

**HOME AFFAIRS PORTFOLIO
DEPARTMENT OF HOME AFFAIRS**

PARLIAMENTARY INQUIRY SPOKEN QUESTION ON NOTICE

Parliamentary Joint Committee on Intelligence and Security
Security Legislation Amendment (Critical Infrastructure Protection) Bill 2022

16 March 2022

QoN Number: 001

Subject: Business critical data, not including Government data

Asked by: Mark Dreyfus

Question:

Hon Mark Dreyfus QC, MP: Why has the definition of business critical data not been actually broadened to reflect the types of data assets that are actually relevant to the functioning of Governments. You don't have to answer now, tell us tomorrow in writing if you can.

Answer:

Existing frameworks govern governmental security including the storage of government data. For example, the Australian Government security is, inter alia, underpinned by information security requirements under the Australian Government's Information Security Manual (ISM), the Protective Security Policy Framework (PSPF) and other policies such as the Digital Transformation Agency's Hosting Certification Framework. It is through these frameworks that Government's critical data is secured.

The Security Legislation Amendment (Critical Infrastructure Protection) Bill 2022 (SLACIP Bill) adds to these frameworks by refining the data storage or processing assets as critical infrastructure. The Department has undertaken detailed co-design of the definition of the data storage or processing assets for many months. The suggested changes reflect the outcomes of these consultations.

The definition as proposed in the SLACIP Bill covers business critical data of governments. This includes the rich source of data held on a large proportion of Australians or individuals. Both the Commonwealth Government and State and Territory governments host a large amount of personal information, which is expressly captured as per the requirement in paragraph (a) to the definition of 'business critical data'.

Should there be a particularly sensitive data storage or processing provider that is not captured by the definition, the Minister for Home Affairs could capture the specific entity as a critical infrastructure asset under s51 of the Security of Critical Infrastructure Act 2018.

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Parliamentary Joint Committee on Intelligence and Security
Security Legislation Amendment (Critical Infrastructure Protection) Bill 2022

16 March 2022

QoN Number: 002

Subject: Declaration of SoNS to PJCIS

Asked by: Mark Dreyfus

Question:

Is there any reason why declarations of SoNS should not be referred to the PJCIS in the same way that use of Part 3A Government Assistance powers are under SOCI?

Answer:

No. However, the Department notes that the SLACIP Bill provides Parliament with oversight of the number of declarations of Systems of National Significance that the Minister has made each calendar year (via the Annual Report). The PJCIS also has a review scheduled of the SOCI Act (s60A and s60B refers) that could include the administration of Systems of National Significance.

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Parliamentary Joint Committee on Intelligence and Security
Security Legislation Amendment (Critical Infrastructure Protection) Bill 2022

16 March 2022

QoN Number: 003

Subject: Appeal Mechanisms including role of AusCheck background checking regime

Asked by: Mark Dreyfus

Question:

Hon Mark Dreyfus QC, MP: Finally, I ask for a comment, do it in writing, on the proposals that the ACTU and the ETU have put forward in their submission that you didn't comment on previously, though you commented on quite a number of other submissions that put forward a range of checks and balances on the background checks question.

Mr Hamish Hansford: We put forward evidence today on merits review on the AusCheck check from ASIO and Criminal history check.

Hon Mark Dreyfus QC, MP: Since you've said that, it does not go to the merits review available in respect of an AusCheck in respect of an individual worker. We are not talking about that, and neither is ACTU or ETU talking about that kind of or that aspect of AusCheck, they are talking about systems, the systems approached to be adopted by individual employers and the un-reviewability under the current legislation and the current rules of those systems. So, I'm not interested and I don't think my colleagues in the committee are interested in receiving information about merits review available in respect of AusCheck for individual workers, we know about that already these rules and this legislation goes to industry wide systems and its reviewability I respect of that that the recommendations of the ACTU go to. Just to be clear.

Mr Hamish Hansford: We'll have a look at that.

Answer:

The SLACIP Bill is intentionally non-prescriptive in determining a critical worker or a critical component. Individual entities are best placed to determine which roles are critical to the operation of their own particular critical infrastructure assets. Flexibility will provide critical infrastructure to appropriately manage the risks relevant to their unique operational context and security environment.

Through engagements with sectors, even within one sector, a role which may be critical to a smaller business may be redundant due to other controls in a much larger organisation, making a designation of that role as critical unnecessary. In this way, responsible entities will be able to designate which workers are critical to their operations, and consider what controls should be implemented to protect the business.

The Department is positioned to support entities as they develop their risk management programs, and will provide detailed guidance on what a business should be considering in developing their risk management programs, including in their consideration of critical employees. The Department encourages responsible entities to consult on proposed risk management programs, including personnel rules, with all affected parties, including workers and their representatives.

The SLACIP Bill does not negate responsibilities of employers under the Fair Work Act 2009, Work Health and Safety legislation, or any other currently legally mandated or protected action. An employee who is subject to action as a result of an employer's background check, AusCheck or otherwise, is protected by all existing employment legislation and worker entitlements, such as the right to appeal a decision with the Fair Work Tribunal. This could be made clear in the Explanatory Memorandum.

