

Chapter 4

Consultation

Failure to consult with university and research sectors

4.1 Evidence given at the committee's 2 and 21 March public hearings, particularly by witnesses from Universities Australia and the University of Sydney, demonstrated that Defence had failed to adequately consult with all stakeholders on the bill. The substantial part of Defence's consultation process with universities and other relevant research stakeholders began during March 2012; four months after the bill had been introduced and only after the committee recommended that Defence conduct the process.

4.2 Defence outlined its consultation process in answer to questions taken on notice at the public hearings. The process included the release of an exposure draft of the bill, a series of consultation workshops (from information provided these workshops were aimed at industry), and release of draft regulations for consultation. While Defence noted that it contacted Universities Australia, it provided no information about the nature or extent of the contact with other universities and research organisations.

4.3 The inadequacies of Defence's consultation process were first brought to the committee's attention by Dr Pamela Kinnear from Universities Australia during the 2 March 2012 public hearing:

I will finish my opening statement by making the point that it is very unfortunate that we are having to address these issues at this point in time. We do understand the stage that the legislation is at. We think the situation could have been avoided through greater levels of engagement between the government and the university sector, and possibly even internally to government. We would like to point out that we do not understand how the regulatory impact statement can have assessed that the impact on universities will be small when in its own admission it did not have any data to support its conclusion, and it did not consult with the university sector.¹

4.4 Defence disagreed with Universities Australia's assertions regarding consultation.² The committee notes, however, that when the exposure draft of the bill was released for public consultation on 15 July 2011, the explanatory memorandum included a Regulation Impact Statement which detailed the impact of the legislation

1 Dr Pamela Kinnear, Deputy Chief Executive, Universities Australia, *Committee Hansard*, 2 March 2012, p. 24.

2 Defence, answers to questions on notice from public hearings, 2 and 21 March 2012 (received 20 June 2012), pp. 25-26.

on academic institutions. In its advice to the committee, Defence indicated that it received no response to its letter sent to Universities Australia on 9 May 2011, prior to the exposure draft process. Given this lack of response, it is difficult for the committee to understand how Defence reached the conclusion in the Regulation Impact Statement that the bill would not have a detrimental effect on academic institutions.

4.5 In the explanatory memorandum to the bill, Defence outlines the consultation conducted with industry.³ The Australian Industry Group Defence Council also discussed in their submission the consultation process Defence had undertaken with their members. Despite this consultation, companies such as Saab and Boeing raised concerns with the committee and indicated that further detail was required from Defence, particularly in relation to the regulations accompanying the bill.

4.6 On 20 June 2012, Defence provided answers to the committee's questions taken on notice and written questions following the public hearings. As part of this information, Defence advised the committee that its consultation process, which started in March, would be concluded by the end of June 2012 and that Defence would be able to advise the committee of an outcome at the end of July.

4.7 Also, as a result of the concerns about the effect of the bill on research organisations raised by Universities Australia and the University of Sydney, the committee invited a number of other research organisations to make submissions to the committee's inquiry. The National Health and Medical Research Council (NHMRC), the Australian Research Council, and the Department of Industry, Innovation, Science, Research and Tertiary Education (DIISRTE) responded. The Queensland Government also made a submission regarding the effect the proposed legislation could have on universities and research organisations.

4.8 The NHMRC, the Australian Research Council and DIISRTE all referred to the consultation process and each recommended that further consultation be conducted. They made clear that they were willing to work with Defence to find a solution to concerns about the bill's effect on research.

4.9 The NHMRC and DIISRTE noted in their submissions, dated 15 June and 2 July respectively, that Defence had provided two options papers. One contained three options for amending the bill (of which option 3 was the submitters' preferred option) and a second paper had four options. The submitters had concerns regarding option four. For example, the NHMRC expressed strong reservations about this option:

Option 4 as presented raises a number of questions and concerns. As presented, and without clear advice and definitions, implementation of Option 4 may result in a significant increase in regulatory burden for

3 Explanatory Memorandum, *Defence Trade Controls Bill 2011*, p. 14.

researchers and institutions in comparison to Option 3, which appears to largely address concerns raised by the research community.⁴

4.10 Given the concerns raised by these submitters, the committee is concerned that Defence's proposed timeline does not allow sufficient time for the conclusion of consultation and the creation of a suitable solution for all stakeholders.

