PJCIS Inquiry into the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017

Attorney-General's Department Response to Questions in Writing

Questions in Writing – 23 March 2018

Question 1

The Attorney-General's letter of 5 March 2018, in responding to issues raised by the Inspector-General of Intelligence and Security, stated:

> *My view is that it is not necessary to amend the defences in subsections 122.5(3) or (4) so that they are exceptions rather than defences. Consistent with the principles of criminal responsibility in Chapter 2 of the Criminal Code, there is no practical difference between a defence and an exception. The effect of both types of provisions is that a person is not criminally responsible for an offence. Under subsection 13.3(3) of the Criminal Code, a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter. The evidential burden applies whether a particular matter is framed as a defence or an exception.*

a) *Could the Department please clarify whether framing a matter as a defence or an exception would make any procedural difference the defendant? For example, paragraph 7.6 of the 2009 Australian Law Reform Commission report, Secrecy Laws and Open Government in Australia, states*

> > *While framing a provisions as a defence, rather than as an exception, does not of itself alter evidential burdens of proof, it may have procedural disadvantages for a defendant, in that a defendant must wait until the defence case is called before being able to lead evidence to justify his or her conduct.*

After consultation with the Office of the Commonwealth Director of Public Prosecutions, the department does not agree with paragraph 7.6 of the ALRC's Secrecy Report.

Regardless of whether the provision is framed as an exception or defence, the accused must discharge the evidential burden pursuant to section 13.3 of the Criminal Code. In either circumstance, an accused may do this by relying on matters that form part of the prosecution case or seeking to lead evidence as part of the defence case, to discharge the burden. The question of whether the evidential burden has been satisfied is a question of law, to be decided by a judge. If discharged, the question of whether the prosecution has disproven the defence/exception beyond reasonable doubt is put to a jury.

Neither the department nor the Office of the Commonwealth Director of Public Prosecution is aware of there being a difference in procedure for an exception or a defence.

An accused person may, for forensic reasons, wait until the defence case is called before revealing evidence to justify his or her conduct, but they do not have to take that course. An accused person may, and sometimes will, act proactively to advance evidence of a defence

in a record of interview, by way of a statement or by supplying evidence to the prosecution in advance of a trial or a prosecution being initiated. This observation applies equally whether the provision is framed as an exception or defence.

The department notes that the line between what might be considered an exception or defence may be quite fine. The case of *The Queen v Khaazal* [2012] HCA 26, which considered the operation of the evidential burden in relation to subsection 101.5(5) of the Criminal Code, illustrates this. Subsection 101.5(5) provides:

> Subsections (1) and (2) do not apply if the collection or making of the document was not intended to facilitate preparation for, the engagement of a person in, or assistance in a terrorist act.

Subsection 101.5(5) was described in the Supplementary Explanatory Memorandum as a defence and Chief Justice French also described it as a defence in his judgment. In contrast, the joint judgment of Gummow, Crennan and Bell JJ refers to subsection 101.5(5) as an 'exception from liability' or 'exception creating provision'. Justice Heydon also referred to the provision as an '"exception" to the offence charged'. The use of different terminology appears to have made no material difference and the court was unanimous in finding that the evidential burden had not been discharged in that matter.

b) *Additionally, could the Department please confirm whether there are ways of framing offences that do not place an evidential burden on the defendant, for example, where the elements of the offence do not apply to certain categories of person? For example, paragraph (1)(e) of the secrecy offence in section 18A of the Australian Security Intelligence Organisation Act 1979 excludes conduct engaged in by a person as an ASIO employee or affiliate acting in the course of their duties. Would such an employee or affiliate bear an evidential burden in relation to this element of the offence? If not, would there be any problems with applying a similar exemption in the elements of the proposed secrecy offences in the Bill (e.g. for public officials acting the course of their duties)?*

An offence consists of the physical and fault elements specified in the provision (see section 3.1 of the Criminal Code). The prosecution bears the burden of proving each of these elements beyond a reasonable doubt (see section 13.1 of the Criminal Code).