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PARLIAMENTARY INQUIRY SPOKEN QUESTION ON NOTICE

Parliamentary Joint Committee on Intelligence and Security
Security Legislation Amendment (Critical Infrastructure Protection) Bill 2022

16 March 2022

QoN Number: 004

Subject: Proposed definition of critical component

Asked by: Mark Dreyfus

Question:

Hon Mark Dreyfus QC, MP: I'm not going to ask for an oral answer, but I will respond in writing to the point made by the ACUT and the ETU that when one goes to the exposure draft of the rules, that is attached to the department's submission to this committee, we see in respect of the definition of critical component: TBA. Which means that the definition of critical worker can't be made sense of and it would be helpful for both the public, the community and Australia and the union movement and this committee to know what is intended there. It's an obvious problem to determine what the scope of the government has in mind might be.

Mr Hamish Hansford: I agree. I covered that in Senator McAlister's question and the intent is to rectify that.

Answer:

Critical component is proposed to be defined as:

an asset, part of an asset or system that's absence, damage or compromise would prevent the proper function of the asset or could cause significant damage to the asset, as assessed by the entity.

As Group Manager, Cyber and Infrastructure Security Centre, Mr Hamish Hansford advised the Committee, the Department has indicated that this could be made clear in the Explanatory Memorandum of the SLACIP Bill.

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Parliamentary Joint Committee on Intelligence and Security
Security Legislation Amendment (Critical Infrastructure Protection) Bill 2022

16 March 2022

QoN Number: 005

Subject: Promote and Protect Australian Governments

Asked by: Mark Dreyfus

Question:

Hon Mark Dreyfus QC, MP: Given that Government doesn't seem to be a critical infrastructure sector in its own right, with the exception of Defence, what does this legislation do to protect the resilience of Australian governments and the critical services that they provide.

Answer:

The Explanatory Memorandum to the SLACIP Bill outlines that the intention of this legislation is to, broadly speaking, '[protect] the essential services all Australians rely on by uplifting the security and resilience of our critical infrastructure'.

In addition to governments reliance on the essential services that will be protected by this Bill and the SOCI Act 2018, governments already have in place a range of frameworks and initiatives to secure government institutions, and ensure these essential systems are appropriately protected. For example at the Commonwealth level:

- Whole-of-government information security requirements under the ISM, PSPF and other policies such as the Digital Transformation Agency's Hosting Certification Framework.
- The Electoral Integrity Assurance Taskforce, which was established in 2018, to support the integrity of Australian electoral activities. The Taskforce is comprised of multiple agencies and includes the Australian Electoral Commission and national security agencies.
- The Cyber Security Strategy 2020, under which Government agencies will put a renewed focus on policies and procedures to manage cyber security risks.

For State and Territory governments, the critical infrastructure assets are captured where they are state owned and defined as critical infrastructure.

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Security Legislation Amendment (Critical Infrastructure Protection) Bill 2022

16 March 2022

QoN Number: 006

Subject: No abrogation of existing responsibilities of employers

Asked by: Mark Dreyfus

Question:

Hon Mark Dreyfus QC, MP: The other questions I have go to the matters raised by the ACTU and the ETU. The ACTU represents millions of Australian workers. As far as I could see the Department in its supplementary submission didn't think it was worthwhile responding to the point that was made by ACTU in its written submission. Can I ask by way of shorthand, was the Department in a position to listen to the evidence given by ACTU and ETU between 12:15 and 12:45 today?

Mr Hamish Hansford: Yes, we certainly were. In addition to that, I have personally engaged with ACTU, ETU, we have read their submissions, we have understood their position. We will provide some further information to you, but anything in this Bill does not abrogate responsibilities of employers under the Fair Work legislation, under WHS legislation, under the right of entry for union officials. There is nothing in this legislation that prohibits these existing obligations that are inherent in law.

Hon Mark Dreyfus QC, MP: That's heartening, but that's something that so often before the Department is saying, take that on trust, because there is nothing in this Bill that says what you've said, is there?

Mr Hamish Hansford: There is, in the EM and commentary--to respond to the issues put to us by the ETU, that some employers were purportedly using this Bill to surveil and monitor staff. There is nothing in this Bill that allows them to do that. If it's illegal today, if this Bill passes, it would still be illegal. There is no governing legislation that gives them the ability to do what the allegations alleged. And we did communicate that to, particularly to the ETU, and I did offer my services to talk to any company that the ETU had concerns with and to explain to them the proposed legislation, what the legislation does and what it doesn't do.

Answer:

The SLACIP Bill does not restrict legislated protections for worker's rights. Where a worker would be protected from dismissal, demotion or other administrative action under existing legislation, this Bill does not propose to modify that.

As noted in response to Q4, the SLACIP Bill does not negate responsibilities of employers under the Fair Work Act 2009, Work Health and Safety legislation, or any other currently legally mandated or protected action. An employee who is subject to action as a result of an employer's background check, AusCheck or otherwise, is protected by all existing rights at work, such as the right to appeal a decision with the Fair Work Tribunal.

For clarity, there is nothing in this legislation that alters these existing rights and obligations that are currently in law. The commentary that Mr Hansford referred to was stated in the Department of Home Affairs Supplementary Submission to the PJCIS Review of the SLACIP Bill:

The Bill does not enable employers to use the background check including through the AusCheck Scheme, or any other elements of the critical infrastructure risk management program rules, to dismiss or otherwise disproportionately impact an employee. Responsible entities must manage their obligations under the Act and accompanying rules with existing obligations to their employees, such as under the Fair Work Act 2009. The draft personnel security rules detail protections required for critical employees that require persistent, ongoing access to critical systems of critical infrastructure assets, and will not prevent access to a site for legitimate purposes, such as by union representatives performing protected actions.

This information could be further articulated in the Explanatory Memorandum to the Bill.