SUBMISSION ON AMENDMENTS TO THE *DEFENCE TRADE CONTROLS ACT 2012*

17 November 2023

Universities Australia (UA) welcomes the opportunity to make a submission with respect to proposed amendments to the *Defence Trade Controls Act 2012* (the Act) as articulated in the Exposure Draft of the Defence Trade Controls Amendment Bill 2023 (the Bill) and Explanatory Memorandum.

We note that the timeline for comment on complex legislative amendments has been too short for deep consideration – for both UA and our member universities. UA consider it imperative that this Bill be subject to an inquiry by the relevant Parliamentary Committee, and pending the outcomes of that inquiry, that the Department of Defence conduct appropriate consultation to inform the drafting subsequent amendments to the *Defence Trade Controls Regulation 2013* (the regulations).

We also acknowledge the other critical ongoing work of reviewing the Act, being undertaken by Mr Peter Tesch and Professor Graeme Samuel AC. In our submission to that review (Attachment A), UA noted that Australia needs to leverage its research sector to full effect in order to meet AUKUS challenges. To this end, UA considers that any legislative and/or policy change in this space should be aimed at reducing complexity and enhancing clarity around obligations.

Universities and the Department of Defence learned a great deal from the development of the original iteration of Australia's defence trade control regime – including the importance genuine engagement to strike the right balance of controls without stifling our ability to collaborate and the critical need for appropriate transition and support arrangements. UA and our members look forward to continued deep engagement to ensure that this balance is maintained.

ALL INTERNATIONAL RESEARCH COLLABORATION IS IMPORTANT

Australian Universities are committed to making AUKUS as successful as possible and UA acknowledges the necessity of amendments to enable our researchers to collaborate freely with US and UK counterparts. It is critical that this not come at the expense of limiting our ability to cooperate with other existing and potential international research collaborators.

The significant amount of detail which the Bill defers to subordinate legislation is a major cause for concern for the university sector. The new offences, if implemented as drafted and without properly articulated exemptions, would immediately jeopardise a significant proportion of Australia's ongoing collaborative research projects with partners outside of the US and UK. This is because research and research training, are fundamentally international endeavours.

According to UA data in 2020 our 39 member universities had 5,281 international research/academic partnerships across 124 countries - the US and UK are 4th and 7th respectively according to total collaborations. These partnerships not only dramatically increase the reach and impact of Australian research, they are also a critical component of Australia's soft power, particularly within our region.

Based on the Bill, there may be exemptions for employees of institutions who are citizens of certain countries included in the *Defence Trade Controls Act 2012 - Foreign Countries List* which comprises 25 countries including the US and UK (noting again that certain details are deferred to regulations). In considering the reach and application of the proposed new controls, it is important to note that 11 of our top 20 research collaborator countries are not on this list and would therefore not be included in this exemption from permit requirements, accounting for 49 per cent of current partnerships.

This is just one example of the how the lack of specific details in the Bill may impact significantly on current and future research collaboration. A more general concern is that the amendments do not recognise the nature of research collaboration as multifaceted and multimodal. It is not as simple as the bilateral 'supply' of information or knowledge, or the provision of access to a resource or technology. It requires genuine ongoing exchange – of ideas, of staff, of students – and it is built on the basis of trust.

UA has encouraged our members to respond to this consultation individually, noting that the proposed amendments will impact each of them differently and that they have unique perspectives as those potentially subject to offences under the Act and as proposed in the Bill. However, we do wish to make the following additional specific observations and comments.

NOTES ON PROPOSED AMENDMENTS

Australian Person

UA welcomes the broad and unambiguous definition of *Australian person.* Noting that permanent residents are included, presumably as they are considered low risk and are trusted by the Government to live, work and study in Australia without restriction, UA suggests the consideration of including holders of Subclass 444 Special Category Visas (SCV) within the definition.

This is a visa category exclusively for New Zealand citizens who meet eligibility criteria including character requirements. Such visa holders enjoy privileges otherwise reserved for permanent residents and citizens including the ability to apply directly for Australian citizenship (without need a permanent visa as an interim step). SCV holders are also explicitly identified in the *Higher Education Support Act 2003* to enable their eligibility for income contingent loans under the Higher Education Loan Program.

Though a minor change, this could meaningfully (and with minimal risk) expand the pool of AUKUS collaborators to include the many New Zealand academics and PhD students who choose to work and study in Australia.

Relevant Supplies and Relevant Services

UA is broadly comfortable with the concepts of relevant supply and relevant DSGL services as mechanisms for ringfencing the AUKUS exemption. We would note, however, that paragraphs 5C(1)(c) and similarly, 5C(2)(c) are ambiguously phrased.