In the example given in Question 1(b), the matters listed in the offence provision in paragraph 18A(1)(e) of the *Australian Security Intelligence Organisation Act 1979* are elements of the offence and must be proved by the prosecution. The department's view is that the physical element in paragraph 18A(1)(e) is a circumstance element and the default fault element of recklessness would therefore apply, consistent with section 5.6 of the Criminal Code.

The department does not agree with the characterisation of the matters listed in paragraph 18A(1)(e) as 'exemptions' from the offence, as they are clearly elements of the offence which must be proved by the prosecution. Subsection 13(3) of the Criminal Code (which places an evidential burden on the defendant where a defendant wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating

an offence) does not apply to paragraph 18A(1)(e). The defendant does not bear any burden in relation to proof of these matters.

The question of whether a matter should be cast as an element of an offence or as a defence is a policy question. The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* states (at paragraph 4.3.1) that:

> a matter should only be included in an offence-specific defence, as opposed to as an element of the offence, where:
>
> - it is peculiarly within the knowledge of the defendant, and
> - it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

As explained in the Explanatory Memorandum, the department's view is that the matters dealt with in section 122.5 of the Bill are appropriately cast as defences rather than elements of the offence. The department can see two options if the matters currently listed in section 122.5 were re-cast as elements of the offence rather than as offence-specific defences.

The first option would be for each of the matters currently listed as defences in section 122.5 to be listed as elements of the offence, which would mean that the prosecution would need to prove that these circumstances did not exist (and the relevant fault element), before the offence could be proved. For example, this might require the prosecution to prove (in addition to all of the elements currently listed in the offence) that:

- the information was not communicated to the IGIS, the Commonwealth Ombudsman or the Law Enforcement Integrity Commissioner and the defendant was reckless as to this
- the information was not communicated in accordance with the Public Interest Disclosure Act 2013 (PID Act) and the defendant was reckless as to this
- the information was not communicated to a court or tribunal and the defendant was reckless as to this, and
- the person was not engaged in reporting news, presenting current affairs or expressing editorial content in the news media and did not have a reasonable belief that his or her dealing with the information was in the public interest.

Proving all of these matters beyond reasonable doubt would be burdensome and costly when compared to the approach taken in the Bill of providing defences for the defendant to raise, as appropriate and as relevant to the individual facts and circumstances of the particular case. It is unlikely that all of these elements will be relevant to each prosecution—for example, in many cases there would be no evidence to suggest that the defendant communicated information to a court or tribunal. Nevertheless, the prosecution would need to prove beyond reasonable doubt that the information was not communicated to a court, and that the defendant was reckless as to this.

The eight defences in section 122.5 contain more than 20 operative limbs. Assuming those defences were directly translated as elements of the offence, the prosecution would need to prove beyond reasonable doubt, at a minimum, eight additional elements for every prosecution (i.e. the prosecution would need to prove beyond reasonable doubt that at least one limb of each former defence did not apply). The burden on the prosecution would extend beyond this, however, as such a process would generally require the prosecution to:

- expend time and resources considering many more of the elements; and
- seek to identify evidence to prove these elements beyond reasonable doubt, in circumstances where such evidence would generally not exist (because, as noted above, not all elements are likely to be present in each prosecution).

The second option would be to create separate offences covering each of the matters currently listed in subsection 122.5. However, this approach would be:

- unlikely to remove the need for offence-specific defences; and
- likely to significantly complicate the drafting of the Bill, by creating up to eight new offences, each of which would require up to seven offence-specific defences.

This would have the effect of placing the burden of proof on the prosecution, but would greatly increase the number of offences and would probably still not avoid the need to create offence-specific defences. For example, a person may be communicating information that has not previously been made public with the authority of the Commonwealth, but may be doing so by communicating it to the IGIS for the purpose of the IGIS exercising a power or performing a function or duty or to a court or tribunal.