Consultation since 21 March 2012

4.11 The committee gained the impression that Defence was not well prepared and was caught by surprise by the concerns raised in some submissions, particularly the comments made by Universities Australia. Indeed, Defence found itself in a position in March, four months after the legislation had been introduced in Parliament, where it had to undertake extensive consultation about some provisions in the bill, most notably those dealing with the application of the legislation to intangible transfers. This aspect of the bill remains one of the pressing concerns still requiring a resolution. Unfortunately any conversation on this matter started very late. Indeed, Universities Australia was of the view that the situation could have been avoided through 'greater levels of engagement between the government and the university sector and possibly internally to government'. For example, as noted earlier, Universities Australia could not understand:

...how the regulatory impact statement can have assessed that the impact on universities will be small when in its own admission it did not have any data to support its conclusion, and it did not consult with the university sector.⁵

4.12 Sydney University supported this view. It noted that when preparing the bill, Defence 'had no information available to it indicating the number of activities in Australian universities likely to be affected'.⁶ Furthermore, at the hearing on 21 March Dr Michael Biercuk informed the committee that discussion with Defence about such matters had started 'about an hour ago'.⁷ At the same hearing, Professor Mann told the committee that there was 'a job of work to be done, not just an instrument, which we have not seen yet, which may have lots of exemptions'. He was of the view that Defence had 'grossly underestimated how many exemptions there would need to be'.⁸

4 National Health and Medical Research Council, *Submission 12, Supplementary Submission*, p. 2.

5 Dr Pamela Kinnear, Deputy Chief Executive, Universities Australia, *Committee Hansard*, 2 March 2012, p. 24.

6 University of Sydney, *Submission 7*, p. 1.

7 Dr Michael Biercuk, Faculty of Science, School of Physics, University of Sydney, *Committee Hansard*, 21 March 2012, p. 22.

8 Professor Graham Mann, Associate Dean, Research, Sydney Medical School, University of Sydney, *Committee Hansard*, 21 March 2012, p. 20.

4.13 Even as late as 30 May, the NHMRC informed the committee that while the university sector had been consulted, the Medical Research Institute (MRI) sector and the public health sector had not. It also had strong reservations about the bill, noting that the legislation 'may have ramifications not only for the university sector, but also for other institutions that conduct health and medical research...' NHMRC then stated:

In order to ensure that the MRI sector will be consulted, my Office will provide details of the draft Bill to (Association of Australian Medical Research Institutes) AAMRI and provide contact details for AAMRI to the Defence Bill secretariat. However, both the MRI and the public health sectors should be included in the consultation process.⁹

4.14 In this regard, the NHMRC suggested broad consultation once the bill had been redrafted, which should 'include the peak body for MRIs and the health sector'. At this late stage, the committee received a similar submission from the Australian Research Council, which was of the view that the concerns raised were 'sufficiently serious as to justify further consultation with universities about the proposed controls, prior to their implementation'.¹⁰

4.15 As noted earlier, Defence commenced consultation in earnest with the Australian research sector about the proposed legislation during March 2012. The consultation was continuing when on 21 June 2012, the committee received information from Defence indicating that it had met with Universities Australia and agreed to develop principles and options for further consultation and discussion with the university and research sectors.

4.16 On 2 July, the Department of Industry, Innovation, Science, Research and Tertiary Education (DIISRTE) stated that it was encouraged with the progress of consultations between Defence and the higher education sector since March 2012. It noted, however, that the consultations were continuing and Defence was 'still developing options for consultation with the sector'. Indeed, based on the perspective of its portfolio agencies, DIISRTE identified another issue that was 'yet to be addressed'—the treatment of statutory authorities, whose staff have not been granted exemption from committing offences under the bill. DIISRTE also noted that while Defence had dealt directly with Universities Australia and the University of Sydney, it had not done so with the broader range of universities. It suggested that universities 'may have different viewpoints and it would be desirable to broaden the consultation process to include all Universities members'.¹¹ It noted that Defence was planning to do so.

9 NHMRC, *Submission 12*, p. 2.

10 Australian Research Council, *Submission 13*, p. 2.

11 DIISRTE, *Submission 16*, p. 3.

Conclusion of consultation process

4.17 On 9 August, Professor Jill Trehwella, Deputy Vice-Chancellor (Research) at the University of Sydney, advised the committee that

It is with considerable regret that I must inform the Committee that at present the university sector is unable to support what we understand to be Defence's preferred position relating to this Bill and its implementation.

