



Office of the President

2 February 2022

Senator James Paterson
Chair
Parliamentary Joint Committee on Intelligence and Security

By email: pjicis@aph.gov.au

Dear Chair

**SUBMISSION TO THE REVIEW OF THE SECURITY LEGISLATION AMENDMENT
(CRITICAL INFRASTRUCTURE PROTECTION) BILL 2022**

1. Thank you for the opportunity to make a submission to the review by the Parliamentary Joint Committee on Intelligence and Security (**PJCIS**) of the above Bill (**SLACIP Bill**).
2. The SLACIP Bill contains further amendments to the *Security of Critical Infrastructure Act 2018* (Cth) (**SOCI Act**). Those measures were deferred from the Security Legislation Amendment (Critical Infrastructure) Bill 2020 (**SOCI Bill**), pursuant to recommendations of the Committee in its September 2021 advisory report on the SOCI Bill. The Committee called upon the Government to withdraw those measures to enable their redevelopment to address numerous issues.
3. This submission has been developed with the assistance of the Law Society of New South Wales, the Law Society of South Australia, and members of the Law Council's National Security Law Working Group, National Criminal Law Committee and Business Law Section (Privacy Law Committee).

Law Council position

4. The Law Council continues to support the amendments it recommended to the PJCIS inquiry into the SOCI Bill in its [submission of February 2021](#), many of which were adopted by the PJCIS in its [advisory report of September 2021](#), particularly the measures in PJCIS recommendations 7, 10 and 11. While the SLACIP Bill proposes to implement some of those recommendations, others do not appear to be addressed.

Focus of this submission—outstanding matters in PJCIS recommendation 7

5. Due to time constraints attending the review of the SLACIP Bill, the Law Council's submission draws attention to two outstanding matters in recommendation 7 of the PJCIS advisory report on the SOCI Bill. That recommendation outlined nine guiding principles for the development of amendments to be included in a deferred Bill, several of which are not present in the SLACIP Bill. The PJCIS called on the government to take actions including the following:
 - reconsider the potentially counter-productive impacts of limitations in the scope of immunities extended to personnel and associates of regulated entities in relation to acts done to comply with regulatory requirements; and

- confer merits review rights in relation to key administrative decisions made under the expanded regime, exercisable in the Security Division of the Administrative Appeals Tribunal (AAT).

Immunities for regulated entities and related persons

6. On the issue of immunities for regulated entities and related persons in respect of acts done to comply with their regulatory obligations, the Law Council broadly welcomes that items 54, 60, 62 and 63 of Schedule 1 to the Bill seek to expand the relevant immunities in sections 30BE, 35AAB, 35AW and 35BB of the SOCI Act beyond the personnel of the regulated entity itself. The proposed expansions would additionally bring the following persons within the immunities, which reflects aspects of the Law Council's recommended amendments to the SOCI Bill:

- members, officers and employees of 'related company groups' as defined in item 5 of Schedule 1 (such as parent or subsidiary companies of regulated entities subject to obligations under the SOCI Act); and
- contracted service providers to regulated entities.

7. While these expansions are significant improvements, the Law Council notes that there are three apparent gaps in the scope of the immunities, namely:

- **Contracted service providers to 'related companies', where a 'related company' is responsible for the activities which would enable the regulated entity to comply with its obligations under the SOCI Act**—the immunity for contracted service providers is expressed as applying only to entities which have a contract with the regulated entity, for the provision of services to the regulated entity. It does not extend to the circumstances of a contracted service provider to a 'related company' to the regulated entity.¹ This means that there may be a gap in the coverage of the immunity if, for example, a parent company in a 'related company group' is subject to obligations under the SOCI Act, but a subsidiary company in that group is, in fact, responsible for carrying out the activities that would ensure the compliance of the parent company with the regulatory obligation. If the subsidiary company had contracted out some or all of the activities that would need to be undertaken to enable the parent company to comply, the contracted service provider to the subsidiary company would have no immunity. However, if the parent company had directly engaged the service provider under a contract, an immunity would be available under the provisions of the SLACIP Bill. This differential treatment would be dependent upon the particular company within the relevant corporate group which engaged the service provider, rather than the substance or purpose of its activities to enable compliance with regulatory obligations under the expanded SOCI regime.

