1 of the Bill. *Public official* is a broader term, which explicitly covers a member of either House of Parliament. This term is used in the defences provided for in other parts of the Bill (see, for example, subsection 91.4(1)).

2. *Proposed section 93.3 enables the Attorney-General to sign evidentiary certificates in relation to security classifications and whether information or an article 'concerns Australia's national security', which would be prima facie evidence for the purposes of proceedings for offences against Divisions 91 (espionage) and 92 (foreign interference). How would this section be applicable to the offences in Division 92, which do not appear to include the concepts of security classification or 'concerns Australia's national security'?*

The department believes that this may be a drafting error. The department considers that section 93.3 should only apply for the purposes of proceedings for offences against Division 91 (espionage).

3. *Submission 26 to the Committee's inquiry notes that the secrecy offences in the Bill appear to provide no defences for state law enforcement agencies or state law enforcement oversight authorities dealing with 'inherently harmful information'. The Explanatory Memorandum (paragraph 1608) notes that possessing or copying information concerning national security is a day to day occurrence for State and Territory law enforcement agencies working on counter-terrorism investigations, and indicates (paragraph 1615) that the defence at 122.5(1)(b) is intended to prevent the offences from applying to this conduct. However, it is not clear this defence would extend to state and territory oversight bodies who may be required to inspect or otherwise deal with such information in the course of their duties. Is it possible that the offences in the Bill could impede a state or territory oversight body from performing its functions? If so, what amendments could be made to mitigate this concern?*

The department's view, as expressed in relation to question 1 above, is that the defence in subsection 122.5(1) should be amended so that it applies to all *public officials* (as defined in the Dictionary to the Criminal Code) as opposed to only *Commonwealth officers* (as defined in section 121.1 of the Bill). The definition of public officials extends to officers and employees of a State or Territory, individuals who hold or perform the duties of an office

established by a law of a State or Territory and individuals who are in the service of a State or Territory (including police forces).

4. *Section 12 of the Foreign Interference Transparency Scheme Bill 2017 defines activity for the purposes of political or government influence. Division 92 of the EFI Bill uses a similar expression 'influence a political or government process'. However, the EFI Bill does not define the expression. Is there a reason why the EFI Bill should not adopt a similar or same definition to clarify the meaning of political or government process?*

The purpose of the definition of 'activity for the purposes of political or governmental influence' is intended to provide clarity to potential registrants in relation to the scope of the Foreign Influence Transparency Scheme and to allow a potential registrant to know whether or not they are required to register. The application of the Scheme is deliberately limited to federal government processes.

The term 'influence a political or governmental process of the Commonwealth or a State or Territory' is not defined, but does explicitly extend to state and territory processes. This provides flexibility for a court to interpret the term based on the admissible evidence.

If the Committee's view is that a definition is desirable, the definition in section 12 of the Foreign Influence Transparency Scheme Bill could provide a useful starting point.

5. AGD's supplementary submission (page 76) includes the following question and response in relation to the foreign interference offences:

> *72. What does the person providing the support need to know about the person they provide the information to? Do they need to*
> - *know that the person they provide the support to acts on behalf of an organisation, or*
> - *be reckless as to whether that person acts on behalf an organisation?*
>
> *Response: The person will have to intend to provide support or resources to an organisation or a person acting on behalf of the organisation. The definition of intention is set out at section 5.2 of the Criminal Code.*

The question goes to whether 'a person acting on behalf of the organisation' is a circumstance, as defined under the Criminal Code. A person needs to <u>intend</u> to provide support because this support is conduct. The clarification we are seeking is, in the scenario that Person B is acting on behalf of an organisation, will Person A (the defendant):

- *need to <u>know</u> that Person B is acting on behalf of the organisation, or*
- *merely be <u>reckless</u> as to whether Person B is acting on behalf of the organisation?*

Each paragraph of the offences in Subdivision C of Division 92 is a separate physical element. Consistent with section 4.1 of the Criminal Code, a physical element can be either conduct, a result of conduct, or a circumstance in which conduct, or a result of conduct, occurs. A physical element is one of these things – it cannot be a combination of them.

