The Senate

Standing Committee for the Scrutiny of Bills

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Introduction

Terms of reference

Since 1981 the Senate Standing Committee for the Scrutiny of Bills has scrutinised all bills against certain accountability standards to assist the Parliament in undertaking its legislative function. These standards focus on the effect of proposed legislation on individual rights, liberties and obligations, and on parliamentary scrutiny. The scope of the committee's scrutiny function is formally defined by Senate standing order 24, which requires the committee to scrutinise each bill introduced into the Parliament as to whether the bills, by express words or otherwise:

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

Nature of the committee's scrutiny

The committee's long-standing approach is that it operates on a non-partisan and consensual basis to consider whether a bill complies with the five scrutiny principles. In cases where the committee has scrutiny concerns in relation to a bill the committee will correspond with the responsible minister or sponsor seeking further explanation or clarification of the matter. If the committee has not completed its inquiry due to the failure of a minister to respond to the committee's concerns, Senate standing order 24 enables Senators to ask the responsible minister why the committee has not received a response.

While the committee provides its views on a bill's level of compliance with the principles outlined in standing order 24 it is, of course, ultimately a matter for the Senate itself to decide whether a bill should be passed or amended.

Publications

It is the committee's usual practice to table a *Scrutiny Digest* each sitting week of the Senate. The Digest contains the committee's scrutiny comments in relation to bills introduced in the previous sitting week as well as commentary on amendments to bills and certain explanatory material. The Digest also contains responses received in relation to matters that the committee has previously considered, as well as the committee's comments on these responses. The Digest is generally tabled in the Senate on the Wednesday afternoon of each sitting week and is available online after tabling.

General information

Any Senator who wishes to draw matters to the attention of the committee under its terms of reference is invited to do so. The committee also forwards any comments it has made on a bill to any relevant Senate legislation committee for information.

Chapter 1

Initial scrutiny

1.1 The committee comments on the following bills and, in some instances, seeks a response or further information from the relevant minister.

Brisbane Airport Curfew and Demand Management Bill 2022

Purpose	This bill seeks to imposes a curfew at Brisbane Airport along with a number of related measures to manage air traffic, flight noise and community impacts, as well as ensuring that consultative, long-term planning underpins future planning.
Portfolio/Sponsor	Mr Adam Bandt MP
Introduced	House of Representatives on 14 February 2022

Exemption from disallowance[1]

1.2 Division 1 of Part 6 of the bill seeks to establish the Compliance Scheme (the Scheme) for Brisbane Airport. The basic purpose of the Scheme is to establish a system for the monitoring of authorised gate movements and infringements under the slot management scheme set out in the bill.

1.3 Subclause 59(1) provides that the minister may, in writing, determine that the Scheme has effect subject to specified modifications during a specified period if the minister considers that there are exceptional circumstances justifying the making of the determination. Subclause 59(5) provides that a determination under subclause 59(1) is not subject to disallowance.

1.4 The committee expects that any exemption of delegated legislation from the usual disallowance process should be fully justified in the explanatory memorandum. The fact that a certain matter has previously been within executive control or continues current arrangements does not, of itself, provide an adequate justification. In this instance, the explanatory memorandum merely re-states the effect of the

1 Subclause 59(5). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

provision and provides no explanation for why determinations made under subclause 59(1) will not be subject to disallowance.[2]

1.5 This issue has been highlighted recently in the committee's review of the *Biosecurity Act 2015*,[3] the inquiry of the Senate Standing Committee for the Scrutiny of Delegated Legislation into the exemption of delegated legislation from parliamentary oversight,[4] and a resolution of the Senate on 16 June 2021 emphasising that delegated legislation should be subject to disallowance and sunsetting to permit appropriate parliamentary scrutiny and oversight unless there are exceptional circumstances.[5]

1.6 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of providing that ministerial determinations made under subclause 59(1) (relating to modifications of the Compliance Scheme) are exempt from parliamentary disallowance.

Immunity from liability[6]

1.7 Subclause 64(1) provides that no action lies against the Slot Manager, or an employee or agent of the Slot Manager, in relation to any loss or damage that results from an act done in the performance of the Slot Manager's functions. However, subclause 64(2) provides that the Slot Manager, or an employee or agent of the Slot Manager, are not protected in relation to loss or damage that is wilfully or negligently caused. Clause 69 contains a similar immunity provision in relation to the Compliance Committee.

