# Submission to the PJCIS regarding the Defence Amendment (Safeguarding Australia's Military Secrets) Bill 2023

My opposition to this bill is both to many specific clauses, and the existence of the bill as a whole. I have split my submission into ''tactical'' concerns about the specifics of the text, and ''strategic'' concerns about the introduction of the bill. Though my hope is for the committee to recommend this bill not be passed in any form, I also present suggestions for what I see as distasteful but begrudgingly acceptable forms the bill could take.

As a general comment, this bill strikes me as incredibly lazy. It appears to be driven by a few edge cases that it can't (or won't) properly articulate, so states that *all* cases are criminal, and the minister will decide which of them are actually relevant, whenever he gets around to it.

## Tactical Concerns

**Extreme Penalty**

The penalty for breaching this legislation is an absurd 20 years in prison. The minister's second reading speech notes this legislation was partly based on American legislation, for which the penalty appears to only be loss of pension for servicemen. There is a bill before congress that would increase this by imposing *civil* penalties of up to $100,000. To be hungrier for subservience and punishment than America, and with such immense appetite, is embarrassing.

An individual receiving 20 years in prison because they work for a foreign government is absolutely absurd. Consider that the premise of the bill is to safeguard our military secrets, but existing laws that criminalise releasing our military secrets attract *half* (or even less) of the penalty proposed by this bill. The penalties in this bill are simply not congruent with the other Australian laws pretecting our nation's secrets.

What's more, is that breaching this bill does not actually harm our military secrets! Whilst it is of course possible for one to cause material harm to Australia's interest while contravening the bill, it is also possible to be engaged in entirely benign actions and be caught under the provisions of this bill, examples of which I give below.

**Scope of Government Body**

State owned enterprises and public institutions are by no means uncommon throughout the world. Below I list examples of cases where I believe it is unreasonable for this bill to impose its conditions on an individual simply by virtual of the fact they once worked for our military machine

- working for a national post office
- working for a national bank
- working for a national library
- working for a national university
- working for a national broadcaster
- working for a national public transit organisation

The institutions above are generally enshrined in legislation (that is, have "special legal status"), and a former Defence member working for any of these institutions would face a 20 year prison sentence. Note that under this bill, the "national" instutions would also include state and local institutions of the same nature.

Continuing this line of reasoning more broadly, it is silly to claim that working as an office clerk administering paperwork for a foreign government is a situation that puts our military secrets at risk. Whilst it is *possible* for such a situation to arise, we are letting edge cases dictate the norm in this bill. Considering the penalties imposed by the bill, we should not be allowing edge cases to dominate our thinking.

It is worth dwelling on some of these cases, as they apply to *all* Australian citizens or permanent residents. Of particular concern is an individual working for a national university, which would appear to fall under the definition of providing training on behalf a foreign country. It is quite clear that many of the courses offered by a university would touch on items listed in Part 1 of the Defence and Strategic Goods List, or would cover military tactics, techniques, or procedures.

On the matter of public enterprises, it is not particularly unheard of for governments to invest heavily in companies without taking any interest in shaping their actual operations. The most common kind is where, for instance, a national pension or wealth fund invests in a company. Consider as an example the Norwegian "Oil Fund," which owns 1–2% of the *world's* publically listed companies. Whilst the 50% ownership limit may seem like a barrier to this ever being a real concern, for small companies it is entirely plausible for their own government to invest enough to own the company, exercise no practical control over it, and then sell their ownership at a later date.

**Due Dilligence of Ownership**

Ownership of publically listed companies is not always clear. It is not generally a person's right to see the share register of a company, or know the affiliations of the board of a company. The explanatory memorandum claims that it is expected an individual will conduct their own due dilligence with regards to foreign ownership! Were such a task so easy I don't believe the government would feel the need to introduce tranches of legislation helping its expansive administration attempt to track such things. This is not a practical requirement, and gives no thought as to how Australians are expected to practically follow this very serious bill.

One interesting consequence of this legislation, is that a foreign government can buy their way into criminalising Australian citizens. We are handing over the power to send our citizens to jail for 20 years to foreign governments.

**Scope of Foreign Work Restricted Individual**

The Department of Defence is a large organisation, with many parts acting mostly disjointly. There are many parts of the department which consist of primarly low/no classification work, or work that does not involve protected technology. When it comes to safeguarding our military secrets (particularly "AUKUS technology transfers" that the minister made reference to), this bill imposes large impost on former employees which in many cases yields no additional protection of Australia's national interest. In general I don't think it makes sense to introduce additional requirements on former employees, some where I think it makes even less sense,

- call centre operators

- public relations
- interns
- facilities
- payroll

Consider the case of an intern in the department who, after finishing their studies, now decides they want to go overseas. In the common case, this is an individual without income, trying to enter a competitive labour market, that will frequently be legally required to discriminate against hiring foreign workers.

