

Chapter 1

New and ongoing matters

1.1 The committee comments on the following bill and seeks a response with further information from the relevant minister.

Bills

Defence Amendment (Parliamentary Joint Committee on Defence) Bill 2024¹⁰

Purpose	This bill seeks to establish a Parliamentary Joint Committee on Defence and provides for its powers and functions and creates criminal offences for dealing with information received by the proposed committee
Portfolio	Defence
Introduced	House of Representatives, 30 May 2024
Rights	Freedom of expression; privacy

Secrecy offences

1.2 This bill seeks to establish a Parliamentary Joint Committee on Defence (PJCD), responsible for reviewing, monitoring and reporting on the administration and operations of all Australian defence agencies. It seeks to establish two new criminal offences:

- the first offence, applicable to all persons, of unauthorised disclosure or publication of non-public evidence taken by the PJCD, or documents produced to the PJCD, in private. This offence would not apply if the person became aware of the relevant information otherwise than because of the PJCD proceedings. It would be subject to a maximum penalty of imprisonment for two years or 120 penalty units or both;¹¹
- the second offence, applicable only to former or current PJCD members, their staff or the PJCD secretariat, of directly or indirectly making a record of, or disclosing or communicating to a person, any information acquired because of holding that office or employment or producing a committee document, if it is not done for the purposes of enabling the PJCD to perform

¹⁰ This entry can be cited as: Parliamentary Joint Committee on Human Rights, Defence Amendment (Parliamentary Joint Committee on Defence) Bill 2024, *Report 5 of 2024*; [2023] AUPJCHR 34.

¹¹ Schedule 1, item 2, proposed section 110ADA.

its functions. No defences would apply. It would be subject to a maximum penalty of imprisonment for 5 years or 300 penalty units, or both.¹²

Preliminary international human rights legal advice

Rights to freedom of expression and privacy

1.3 These secrecy offences are designed to ensure information and documents provided to the committee are not disclosed unless authorised or for the purpose of enabling the proposed PJCD to perform its functions. To the extent that this information or documents could contain personal information these offences would promote the right to privacy. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.¹³ It also includes the right to control the dissemination of information about one's private life.

1.4 However, in restricting the disclosure of such information or documents, this also limits the right to freedom of expression. The right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or print, in the form of art, or through any other media of an individual's choice.¹⁴

1.5 The statement of compatibility identifies that the right to freedom of expression is engaged by these measures. This right may be subject to limitations that are necessary to protect the rights or reputations of others,¹⁵ national security,¹⁶

¹² Schedule 1, item 2, proposed section 110ADG.

¹³ International Covenant on Civil and Political Rights, article 17.

¹⁴ International Covenant on Civil and Political Rights, article 19(2).

¹⁵ Restrictions on this ground must be constructed with care. For example, while it may be permissible to protect voters from forms of expression that constitute intimidation or coercion, such restrictions must not impede political debate. See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [28].

¹⁶ Extreme care must be taken by State parties to ensure that treason laws and similar provisions relating to national security are crafted and applied in a manner that conforms to the strict requirements of paragraph 12(3) of the International Covenant on Civil and Political Rights. It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information. See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [30].

public order, or public health or morals.¹⁷ Additionally, such limitations must be prescribed by law, be rationally connected to the objective of the measures and be proportionate.¹⁸

1.6 In determining whether limitations on the freedom of expression are proportionate, the United Nations Human Rights Committee has noted that restrictions on freedom of expression must not be overly broad.¹⁹ In particular, it has observed that:

When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.²⁰

1.7 The statement of compatibility states that the objective sought to be achieved by both measures is the protection of national security, as the disclosure of information provided to the PJCD 'may include extremely sensitive information where disclosure could have detrimental impacts on the security, defence or international relations of Australia'. The statement of compatibility also states that these offences are necessary to maintain confidence in the PJCD's ability to protect the sensitive information it obtains, as if that trust was undermined it could inhibit the PJCD to perform its functions effectively in the longer term.²¹ In regard to the second justification, it is noted that as a parliamentary committee, the PJCD would have contempt of Parliament powers (in addition to this offence provision) regarding any unauthorised disclosure of committee documents, meaning it is not clear that these additional offences are strictly required. However, in relation to the first justification, protecting national security is a legitimate objective in the context of limiting the right to freedom of expression, and these offences would likely be rationally connected to that objective where the information disclosed could affect national security.

1.8 A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. In this respect, it is necessary to consider a number of factors, including whether a proposed limitation is sufficiently

¹⁷ The concept of 'morals' here derives from myriad social, philosophical and religious traditions. This means that limitations for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition. See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [32].

¹⁸ UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [21]–[36].

¹⁹ UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [34].

²⁰ UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [35].