Question 2

Item 19 of the Bill proposes to amend existing section 93.2 of the Criminal Code, which enables a court to order that certain matters be heard in camera or not be published where the court is 'satisfied that it is in the interest of the security or defence or the Commonwealth'. The proposed amendment would require the court to be 'satisfied that it is in the interests of Australia's national security' (as defined in the Bill).

Previous advice from the Department (Submission 6.1, pp. 2, 44) indicates that aspects of the Bill's definition of 'national security' are intended to align with the National Security Information (Criminal and Civil Proceedings) Act 2004 (the NSI Act), which 'substantially implemented' the recommendations of the ALRC in Keeping Secrets: The Protection of Classified and Security Sensitive Information. The object of the NSI Act is to prevent the disclosure of information in federal criminal proceedings and civil proceedings where the disclosure is likely to prejudice national security. However, the ALRC also noted that section 93.2 would be rendered 'obsolete' by the NSI Act, and therefore recommended that it be repealed (Paragraph 11.190 and Recommendation 11-39).

a) *Subsection 93.2(1) states that the section applies to court proceedings 'whether under this Act or otherwise'. However, the Explanatory Memorandum (page 204, paragraph 1160) appears to suggest that the section only applies to offences against Part 5.2 of the Criminal*

Code (i.e. espionage and related offences introduced by the Bill). Could the Department please clarify the scope of section 93.2?

The department agrees that section 93.2 is not limited only to proceedings arising under Part 5.2 of the Criminal Code and applies to any proceedings described in subsection 93.2(1). The Explanatory Memorandum will be amended to clarify this.

b) *Given that the effect of Item 19 will be to more closely align section 93.2 to the terminology in the NSI Act, what is the practical purpose of section 93.2 being retained?*

There is significant value in section 93.2 being retained, despite the existence of the National Security Information (Criminal and Civil Proceedings) Act 2004 (NSI Act).

The NSI Act neither excludes nor impedes a court's other powers, including powers to make other protective orders such as closure of court and non-publication orders, and sections 20B and 38AB of the NSI Act refer expressly to section 93.2 of the Criminal Code.

The NSI Act provides a comprehensive regulatory framework for the disclosure, storage and handling of all national security information involved in federal criminal proceedings or civil proceedings, whether in documentary or oral form. The NSI Act, once invoked by the prosecutor, applies to the whole proceeding and provides a structure for a court to follow where national security information is disclosed in proceedings.

The processes established by the NSI Act cater for a variety of circumstances, making it particularly well suited to proceedings where there are large numbers of documents that contain national security information. For example, it enables parties to reach agreements about how information that is disclosed in the proceeding should be protected and stored. It also enables a court to make any such orders that the court considers appropriate in relation to the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information (section 19(1A)). It also enables information to be protected at short notice, pending a court hearing about how or if that information should be disclosed

The NSI Act also provides for counsel to be security cleared and can impose requirements for the handling and storage of information in accordance with the Commonwealth protective security requirements.

Section 93.2 allows a presiding judge to make whatever orders are considered appropriate in the interests of the security or defence of the Commonwealth in a more targeted way where the varied protective options available under the NSI Act are not required.

As noted in the department's supplementary submission 6.1 (in relation to Question 44):

> Section 93.2 complements any available state and territory laws allowing for suppression orders or non-publication orders to be imposed on national security grounds (such the Open Courts Act 2013 (Vic) and the Court Suppression and Non-Publication Orders Act 2010 (NSW)). Section 93.2 provides a power to appropriately manage proceedings where the court is satisfied that it is in the interests of Australia's national security to do so. This is an important protection and the decision as to whether to exercise the power remains with the court.

For completeness, the department notes that section 85B of the Crimes Act, which also relates to hearings in camera, is being repealed by the Bill (Item 5 of Schedule 2).