The Law Council encourages the Committee to consider, in consultation with regulated entities participating in the inquiry, whether there may be a need to extend the immunity to contracted service providers to related companies. This could conceivably reflect the manner in which some corporate groups structure their affairs, or how they may do so in future. If the SLACIP Bill is passed, it will significantly expand both the breadth of sectors to be regulated under the expanded SOCI Act as well as the scope of applicable regulatory obligations. Flexibility in the application of the immunity may be desirable to accommodate this broad regulatory coverage. This is particularly so in the technology led

¹ SLACIP Bill, Schedule 1, items 54, 60, 62 and 63, inserting proposed subsections 30BE(4), 35AAB(4), 35AW(4) and 35BB(7) of the SOCI Act.

environments, where it is reasonably common to procure technology services in a group wide environment with multiple related entities and service providers involved in the delivery of services that are within the scope of the newly expanded regime.

- **Actions of a regulated entity (or those of a related company or contracted service provider) which are not clearly referable to one or more specific regulatory obligation under the SOCI Act**—the Law Council notes that the immunity provisions are expressed as applying only if the regulated entity is subject to a particular regulatory obligation, and if a particular act is done for the purpose of complying with that particular obligation.² However, it is conceivable that a regulated entity (or a related company or a contracted service provider) may undertake, in good faith and without negligence, actions to implement or improve internal processes, systems or practices that ensure the regulated entity has the capability to comply, in the most efficient way possible, with the totality of its regulatory requirements under the SOCI regime, as they apply from time-to-time. The limitation of the immunity provisions to acts done for the purpose of complying with specific obligations may not clearly cover such circumstances (that is, where one or more individual obligations was not in the specific contemplation of the relevant person as their reason for taking those actions). The Law Council notes that the general interpretive rule in paragraph 23(b) of the *Acts Interpretation Act 1901* (Cth) that singular words are to be read as including the plural, unless a contrary intention applies, would not resolve the issue. Even with the application of this rule, it would still be necessary to particularise multiple individual regulatory obligations. Unless the issue is addressed, a similar mischief would arise as noted above in a group-wide environment with multiple, related entities and service providers.
- **Acts done in preparation for future regulatory obligations, which are not yet in force**—the immunity provisions state that they apply only if the regulated entity is subject to a specified obligation under the SOCI Act.³ This would appear to exclude actions undertaken by a regulated entity (or a related company or a contracted service provider) where statutory rules prescribing obligations have been made but have not yet commenced; or where draft rules prescribing obligations have been released for comment and are expected to be made imminently. In these instances, a regulated entity may conceivably take steps in good faith, without negligence, to ensure it is ready to comply when those obligations come into force. The Committee may wish to consider, in consultation with regulated entities participating in the inquiry, whether there would be value in expanding the immunity to such preparatory actions, where they are done in good faith and without negligence.
- **The immunity applies to ‘proceedings for damages’ only**⁴—the Law Council notes that it is possible that other remedies and causes of action may be relevant in the types of matters sought to be regulated by the newly expanded regime. The Law Council recommends that this be expanded to cover other causes of action and that the Committee, in consultation with regulated entities participating in the inquiry, expands the immunity to additional causes of action as determined by the inquiry.

² Ibid, inserting proposed paragraphs 30BE(3)(a) and (c)-(d), 35AAB(3)(a) and (c)-(d), 35AW(3)(a) and (c)-(d) and 35BB(6)(a) and (c)-(d) of the SOCI Act. These provisions refer to an entity being subject to ‘a requirement’ under a particular section of the SOCI Act, and the immunity extending to acts or omissions done or omitted to be done, in good faith, for the purposes of ensuring or facilitating compliance with ‘the requirement’.