In our view the current Option 4, which we understand to be Defence's preferred position, is inconsistent with the regulatory principles that we understood had been agreed by Defence early in the consultations.¹²

4.18 Universities Australia shares the concerns of the University of Sydney, noting that

Since March, Universities Australia has engaged in discussions with the Department of Defence...with the intention of securing a workable outcome. Despite early promise of progress and a commitment from the Department to work collaboratively, we have been disappointed that there has not been the opportunity for open or considered sectoral engagement on the issues, and to date adequate responses to our concerns have not been provided.¹³

4.19 The universities argue that their concerns have not been recognised by Defence. A set of amendments to the bill to resolve the issues raised by the universities, known as option 3, was proposed during consultations and supported by the universities, research organisations, and DIISRTE.¹⁴ The University of Sydney explains that option 3

...balances the competing demands of providing controls for high-risk activities and ensuring protection for innovative research, education and freedom of inquiry. It accomplishes this by targeting enforcement to a relatively small class of high-risk activities which have limited overlap with typical academic research (e.g. advanced "experimental development" activities pertaining to Very Sensitive controlled goods). Exemptions for basic, strategic basic and applied scientific research ensure that it is possible to create a culture of compliance among the limited pool of researchers engaged in activities that potentially carry security risks.¹⁵

4.20 Defence propose a different set of amendments to the bill, known as option 4. In June, Defence circulated a paper with both options 3 and 4 to stakeholders. The

12 University of Sydney, *Submission 7A*, pp. 1-2.

13 Universities Australia, *Submission 11A*, p. 1.

14 University of Sydney, *Submission 7A*, p. 3; Universities Australia, *Submission 11A*, p. 1; NHMRC, *Submission 12A*, pp. 1-2; DIISRTE, *Submission 16*, pp. 2-3.

15 University of Sydney, *Submission 7A*, p. 3.

universities, research organisations and DIISRTE have all raised concerns with option 4.¹⁶ Universities Australia explains that:

...from our perspective, it was evident that the proposed new option [option 4] had numerous shortcomings that would not achieve the objective sought. Universities Australia provided a formal response expressing our concerns about the new option [option 4] and reiterating our preference for the core elements of 'Option 3' to form the basis of any solution...Despite some advantages provided by exempting supply of intangible technologies within Australian borders, the sheer volume of international collaborative activity in a digital age means that Option 4 would, in practice, be little different, in practice, to the draft legislation currently before Parliament. More importantly, it fails to address the Bill's own stated objective to apply to a limited and small volume of high-end, specialist research. In doing so, it risks constraining low risk research of high public value, with few obvious benefits to national security.¹⁷

4.21 Both the University of Sydney and Universities Australia raise concerns with the way in which the consultation has been conducted by Defence. For example,

Significantly, on 10 July 2012 Defence advised Universities Australia in writing that it intended to recommend amendments to the Bill to introduce permit requirements for academic publications involving DSGL technologies. Coming so late in the consultation process, Defence's reversal of its previous verbal advice (made during the consultations) that it did not intend to control publication of university research, raises profound questions of principle, policy and process.

Universities Australia requested written advice from Defence about its proposal to control publications as part of Option 4. To date, no such advice has been forthcoming. This means that we have had no detailed information on which to make an assessment of the practicalities of Defence's plans.¹⁸

4.22 On 9 August, Defence wrote to inform the committee it was 'unlikely that Defence and the university and research sectors will reach agreement on a preferred option and, as a result, consultation has moved towards the practical implementation of the legislation'.¹⁹ As noted above, the cause of the disagreement is that the university and research sectors and DIISRTE prefer option 3, while Defence argues for option 4.

4.23 Defence asked the committee to 'adopt'²⁰ option 4 and endorse the amendments that Defence proposes in support of this option. Amongst other

16 University of Sydney, *Submission 7A*, p. 3; Universities Australia, *Submission 11A*, p. 1; NHMRC, *Submission 12A*, pp. 1-2; DIISRTE, *Submission 16*, pp. 2-3.