Now on top of these challenges, that individual becomes *even less* competitive by being a hiring risk: they must ask strange questions about the ownership structure and allegience of the board, they might be required to ask and wait for an unknown amount of time for government approval before they can accept the contract, and if the ownership structure of the company changes they have to quit. In such cases, it's easy to see that this bill is against the interests of Australian citizens.

Consider that the similar American legislation only applies to their military, not civilian positions, and generaly only servicemen with a lengthy record.

**Retroactive Application**

Consider the same intern from before, but they have already gotten a job overseas, started their life in the world, and now this bill passes as law. The law then requires they either very quickly find new employment, or, likely, get deported back to Australia. I would like to emphasise that in the world of today, the 3 months initial amnestry granted by the bill is not a long time to change jobs. Three months is perhaps about a slightly above average period of time to go from submitting an application to being presented a contract. If our intrepid intern takes a couple of weeks before manging to find the company that will agree to employee them, or their hiring process takes a bit too long, it will push the process over 3 months.

Additionally, by applying this bill retroactively to anyone who has ever been a Defence employee, many who have since moved on from government (or from Australia) and stopped paying attention to the gyrations of the Australian government will not even know they are committing criminal acts. Since many benign actions attract a 20 year prison sentence, this situation is unnaceptable, and clearly against the interests of Australian citizens.

This bill can have quite a serious effect on an individual's life, restricting their ability to earn a living. These sort of restrictions require careful thought before agreeing to them, but by making this bill retroactive, it robs our former Defence employees of the right to decide if they want to make that trade or not.

**Unlimited Scope**

Consider the closest analogue to this legislation: non-compete clauses. Though rather controversial in their own right, let's ignore that and look at this bill through the lens of non-compete law. In that regard, this bill is an absurdly aggressive non-compete.

A court would generally consider the geographic area to which the non-compete applies, the activities being restricted, and the period the non-compete applies. For previous Defence employees, this bill applies to unlimited geographic extent, restrains all activities undertaken for a government body, and applies for unlimited time. As a non-compete clause this bill would be immediately thrown out and discarded as unreason-

able.

Consider also that the information this bill aims to protect is expected to at some point be declassified and become public knowledge, but the restrictions in this bill *would still apply* to a former employee. It is worth noting the restrictions would apply regardless of if the employee ever had such knowledge in the first place.

**Training**

The very nature of technologies published in the Defence and Strategic Goods List is that they are *not* military secrets. They are military knowns, publically listed and helpfully compiled in one place. For example, I can look up online all the information I'll ever want to know about "smooth–bore weapons with a calibre of less than 20 mm," or Sarin, or "software specifically designed for modelling military scenarios" (I can in fact download many such games on the Steam game store).

Whilst preventing the export or manufacture of such items in Australia is possible (and for the majority of items on the list it is indeed a desirable goal), preventing knowledge transfer in such cases is a futile effort, a lesson our government should have learned from the "crypto wars." Public information is public information, particularly information concerning the items on the Defence and Strategic Goods List.

The explanatory memoradum for the bill explicitly states it considers "training" to cover all prospective scenarios under which knowledge-transfer could occur, directly or indirectly supporting a foreign military. Above I touched on the case of working for a national university, but consider the following cases which may attract a hefty 20 years in prison,

- writing a blog post about military history
- making a "mil-sim" game
- playing a "mil-sim" game as a squad leader, and a member of your squad works for a foreign government body
- uploading a youtube video with an offhand yet informative comment about an item on the list
- having a conversation about any item on the list
- writing legislation about items on the list
- producing the list itself

The last two are slightly facetious, but it's not clear how the bill, when taken with its explanatory memorandum, would not cover those actions.

**Whitelisting**

I want to touch on the "solution" this bill presents to some of the above concerns, which is, the whitelisting of countries or individual employment arrengements by the minister or their delegate.

Government is slow. Government is inflexible. Government makes mistakes. When an individual is asking the government for something (such as money), this is unfortunate but defendable. When asking the government for permission to perform legal actions on which one's livelihood depends, it is unnaceptable. The wait time for government processing is massive, and the processing itself is frequently underfunded and subject to competing ministerial priorities. Without intentionally meaning to, the government can easily place incredible undue hardship on an individual simply trying live a straightforward, non-threating, consistent-with-Australia's-interests life over-

seas.

Consider also the interests of a citizen looking to gain employment overseas. It is in their interest to immediately apply for foreign work authorisations for all job applications they send out, regardless of the fact that the majority of applications lead to no response. This, of course, further exacerbates the problems of the previous paragraph.