³ Ibid, inserting proposed paragraphs 30BE(3)(a), 35AAB(3)(a), 35AW(3)(a) and 35BB(6)(a) of the SOCI Act.

⁴ Ibid, inserting proposed paragraphs 30BE(3)(d), 35AW(3)(d) and 35BB(6)(d) of the SOCI Act.

Merits review rights

8. On the issue of merits review rights, the Law Council notes that the SLACIP Bill does not implement the Committee's recommendation to formulate 'a merits review system of appeal to the Security Division of the AAT for any determination ... for declarations under proposed Part 6A [declarations of critical infrastructure assets as systems of national significance] and 2C [enhanced cyber security obligations for entities declared to be systems of national significance] with requisite access to protected information'.⁵
9. The Explanatory Memorandum indicates that the Government's position is that implementation of this recommendation 'is not an appropriate measure to include' because of the sensitive information involved in the declaration of a system of national significance, and the related cyber security obligations imposed on those systems. It is noted that, if such information were accessed by malicious actors, it could enable them to target assets subject to declarations and associated cyber security obligations.⁶
10. However, the commentary in the Explanatory Memorandum does not engage with the substance of the Law Council's submissions on the SOCI Bill, which were ultimately reflected in the relevant component of PJCIS recommendation 7. The Law Council submitted that a merits review mechanism could be formulated in the Security Division of the AAT, which made special provision for the protection of classified information, in a similar manner to arrangements for the merits review of adverse or qualified security assessments issued by the Australian Security Intelligence Organisation (ASIO). This could include protections against the full disclosure of certain information to the subject, as well as protections against disclosure to others (including withholding publication of decisions).⁷
11. As the relevant guiding principle referenced in PJCIS recommendation 7, at paragraph [3.49] of the advisory report on the SOCI Bill, referred specifically to a merits review mechanism in the Security Division, with appropriate protections for sensitive information, it similarly appears that the PJCIS had in its contemplation the adoption of special protective mechanisms for classified information. In contrast, the reasoning given in the Explanatory Memorandum appears to have in contemplation merits review in the general division of the AAT without such protections.
12. It is notable that ASIO's security assessments issued for the purpose of the Ministerial direction power under Part 3 of the SOCI Act are subject to merits review in the Security Division of the AAT.⁸ The Law Council remains of the view expressed in its submission to the Committee's review of the SOCI Bill that the availability of merits review rights in relation to other highly sensitive administrative decisions under the SOCI Act 'highlights that effective procedural mechanisms are already available to manage the dissemination and use of classified or otherwise sensitive information in the context of merits review'.⁹

⁵ PJCIS, [Advisory Report on the SOCI Bill](#), September 2021, [3.49] and recommendation 7.

⁶ [Explanatory Memorandum](#), SLACIP Bill, [3.38]-[3.42].

⁷ Law Council of Australia, [Submission to the PJCIS review of the SOCI Bill](#), February 2021, 31 at [57] and 78-79 at [277]-[283].

⁸ *Australian Security Intelligence Organisation Act 1979* (Cth), section 35 (paragraph (e) of the definition of 'prescribed administrative action'). See also: SOCI Act, paragraph 32(3)(c) (Minister for Home Affairs may only issue a direction requiring the responsible entity for a critical infrastructure asset to take or omit to take specified action on security grounds if ASIO has issued an adverse security assessment).

⁹ *Ibid*, 31 at [57].

Further information

13. Thank you again for the opportunity to participate in this inquiry. If the Law Council may be of any further assistance to the Committee, please contact, in the first instance, [REDACTED] Senior Policy Lawyer, National Security and Criminal Law, at [REDACTED] or [REDACTED]

Yours sincerely

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Tass Liveris
President