²¹ Statement of compatibility, p. 28.

circumscribed; whether it is accompanied by sufficient safeguards; and whether any less rights restrictive alternatives could achieve the same stated objective. In relation to proportionality, the statement of compatibility states that the exception in the first offence (that the offence of disclosure or publication does not apply if the person became aware of the relevant information otherwise than from the PJCD context) ensures that the offence is no broader than necessary. In relation to the second offence, it states that it is proportionate as the offence is limited to the narrower class of PJCD members, their staff, and secretariat staff so that the offence does not apply more broadly than necessary.²²

1.9 These provisions assist somewhat with proportionality and the question of whether the measure is sufficiently circumscribed. However, it is not clear why further safeguards have not been provided in relation to these secrecy offences. In this regard it is noted that the recent review of Commonwealth secrecy provisions by the Attorney-General's Department (the review) recommended that secrecy offences should include defences where the relevant conduct is excused or justified. In particular, it recommended that the defences that are available for the general secrecy offences in Part 5.6 of the *Criminal Code Act 1995* should be considered when framing specific secrecy offences, such as those in this bill:

As a starting point, the following offence-specific defences should generally be included:

- disclosures made in the course of an officer's functions or duties
- information that is lawfully in the public domain, and
- information communicated by persons engaged in the business of reporting news (the public interest journalism defence), where the offence could apply to a journalist.

Additionally, the Review recommends that the following additional defences, which are available for the general secrecy offences, should be considered when drafting specific secrecy offences:

- disclosures made for the purpose of communicating information to a relevant oversight or integrity agency
- information communicated in accordance with the [*Public Interest Disclosure Act 2013*] and [*Freedom of Information Act 1982*]
- information communicated for the purpose of reporting offences and maladministration
- information communicated to a court, tribunal or Royal Commission
- information communicated for the purposes of obtaining or providing legal advice

²² Statement of compatibility, p. 28.

- information that has been previously communicated, or
- information communicated to a person to whom the information relates.²³

1.10 The statement of compatibility does not identify why all of these additional defences do not apply in relation to the proposed offences in this bill.

1.11 The review also specified that a harms-based approach should be taken in framing secrecy offences, and offences should either:

- contain an express harm element;
- cover a narrowly defined category of information and the harm to an essential public interest is implicit; or
- protect against harm to the relationship of trust between individuals and the government integral to the regulatory functions of government.

1.12 The review stated that this would ensure that ‘criminal liability is only applied where harm is or could be caused to an essential public interest’.²⁴ It is not clear why the proposed offences in this bill do not appear to take a harms-based approach. In particular, the offences apply to all types of information, not just those which may cause harm. Further, the second offence makes it an offence for a person to ‘directly or indirectly’ make a record of something – even if the person does not intend to disclose it. This would appear to mean, for example, that a member of the PJCD who photocopies something for their own education (with no intention of disclosing it to anyone) would be guilty of an offence punishable by up to five years imprisonment. It is not clear why the offences could not be restricted to apply only to ‘protected information’ or ‘operationally sensitive information’ (as defined in the bill) rather than *all* information or documents, some of which may contain no sensitivity.

1.13 Further, as the statement of compatibility makes no reference to disclosure on the basis of the public interest, it is not clear why there is no general public interest disclosure defence, noting that concerns have been raised as to the adequacy of the defences in the *Public Interest Disclosure Act 2013*.²⁵

1.14 This further information is required to fully assess the compatibility of this measure with the right to privacy.

Committee view

1.15 The committee considers that the creation of secrecy offences to prohibit the disclosure of information and documents provided in confidence to the proposed

²³ Attorney-General’s Department, [Review of secrecy provisions, Final Report](#) (2023) p. 29.

²⁴ Attorney-General’s Department, [Review of secrecy provisions, Final Report](#) (2023) p. 21

²⁵ See Brown, A. J. & Pender, K, [Protecting Australia’s Whistleblowers: The Federal Roadmap](#) (2022, updated in 2023), Griffith University, Human Rights Law Centre and Transparency International Australia: Brisbane and Melbourne.

Parliamentary Joint Committee on Defence, may promote the right to privacy but it also limits the right to freedom of expression.

1.16 The committee considers further information is required to assess the compatibility of this measure with the right to freedom of expression, and as such seeks the minister's advice in relation to why the proposed secrecy offences:

- (a) do not contain additional defences as recommended by the Attorney-General's Department's recent review into secrecy provisions²⁶ (by reference to each of the proposed protections and why each one is, or is not, appropriate for inclusion);
- (b) do not take a 'harms-based' approach and are not restricted to apply only to 'protected information' or 'operationally sensitive information' (as defined in the bill) rather than *all* information or documents; and
- (c) do not include a general public interest disclosure defence.

²⁶ See Attorney-General's Department, [Review of secrecy provisions, Final Report](#) (2023).