Importantly, the Explanatory Memorandum makes clear that the intended effect of these sections is to "…enable the Minister to specify certain DSGL goods and DSGL technology that will continue to be a 'relevant supply and 'relevant DSGL services' and subject to the permit requirements…". In other words, items listed in a relevant determination would not be covered by the AUKUS exemption.

However, the wording of the amendments is at best confusing and possibly suggestive of the contrary effect – i.e. that ***only*** things in the determination would be exempt from permit requirements. UA recommends reconsidering the drafting of these amendments for the avoidance of doubt.

While we are otherwise comfortable with these mechanisms, UA recommends removing paragraphs 5C(1)(d) and similarly, 5C(2)(d) from the Bill. These paragraphs would allow the Department of Defence to add "any other requirements" to these mechanisms through regulations.

The exemption is the fundamental underpinning of the value of the Bill from a research collaboration perspective. It exists as a direct trade-off with the proposed additional safeguards (i.e. offences) and the only impact that more requirements could possibly have would be to reduce its scope (undermining the overall value proposition).

This would appear unnecessary noting that sections 5C(1)(c) and 5C(2)(c) already provide a specific and more acceptable way for a Minister to exclude particular goods/technologies/services from the scope of the exemption.

Most importantly, the inclusion of these apparent Henry VIII clauses would seem to allow the regulations broad scope for subordinate legislation to significantly modify the application of (and potentially contradict) the primary legislation.

Repeal of subsection 10(1A)

This subsection was previously an exemption with respect to the supply of DSGL technology. The Bill would see it replaced by unrelated clauses around *absolute liability* and it does not appear to be reintegrated into other offence exemptions. This repeal is also not explained in the Estimates Memorandum.

UA seeks clarity around the repeal of the current subsection 10(1A).

New Offences

As a peak body, UA does not interact with the Act in the same way that practitioners in our member organisations do. We have encouraged our members to make individual submissions - being best placed to assess the likely impacts (intended and unintended) in particular with respect to the proposed new offences.

UA acknowledges the good faith efforts of the Department of Defence in seeking to avoid the potential for unintended consequences with respect to required new safeguards. This includes consultation through the University Foreign Interference Taskforce and targeted consultations with Deputy Vice-Chancellors (Research) and other experts in the higher education sector. However, we reiterate that the period for consultation on this Exposure Draft has not been adequate.

Noting the risk of unintended consequences, UA recommends a pilot phase with respect to new offences similar to arrangements during the first six months of implementation of the current Act. Consideration should also be given to grandfathering arrangements for foreign researchers (including PhD students) already conducting research within our research institutions.

Exemptions deferred to regulations

Across the existing and proposed new offences the Bill proposes exemptions in situations where the supplier holds a covered security clearance and when the supply is made *"…solely or primarily for a purpose prescribed by the regulations…"* – see 10(3B), 10A(6), 10B(7) and 10C(6).

UA understands and welcomes that the Department of Defence intends to consult separately on subsequent amendments to the regulations but also seeks further detail with respect to the possible/intended "purposes" which may be prescribed for these exemptions.

Similarly, we would welcome any further detail on the even broader clauses allowing additional exemptions to be prescribed in regulations - see 10A(8), 10B(8) and 10C(7).

UA would welcome the opportunity to work with the Department of Defence around a clear and functional 'basic research' exemption which could potentially be implemented through such mechanisms.

Imposition of permit obligations

UA has concerns about the imposition of 'obligations' on permit holders outlined in the proposed new subsections 11(7A) through 11(13). The espoused purpose of this is to *"…provide Defence with additional assurances, mitigate/manage risks, or increase visibility of an entity's export compliance".*

Our concern is two-fold. Firstly, this would potentially add a significant compliance burden onto permit holders. Secondly, rather than mitigate risk, this appears to shift risk onto permit holders. In the broader context of the Bill which establishes 3 new offences, explicitly tied to constitutional heads of power, this seems an unnecessary additional burden which may represent a barrier to participation in defence focused research.

CONCLUSION

Australia's universities are actively engaged in supporting the Australian Government's Defence objectives. Achieving the right balance between fulfilling national security requirements and supporting research collaboration is in our mutual interest - both within and beyond AUKUS.

UA has endeavoured to provide constructive feedback aimed at ensuring that these amendments adequately establish (and protect) the scope of the exemption which is the critical counterbalance to the understood need for increased safeguards. As stated above, amendments should be considered with the dual aims of minimising complexity and maximising clarity in mind.

UA looks forward to participating in the necessary further consultation and engagement around amendments to both the Act and the regulations.