17 Universities Australia, *Submission 11A*, p. 2.

18 University of Sydney, *Submission 7A*, pp. 3-4.

19 Department of Defence, *Submission 15A*, p. 1.

20 Department of Defence, *Submission 15A*, p. 3.

arguments, Defence lists the following reasons the committee should endorse option 4:

It implements Australia's obligations under the Wassenaar Arrangement to implement controls on intangible transfer of controlled technology;

It is most consistent with the existing tangible export control model and therefore provides a more simple and common approach. It also reduces potential cost to businesses as they will not need to establish separate compliance systems for tangible and intangible controls.²¹

4.24 Defence lists the proposed amendments which could be made to the bill explaining that:

To implement Option 4 and address other aspects that have arisen during the course of consultation, if accepted by the Committee, the Bill could be altered by:

- making the Bill consistent with Australia's existing tangible export controls by:
 - removing controls on supplies of technology inside Australia;
 - removing controls for Australians located overseas who supply technology; and
 - applying controls to all supplies of technology from Australia to anyone outside Australia;
- including definitions for 'in the public domain' and 'basic scientific research' in the Bill and Regulations;
- removing controls on defence services; and
- including an additional control on publishing information where it will transfer controlled technology to the public domain.²²

4.25 Defence proposes to work with the university and research sectors to assist them in implementing option 4, should the committee agree that bill be amended in this way.²³

Defence will remain engaged with the Department of Innovation, Industry, Science, Research and Tertiary Education and UA [Universities Australia] on outreach activities and materials, so that we can benefit from their knowledge of how to best communicate with the sector. Planned measures include:

- a simple user guide to help individuals to understand and navigate the Defence and Strategic Goods List;

21 Department of Defence, *Submission 15A*, p. 3.

22 Department of Defence, *Submission 15A*, p. 4.

23 Department of Defence, *Submission 15A*, p. 9.

- a sector-specific publication to assist the academic and research sectors to understand what Australia's export control system means for them (similar to the product developed previously for the mining industry);
- tools and guidance to help academic and research institutions to build internal compliance frameworks that are appropriate for their organisations;
- sector-specific outreach sessions for key export compliance staff (train the trainers); and
- sector-specific outreach sessions with researchers to help them understand their obligations and how the export control process works.²⁴

4.26 Universities Australia, and the other research organisations, remains willing to work with Defence to find a solution. However, Universities Australia notes that 'agreement can only be achieved through a transparent consultation process in which all stakeholders from the research community and other affected organisations are brought together'.²⁵ Universities Australia suggested that the Chief Scientist, Professor Ian Chubb, could assist in resolving the consultation deadlock. It informed the committee that Professor Chubb has accepted an invitation to convene a roundtable of key stakeholders.²⁶ Universities Australia supports a roundtable in that it is

...an initiative that is consistent with our calls during the consultation process to move beyond the series of bilateral conversations that had characterised the Department's approach. A roundtable would enable the key stakeholders to hear the Department's proposal and reasoning and develop their own response in light of perspectives that extend beyond narrow sectoral interests.²⁷

Recommendation 6

4.27 The committee endorses the roundtable approach proposed by Universities Australia and recommends that Defence participate in the roundtable of key stakeholders convened by Universities Australia and chaired by the Chief Scientist, Professor Ian Chubb. The committee also recommends that the further consultation be conducted by Defence with key stakeholders, until the issues raised can be resolved to the satisfaction of all parties. Further, the committee recommends that consultation be conducted in an open and transparent manner, and sufficient time allowed for key stakeholders to consider the complex issues and respond.

24 Department of Defence, *Submission 15A*, p. 9.

25 Universities Australia, *Submission 11A*, p. 3.

26 Universities Australia, *Submission 11A*, p. 3.

27 Universities Australia, *Submission 11A*, p. 3.

4.28 The committee further recommends that, in designing the implementation of the strengthened export controls, Defence create an advisory group of key stakeholders which must have input into each part of the process. Key stakeholders in the group should include, but not be limited to: DIISRTE, the Department of Health and Ageing, NHMRC, Universities Australia, and the Chief Scientist of Australia.

Recommendation 7

4.29 The regulations are an important part of the implementation of the strengthened export controls. Defence has proposed that the regulations will be amended in line with any amendments made to the bill. The committee recommends that the regulations form an integral part of the consultation process.