



Australian Government

Defence

Parliamentary Joint Committee on Intelligence and Security

Review of the Defence Amendment (Safeguarding Australia's Military Secrets) Bill 2023

Department of Defence Submission

November 2023

Introduction

The Department of Defence welcomes the opportunity to provide a submission to the Parliamentary Joint Committee on Intelligence and Security's (the Committee) review of the Defence Amendment (Safeguarding Australia's Military Secrets) Bill 2023 (the Bill).

In the Australian Security Intelligence Organisation (ASIO) 2023 Annual Threat Assessment, the Director-General of ASIO highlighted that the most serious threat to Australian national security is currently from sophisticated foreign actors seeking to advance their interests and undermine our own. ASIO's assessment specified that foreign intelligence services are seeking to penetrate government, military, academia and business to obtain classified information, military capabilities, policy plans and sensitive research and innovation.

In 2022, concerning reports emerged of international flight training schools attempting to recruit serving and former military pilots from western countries to provide training in China. The United Kingdom's Ministry of Defence subsequently released a statement in October 2022 advising of their intention to take immediate steps to deter and penalise former UK military pilots providing training to foreign militaries as it erodes the United Kingdom's defence advantage.

Following these incidents and on becoming aware of security concerns from other agencies, the Deputy Prime Minister directed Defence to conduct an inquiry into the adequacy of current policies and controls to prevent former Defence personnel from undertaking employment in support of foreign militaries of concern. This inquiry made nine recommendations, including a recommendation to strengthen existing legislative provisions to address these concerns. While the inquiry is classified, Defence can advise the Committee that all nine of these recommendations have been implemented, including the introduction of this legislation.

This Bill is an important step towards ensuring foreign actors cannot collect Defence secrets through the employment of former Defence personnel, or Australians with knowledge of and access to sensitive technology and military information.

The Bill will also help maintain Australia's reputation as a reliable and trusted international partner. It provides greater confidence to our key security partners in Australia's ability to protect defence related information shared with Australia and Australian Defence personnel.

The Department of Defence looks forward to engaging with the Committee and welcomes the opportunity to enhance the Bill through the Committee process.

Intention of the Bill

The Bill strengthens Australia's already robust legislation by establishing an authorisation framework that requires former Defence personnel to obtain authorisation before performing work for, or on behalf of, foreign military organisations or government entities. The Bill also requires any Australian citizen or permanent resident to obtain an authorisation if they intend to provide training in relation to certain export-controlled items or military tactics, techniques, or procedures to a foreign military, foreign government, or foreign government entity.

This reflects Australia's commitment to safeguarding sensitive technology and information shared with the United States and the United Kingdom through the AUKUS (Australia, United Kingdom and United States) partnership and is an important step towards establishing more seamless technological transfers with our AUKUS partners. This Bill will be complemented by legislative reform efforts currently underway to strengthen Australia's export control framework.

Strengthening Australia's export control framework will not only protect Australian defence industry knowledge and capability, but in combination with this Bill, will also help facilitate passage of United States legislation by ensuring Australia's export control framework is aligned with United States export controls. Australian export control reforms are essential to creating a stronger national defence industry base as well as enabling collaboration between AUKUS partners at the required speed and scale to meet Australia's challenging strategic circumstances and support our international partners. These combined legislative reforms also open up significant benefits and opportunities for Australian industry, higher education and research sectors.

The intention of the Bill is not to prevent former Defence personnel from undertaking work for foreign militaries or foreign government entities, but to regulate certain work that certain former Defence personnel, Australian citizens and permanent residents may undertake with foreign actors with interests inimical to Australia's own. Rather, the Bill contains sensible and targeted actions that will enhance the Government's ability to prevent the unwanted transfer of sensitive Defence information to foreign militaries.

Operation of the Bill & Delegated Legislation

The Bill contains several exemptions to manage the impact on individuals. For example, the Bill allows the Government to exclude certain individuals from the Bill's operation by way of legislative instruments. These legislative instruments would identify countries for which former Defence personnel do not require a foreign work authorisation. Through instruments the Government will also be able to exclude former Defence personnel based on the type of work an individual performed in Defence and the time passed since an individual has engaged with sensitive Defence work.

These instruments are being developed and will align with the Bill's commencement. It is expected these exempt countries will include our AUKUS partners, as well as New Zealand and Canada. Defence is also reviewing all Defence roles and job categories to identify those specified roles that should be included in the operation of the Bill. Defence is currently considering a five-year period for most roles, with a potential ten-year period for some particularly sensitive roles. These periods reflect the minimum period of time Defence considers needs to have elapsed in order for that information or knowledge to be of strategic benefit or advantage to an adversary.

Importantly, the Bill allows these instruments to be amended as security threats and risks change. Defence will over time analyse and assess whether the scope should be modified to address evolving security risks and moderate the impact of the Bill on former Defence personnel, and make recommendations to Government accordingly.

Fewer exemptions will apply in relation to individuals providing training in relation to Part 1 of the Defence and Strategic Goods List; or on military tactics, military techniques or military procedures. Due to the sensitive nature of export controlled goods and the critical importance of protecting Australia's and our partners', military tactics, techniques and procedures, there are no time or job role exemptions for these offences.

