

Chapter 2

Concluded matters

2.1 The committee considers a response to matters raised previously by the committee.

2.2 Correspondence relating to these matters is available on the committee's website.¹

Bill

Defence Amendment (Parliamentary Joint Committee on Defence) Bill 2024²

Purpose	This bill sought 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 Third reading negated in the Senate, 4 July 2024
Rights	Freedom of expression; privacy

2.3 The committee requested a response from the minister in relation to the bill in [Report 5 of 2024](#), while the bill was still before the Parliament.³

2.4 On 4 July 2024, the third reading of the bill was negated in the Senate and the bill consequently did not proceed.

Secrecy offences

2.5 This bill sought 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 sought to establish two new criminal offences:

¹ See https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports

² This entry can be cited as: Parliamentary Joint Committee on Human Rights, Defence Amendment (Parliamentary Joint Committee on Defence) Bill 2024, *Report 7 of 2024*; [2023] AUPJCHR 52.

³ Parliamentary Joint Committee on Human Rights, [Report 5 of 2023](#) (26 June 2024) pp. 9–15.

- 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 have applied if the person became aware of the relevant information otherwise than because of the PJCD proceedings. It would have been subject to a maximum penalty of imprisonment for two years or 120 penalty units or both;⁴
- 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 its functions. No defences would have applied. It would have been subject to a maximum penalty of imprisonment for 5 years or 300 penalty units, or both.⁵

Summary of initial assessment

Preliminary international human rights legal advice

Rights to freedom of expression and privacy

2.6 These secrecy offences were designed to ensure information and documents provided to the committee were 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 have promoted 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.⁶ It also includes the right to control the dissemination of information about one's private life.

2.7 However, in restricting the disclosure of such information or documents, this would have also limited 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.⁷

2.8 The statement of compatibility identified that the right to freedom of expression is engaged by these measures. This right may be subject to limitations that

⁴ Schedule 1, item 2, proposed section 110ADA.

⁵ Schedule 1, item 2, proposed section 110ADG.

⁶ International Covenant on Civil and Political Rights, article 17.

⁷ International Covenant on Civil and Political Rights, article 19(2).

are necessary to protect the rights or reputations of others,⁸ national security,⁹ public order, or public health or morals.¹⁰ Additionally, such limitations must be prescribed by law, be rationally connected to the objective of the measures and be proportionate.¹¹

2.9 The statement of compatibility stated that the objective sought to be achieved by both measures was 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 stated that these offences were necessary to maintain confidence in the PJCD's ability to protect the sensitive information it would have obtained, as if that trust was undermined it could inhibit the PJCD from performing its functions effectively in the longer term.¹² 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 were 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 have been rationally connected to that objective where the information disclosed could affect national security.

2.10 The recent review of Commonwealth secrecy provisions by the Attorney-General's Department (the review) recommended that secrecy offences should

⁸ 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].

⁹ 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].

¹⁰ 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].

¹¹ UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [21]–[36].

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
- information that has been previously communicated, or
- information communicated to a person to whom the information relates.¹³

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

2.12 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.

¹³ Attorney-General's Department, [Review of secrecy provisions, Final Report](#) (2023) p. 29.

2.13 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’.¹⁴ It is not clear why the proposed offences in this bill did not take a harms-based approach. In particular, the offences applied to all types of information, not just those which may cause harm. Further, the second offence made it an offence for a person to ‘directly or indirectly’ make a record of something – even if the person did not intend to disclose it. This would appear to mean, for example, that a member of the PJCD who photocopied something for their own education (with no intention of disclosing it to anyone) would have been guilty of an offence punishable by up to five years imprisonment. It is not clear why the offences could not have been 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.

2.14 Further, as the statement of compatibility made no reference to disclosure on the basis of the public interest, it is not clear why there was 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*.¹⁵

Committee's initial view

2.15 The committee considered that the creation of secrecy offences to prohibit the disclosure of information and documents provided in confidence to the proposed Parliamentary Joint Committee on Defence may have promoted the right to privacy but it also would have limited the right to freedom of expression.

2.16 The committee considered further information was required to assess the compatibility of this measure with the right to freedom of expression, and as such sought the minister's advice in relation to why the proposed secrecy offences:

- (a) did not contain additional defences as recommended by the Attorney-General's Department's recent review into secrecy provisions (by reference to each of the proposed protections and why each one was, or was not, appropriate for inclusion);
- (b) did not take a ‘harms-based’ approach and were 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) did not include a general public interest disclosure defence.

¹⁴ Attorney-General's Department, [Review of secrecy provisions, Final Report](#) (2023) p. 21.

¹⁵ 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.

Minister's response¹⁶

2.17 On 13 August 2024, the committee received a short response from the minister noting that the bill had not proceeded and stating that should the government reintroduce the bill, the department would take the committee's concerns into consideration and provide a detailed response to the committee through the formal processes.

Committee view

2.18 The committee notes that it requested a response from the minister in relation to the compatibility of this bill with the right to freedom of expression in [Report 5 of 2024](#), while the bill was still before the Parliament. The committee notes that, on 4 July 2024, the third reading of the bill was negated in the Senate and the bill consequently did not proceed.

2.19 The committee notes the minister's response of 13 August 2024. The committee considers that, without the further information requested, the committee is unable to conclude as to the permissibility of the proposed limitation on the right to freedom of expression.

Suggested action

2.20 The committee recommends that, in the event a similar bill is introduced in future, the minister have regard to the committee's analysis in the development of such a bill.

2.21 As this bill has not proceeded, the committee makes no further comment with respect to this bill.

Mr Josh Burns MP

Chair

¹⁶ This is an extract of the response. The response is available in full on the committee's [website](#).