1.8 The immunities provided for under subclauses 64(1) and 69(1) would remove any common law right to bring an action to enforce legal rights, unless the loss or damage was wilfully or negligently caused.

1.9 The committee expects that if a bill seeks to confer immunity from liability, particularly where such immunity could affect individual rights, this should be soundly

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2 See explanatory memorandum, pp. 5-6.

3 See *Review of exemption from disallowance provisions in the Biosecurity Act 2015:* https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Completed_inquiries; *First Report,* Scrutiny Digest 7 of 2021, chapter 4, pp. 33-34; and *Second Report,* Scrutiny Digest 1 of 2022*,* chapter 4, pp. 76-86.

4 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report*, December 2020; and *Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report*, March 2021.

5 Senate resolution 53B. See *Journals of the Senate*, 16 June 2021, pp. 3581–3582.

6 Part 7, subsection 64(1) and Part 8, subsection 69(1). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

justified within the explanatory memorandum to the bill. In this instance, the explanatory memorandum provides no explanation for clauses 64 and 69, merely restating the terms of the provisions.[7]

1.10 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of conferring immunity from liability on the Slot Manager, or an employee or agent of the Slot Manager under subclause 64(1), and the Compliance Committee under subclause 69(1).

7 Explanatory memorandum, p. 6.

Electoral Legislation Amendment (Voter Identification) Bill 2022

Purpose	This bill seeks to amend the *Commonwealth Electoral Act 1918* and the *Referendum (Machinery Provisions) Act 1984* to require electors to display a proof of identity document, as defined by this bill, before casting their ballot in a federal election or referendum.
Sponsor	Senator James McGrath
Introduced	Senate on 9 February 2022

1.11 The bill seeks to amend the *Commonwealth Electoral Act 1918* and the *Referendum (Machinery Provisions) Act 1984* to introduce voter identification requirements for pre-poll and polling day ordinary votes.

1.12 The bill is identical to the proposed amendments in the *Electoral Legislation Amendment (Voter Integrity) Bill 2021* introduced into the House of Representatives on 28 October 2021. The committee raised scrutiny concerns in relation to the earlier bill in *Scrutiny Digest 17 of 2021*.[8] The committee reiterates those comments in relation to this bill.

8 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 17 of 2021,* pp. 12–13.

Social Media (Protecting Australians from Censorship) Bill 2022

Purpose	This bill seeks to prohibit large foreign social media services from de-platforming or censoring content by members of Parliament, election candidates, registered political parties, journalists and media organisations on their platforms within Australia. The bill also seeks to prohibit large foreign social media services from censoring philosophical (including political) discourse on their platforms within Australia.
Sponsor	Mr George Christensen MP
Introduced	House of Representatives on 14 February 2022

Reversal of the evidential burden of proof[9]

1.13 Subclauses 31(1) and (2) seek to provide that a person commits either a criminal offence or is subject to a civil penalty if the person refuses or fails to take an oath, to make an affirmation, to answer a question, or to produce a document during an investigation by the ACMA. Subclause 31(3) provides an exception (offence-specific defence), stating that subclauses 31(1) and (2) do not apply if the person has a reasonable excuse.

1.14 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.[10] This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right.

1.15 While in this instance the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. Additionally, the committee notes that the *Guide to Framing Commonwealth Offences* states that:

9 Subclause 31(3). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

10 Subsection 13.3(3) of the Criminal Code provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

> An offence-specific defence of 'reasonable excuse' should not be applied to an offence, unless it is not possible to rely on the general defences in the Criminal Code or to design more specific defences.[11]

1.16 The reversal of the evidential burden of proof in subclause 31(3) has not been addressed in the explanatory materials.

1.17 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof in relation to the reasonable excuse defence in subclause 31(3) of the bill.

Immunity from civil liability[12]

1.18 Subclause 33(1) of the bill seeks to provide that a person is protected from civil liability for loss, damage or injury of any kind suffered by another person because of the making, in good faith, of a complaint under clause 11 of the bill or because of the making of a statement, or the giving of a document or information to the ACMA in connection with an investigation under clause 12 of the bill. Subclause 33(2) seeks to provide immunity from civil liability to a person in relation to acts done in compliance with an anti-censorship notice or a notice given under subclause 21(2).

1.19 Clause 34 of the bill provides that the ACMA, or a delegate of the ACMA, are protected from liability for damages for acts or matters done or omitted to be done, in good faith in the performance or purported performance of any functions or exercise of any power conferred on the ACMA by or under the bill.