Using section 92.7 as an example, the entirety of paragraph (a) is a conduct element. The conduct is the person 'providing support or resources to an organisation or a person acting on behalf of an organisation'. As described in the Explanatory Memorandum and the department's supplementary submission, the fault element of intention applies to this entire physical element. The prosecution must prove that the person intended to 'provide support or resources to an organisation or a person acting on behalf of an organisation'. Consistent with the definition of intention in section 5.2 of the Criminal Code, the person will need to 'mean to' provide support or resources to an organisation or a person acting on behalf of an organisation.

6. AGD's supplementary submission (page 75) includes the following question and response in relation to the foreign interference offences:

> *70. The proposed new foreign interference offences involving a foreign intelligence agency (Subdivision C) are similar to the terrorist organisation offences in Division 102 of the Criminal Code. Why was the structure of the terrorist organisation offences not adopted here (e.g. s. 102.7)?*
> *Response: The structure of the terrorist organisation offences in sections 102.6 and 102.7 was used as a relevant model for the offences.*

Based on those existing terrorism offences, is there a reason why 92.8 and 92.10 do not have an explicit requirement that 'the person is reckless as to whether the organisation is a foreign intelligence agency'? It is noted that section 5.6 of the Criminal Code means that if a circumstance that does not specify a fault element, recklessness is the fault element.

As noted in the question, the effect of section 5.6 of the Criminal Code is that recklessness is the fault element if a physical element that is a circumstance does not specify a fault element. As this achieves the desired effect of applying recklessness to paragraphs 92.8(b) and 92.10(b), it is not considered necessary to explicitly state that the fault element of recklessness applies. This is consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, which states (at paragraph 2.2.4 on page 20) that the default elements supplied by section 5.6 of the Criminal Code should apply unless there is a sound reason to depart from them.

The department is not able to clarify why a different approach was taken in the drafting of the existing terrorism offences in section 102.6 and 102.7. However, the effect of both drafting approaches appears to be the same, in that the result is that recklessness is the applicable fault element.

7. *The response to question 11 in AGD's supplementary submission (page 48, citing paragraph 615 of the Explanatory Memorandum) is somewhat unclear. Could you please clarify whether it is intended that causing embarrassment to the Australian Government could or will constitute prejudice to Australia's national security?*

The answer was seeking to clarify that mere embarrassment is not expected to be sufficient to amount to prejudice to Australia's national security. However, there will also be circumstances where embarrassment will lead to the additional consequence of harm being caused to Australia's international relations, for example. If this occurred, it may be possible to prove, beyond a reasonable doubt, that there was prejudice to Australia's national security.

8. *The response to question 31 in AGD's supplementary submission (page 58) does not appear to respond to the question of whether the use of social media, blogs, threads and other online forums to comment on content or post links could be considered 'dealing with' inherently harmful information, in the context of an unauthorised publication of documents on the internet. Is this the case, and could either of the defences referred to in the response apply to such activities?*

The department considers it is difficult to comment on this in the abstract, as this conduct could be trivial or very serious, depending on the nature of the information and the person's intention. Making a comment or blog post which reproduces the information or posting a link to the information could potentially constitute communicating, publishing or making available the information, depending on the circumstances.

However, as per the department's previous response, the defence at 122.5(8) will apply to situations where the information was initially communicated by another party and a person reasonably believes that communication will not harm Australia's interests or the security or defence of Australia.

9. The response to question 112 in AGD's supplementary submission (page 91) states that the department 'will consider further the interaction between the Bill and Australia's obligations under the 1961 Reduction Convention' (in respect of citizenship applications and revocations). What is the timeframe for this consideration, and will the Committee be notified of the outcomes?

The department is seeking to finalise this consideration within the next two weeks. The department will inform the Committee of the outcomes of this consideration as appropriate