As the power this bill would give to the government over individuals is great, using that power should be explicitly the exception, not the norm. The default position of the government should *not* be that all foreigners are problematic and we'll allow a couple of them, but rather there are a few specific countries which exercise extreme control and coercion over their employees, and in those cases perhaps it might be sensible for the government to take additional measures to protect its military secrets. It is also worth considering if, in those countries, the distinction between state employee and non-state employee is one that makes a material difference to the application of coersion.

## Strategic Concerns

First and foremost, this bill is entirely unnecessary. Military secrets are already protected by legislation. Training foreign militaries is already criminal. It adds nothing to Australia's security posture, but imposes incredibly serious penalties on benign activity, to the cost of the Australian citizen. In this bill is an implicit acknowledgement that none of the actions taken are *really* criminal actions. All the activites criminalised under this bill are legal, as long as the government specifically approves them. It criminalises actions which *maybe*, under *some* circumstances *might lead* to actually criminal actions.

This bill is selling out the Australian citizen to show servitude to American interests. Being an American ally does not mean being their vassal, and we should not accept an exchange of military technology for the rights and interests of our citizens. We have a diplomatic apparatus, and we should use it to negotiate and sooth the concerns they have about disclosing military secrets. Whilst Australia is undoubtedly the junior parnter, we both stand to gain from our alliance, and it is worth remembering that and asserting our sovereignty when it benefits Australia. If we are to send our citizens to die in a fundamentally American war over Taiwain, they should at least be willing to work with our already healthy domestic safeguards for military secrets.

Secondly, the government is designing a system whereby it acts as big brother, just ''keeping tabs'' on it's citizens abroad, with the thinly veiled threat that their job could be taken away from them at any moment, for any reason, lest they want 20 years in prison. This is more control of an individual's life than the government has *in Australia*, and presents a rather insidious situation whereby an individual who wants to leave the clutches of a government they might disagree with has the noose tightened around them even further. It is not criminal to disagree with the government, and it is not criminal to want to set up one's life abroad, regardless of if that person has worked for the Defence machine or not. This bill is a large and serious step toward making it so, by conferring on the government the necessary power to practically achieve it.

Thirdly, this bill seems confused and lazy. The text of the bill talks about one issue, the minister's speech makes reference to another, and the ''vibe'' of the bill is that there is a third, or perhaps even fourth, hidden concern that the bill *actually* wants to legislate, but is unable or refusing to bring to light. Our legislation, particulary concerning serious crimes,

should not be shrouded in such intrigue and mystery.

Perhaps the most concerning aspect of this bill can be found in the minister's second reading speech. Despite the overreach already present in this bill, the minister informed parliament that

> *"[...] this bill does not represent the entirety of our legislative ambition in this respect [...]"*

I urge the committee to reign in these ambitions as a matter of import.

## Suggestions

All of the suggested alternatives to this bill should be taken to have adopted (if applicable) the following recommendations, which I consider absolutely necessary,

- Increase the amnesty period before penalties apply to 6 months after the assent of this bill
- Only apply the provisions in the bill to individuals who were employed in our Defence organisation after the end of the amnesty period
- Instead of a list of not relevant foreign countries, the minister is required to produce, by legislative instrument, a list of relevant foreign countries
- Remove the sections concerning training provided to foreign countries
- Reduce the penalty for each crime to no more than 3 years inprisonment, and preferably replace it with civil penalties that are financial in nature
- Scope the time after being employed in Defence that an individual is subject to this bill to at most 30 years, and preferably no more than 5
- Add an amnesty period of 6 months where the penalties in the bill do not apply, to deal with cases where an individual becomes an employee of a foreign government body due to changes in ownership or allegiance of their employer
- Make the evidentiary burden on the prosecution that an employee was grossly negligent in their investigation of if their employer is a foreign government body, otherwise they have not committed an offence

I now present potential alternative forms for the bill, from most to least palatable, though I wish to reiterate that my preferred version of this bill is for it to be scrapped in its entirety.

1. Use civil law mechanisms such as contract clauses to similar effect. In this case they should be similar in substance to non-compete clauses and attract no criminal punishment.
2. Allow the minister to produce a document, of some kind, which an employee is given the opportunity to willingly accept or reject, that binds them to the provisions in this bill. Such a document should only be applied to specific projects or roles which are intimately involved in the technologies transferred to Australia via the AUKUS agreement.
3. Make the bill only have effect when our country is in a state of war. In this case there should be some (possibly quite short, but certainly more than a single day) amnesty for employees to quit their jobs.
4. Have the minister produce, by legislative instrument, a list of projects or technologies by way of a Defence-assigned internal codename. All staff should be made abundantly aware of the existence of this list, and told when, during the course of their duties, they have come across such a project. In this case, the bill's provisions only apply insofar as they relate to the technologies covered by the list of codenames.
5. Make no further changes