In addition to the legislative instruments, there are a number of exemptions to the offence for individuals if their proposed work or training is in relation to providing humanitarian aid or an official duty for the United Nations or the International Committee of the Red Cross. Exemptions also include work or training in the course of an individual's employment or engagement by the Commonwealth.

Through these exemptions it is intended that the impact of the legislation will be focused on those individuals who are unwittingly or deliberately engaging in activities that would harm Australia's national security.

Foreign Work Authorisations

Subject to passage of the Bill, Defence will publish guidance online for individuals who may need to apply for a foreign work authorisation. This will include a range of scenarios covering a broader range of specific 'real-world' circumstances. These scenarios will be updated in response to questions and applications received.

The penalty for performing work or specified training with a foreign country without authorisation is comparable with penalties in the Criminal Code for offences related to providing military-style training to foreign government principals or foreign political organisations, unauthorised disclosure of classified information, and foreign interference. An individual will not commit an offence under this Bill if they have been granted an authorisation for the work or training.

The Bill does not impose any limit on the validity period of any authorisation, however, as a matter of policy it is intended that authorisations will generally last for three years, but may be cancelled, suspended, or varied. This broad discretion allows the Government to protect Australia's national interests in changing geopolitical circumstances.

Each work authorisation request will be assessed on a case-by-case basis. An individual will be able to apply for multiple authorisations at the same time and approvals can be sought pre-emptively ahead of employment or work activities. Individuals are responsible for ensuring that any work undertaken is in accordance with the authorisation.

It is not intended that any type of work or country will be automatically prohibited. Defence will carefully consider the circumstances of each case in the context of the best available information regarding threats to Australia's national security. Where there are questions or doubts, Defence will work with an applicant to clarify any issues. The Bill also provides an opportunity for applicants to seek an internal and external merits review of adverse decisions.

There is no need for individuals to obtain an authorisation for any activities completed prior to the passage of the Bill. However, if an individual is engaged in work that will continue after the passage of the Bill, and the work is within the scope of the authorisation framework, they will need to apply for approval. Such individuals will have three months after the passage of the Bill to apply for a work authorisation before they are considered to have committed an offence under the Bill. These offence provisions will not be retrospective.

Illustrative Case Studies

The following examples are intended to illustrate the Bill's intended operation.

Scenario 2: A former Defence Australian Public Service (APS) employee left Defence one year ago, after being in a specified role. The individual was recently offered a short-term contract by a company. The company's offices are located in Australia but it is majority owned by a non-exempt foreign entity.

Outcome: The individual is required to apply for a foreign work authorisation as they would be working for a company that is majority-owned by a non-exempt relevant foreign country and insufficient time has passed since working in a specified role in Defence.

Scenario 1: A former Australian Defence Force (ADF) member has been watching the news and wants to help search and rescue efforts in a relevant foreign country suffering from a natural disaster. The individual left a specified role. They travel overseas to join a humanitarian aid organisation.

Outcome: The individual is not required to apply for a foreign work authorisation as the work is considered to be humanitarian aid.

Scenario 3: A former ADF member who transitioned out of the ADF twelve years ago received a job offer from the border protection service of a relevant foreign country. The job entails instructing the foreign country's recruits in tactics for intercepting vessels.

Outcome: Despite the time that has elapsed, the individual is required to apply for a foreign work authorisation, as they would be sharing military tactics, techniques or procedures with a government body of a relevant foreign country (which does not have a time based exemption).

Scenario 4: A former ADF member transitioned out of the ADF twenty years ago. The individual now wishes to work overseas for a company owned by a government of a non-exempt foreign country in a role that does not involve training related to military tactic, techniques or procedures; or export control goods.

Outcome: The individual is not required to apply for a foreign work authorisation as enough time has passed since working in a specified role within Defence. The time elapsed since the member ceased being in the specified role is long enough that they are not considered a 'foreign work restricted individual' under the Bill.

Engagement with Stakeholders

Defence held discussions with a number of key stakeholder groups ahead of the Bill's introduction, including:

- Veterans' groups: Ex Service Organisation Round Table (ESORT), Younger Veterans – Contemporary Needs Forum (YVF), and the Commando Welfare Trust.
- Unions: Community and Public Sector Union (CPSU), Australian Manufacturing Workers' Union (AMWU), and Professionals Australia.
- Defence industry associations: Australian Industry and Defence Network (AIDN) and Australian Industry Group (AI Group).
- Australian Defence Association.

Broadly, the feedback from these discussions was that stakeholders recognise the need for the Bill in regards to national security, and emphasised the importance of communication and transparency during the implementation phase of the Bill to better understand the impact on individuals and industry. Defence will continue to engage with stakeholders on the implementation of the Bill's authorisation framework.

Following the Committee's review of the Bill, further consultations will be undertaken by Defence to ensure implementation of the authorisation framework is well understood, and to provide opportunities for questions and concerns to be raised and addressed. As noted above, Defence will work with stakeholders to develop a range of detailed scenarios to help clarify how the authorisation framework will apply in various circumstances.

Defence will also continue to work with stakeholder groups to raise awareness of the new work authorisation framework, not only in Australia, but also among Australian citizens and permanent residents working overseas. Defence is planning a broad national and international communications campaign to support the commencement of the legislation.

Defence is very conscious that it will be important to efficiently process work authorisation requests. Detailed planning activities have commenced to ensure this objective is met.