



Law Council
OF AUSTRALIA

Office of the President

31 January 2022

Mr Hamish Hansford
First Assistant Secretary
Cyber and Infrastructure Security Centre
Department of Home Affairs

By email: CI.Reforms@homeaffairs.gov.au

Dear Mr Hansford

Exposure Draft, Security Legislation Amendment (Critical Infrastructure Protection) Bill 2022

1. Thank you for the opportunity to comment on the above exposure draft Bill (**ED Bill**), which contains further amendments to the *Security of Critical Infrastructure Act 2018* (Cth). Those measures were deferred from the Security Legislation Amendment (Critical Infrastructure) Bill 2020 (**SOCI Bill**), further to recommendations of the Parliamentary Joint Committee on Intelligence and Security (**PJCIS**) in September 2021 to redevelop them to address various issues.
2. 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 recommendations 7, 10 and 11). While the ED Bill proposes to implement a number of those recommendations, others do not appear to be addressed.
3. For example, PJCIS recommendations 10 and 11 on the SOCI Bill, which concerned immunities and cooperation provisions for intelligence agencies, are not addressed in the ED Bill or its accompanying explanatory document. These matters did not appear to be addressed in the Parliamentary amendments to the SOCI Bill in late 2021.
4. Additionally, PJCIS recommendation 7 referred to nine guiding principles for the development of amendments to be included in a deferred Bill, several of which are not present in the ED Bill or its explanatory document. In particular, the PJCIS called on the government to:
 - reconsider implications of the expanded regulatory framework on foreign investment laws (noting that the former laws incorporate by reference key definitions of regulated entities under the expanded critical infrastructure laws);
 - 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;
 - 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; and

- remove provisions requiring the wholesale non-disclosure of all Ministerial declarations of critical infrastructure assets as 'systems of national significance', and to replace them with provisions mandating disclosure as the default position, unless a specific harm-based condition is met, which requires a case-by-case assessment of the specific circumstances attending each declaration.
5. The policy position taken in respect of the totality of the PJCIS's recommendations is therefore unclear from the provisions of ED Bill itself, and the accompanying explanatory document. The Law Council suggests that the interests of transparency would be served most effectively by a return to the established practice of the government issuing public responses to all PJCIS reports, as soon as possible after they are tabled, which set out the policy position in response to each recommendation.
 6. This practice is especially valuable in identifying instances in which a recommendation has not been adopted, in full or in part, and ascertaining the reasons for that position. It is similarly valuable in providing a clear statement of the intended approach to implementing those recommendations which have been accepted, and an explanation for the selection of that approach in preference to alternatives.
 7. Importantly, the issuance of a government response to each PJCIS recommendation would also provide information to the Parliament and the public about the outcomes of various reviews of discrete policy issues, which the PJCIS requested the government to undertake (particularly those in recommendation 10, concerning immunities for intelligence agency staff; and those in recommendation 7, concerning implications for foreign investment laws, and limitations in immunities for the personnel or associates of regulated entities). The outcomes of any such reviews do not appear to have been released publicly.
 8. In the Law Council's experience, it is difficult to undertake meaningful scrutiny of proposed amendments in the absence of a guiding document setting out the policy position on the underlying review recommendations. Uncertainty about the underlying policy narrative can potentially create complexity and delay in subsequent parliamentary scrutiny of relevant proposed amendments.
 9. Thank you again for the consultation opportunity. Should you wish to engage further with the Law Council, 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