1.20 As a result, clauses 33 and 34 would remove any common law right to bring an action to enforce legal rights (for example, a claim of defamation), unless it can be demonstrated that lack of good faith is shown. The committee notes that in the context of judicial review, bad faith is said to imply a lack of an honest or genuine attempt to undertake the task and that it will involve personal attack on the honesty of the decision-maker. As such the courts have taken the position that bad faith can only be shown in very limited circumstances.

1.21 The committee expects that if a bill seeks to provide immunity from civil liability, particularly where such immunity could affect individual rights, this should be soundly justified. In this instance, the explanatory memorandum to the bill provides no explanation for these provisions, merely restating the terms of the provisions.

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11 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 52.

12 Clauses 33 and 34. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

1.22 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of conferring immunity from liability in certain circumstances under clauses 33 and 34 of the bill.

Bills with no committee comment

1.23 The committee has no comment in relation to the following bills which were introduced into the Parliament between 7-14 February 2022:

- Anti-Money Laundering and Counter-Terrorism Financing Amendment (Increased Financial Transparency) Bill 2022
- Commonwealth Electoral Amendment (Cleaning up Political Donations) Bill 2022
- Electoral Legislation Amendment (Authorisations) Bill 2022
- Electoral Legislation Amendment (COVID Enfranchisement) Bill 2022
- Electoral Legislation Amendment (Foreign Influences and Offences) Bill 2022
- Fair Work Amendment (Equal Pay for Equal Work) Bill 2022
- Moratorium on New Coal, Gas and Oil Bill 2022
- Parliamentary Workplace Reform (Set the Standard Measures No. 1) Bill 2022
- Renewable Energy (Electricity) Amendment (Cheaper Home Batteries) Bill 2022
- Sex Discrimination and Other Legislation Amendment (Save Women's Sport) Bill 2022
- Telecommunications Legislation Amendment (Faster Internet for Regional Australia) Bill 2022

Commentary on amendments and explanatory materials

1.24 No amendments were made, or explanatory materials were tabled, for consideration by the committee since the presentation of the committee's *Scrutiny Digest 2 of 2022* out of sitting on 18 March 2022.

Chapter 2

Commentary on ministerial responses

2.1 This chapter considers the responses of ministers to matters previously raised by the committee.

Corporate Collective Investment Vehicle Framework and Other Measures Bill 2021

Purpose	Schedules 1 to 4 to the bill amend corporate and financial services law to establish a Corporate Collective Investment Vehicles as a new type of a company limited by shares that is used for funds management. Schedule 5 to the bill amends the taxation law to specify the tax treatment for the Corporate Collective Investment Vehicles. Schedule 6 to the bill amends the income tax law to extend the loss carry back rules by 12 months, allowing eligible corporate tax entities to claim a loss carry back tax offset in the 2022-23 income year. Schedule 7 to the bill seek to amend the *Income Tax Assessment Act 1997.* Schedule 8 to the bill makes a number of miscellaneous and technical amendments to various laws in the Treasury portfolio. Schedule 9 to the bill amends the *Superannuation Industry (Supervision) Act 1993* to insert a new covenant that requires trustees of Registrable superannuation entities to develop a retirement income strategy for beneficiaries who are retired or are approaching retirement. Schedule 10 to the bill amends the *Income Tax Assessment Act 1997* to remove cessation of employment as a taxing point for Employee share scheme interests which are subject to deferred taxation.
Portfolio	Treasury
Introduced	House of Representatives on 25 November 2021
Bill status	Received the Royal Assent on 22 February 2022

Significant matters in delegated legislation[1]

2.2 In *Scrutiny Digest 1 of 2022* the committee requested the Assistant Treasurer's more detailed advice regarding:

- why it is considered necessary and appropriate to leave the following matters to delegated legislation:
  - providing additional circumstances where a person is, or is not, a protected member of a CCIV;[2]
  - the requirements for the issue of shares by a CCIV;[3]
  - the requirements or restrictions for cross-investment;[4]
  - the requirements for the reduction of share capital;[5]
  - the matters to be considered in determining the extent to which money or property of a CCIV forms part of the assets of a sub-fund of the CCIV;[6]
  - the matters to be considered in determining the extent to which a liability of a CCIV forms part of the liabilities of a sub-fund of the CCIV;[7]
  - how the money or property of a CCIV may be held, including exempting classes of assets from these requirements;[8] and
  - exempt conduct engaged in by the CCIV from being also engaged in by its corporate director;[9] and
- whether the bill could be amended to provide at least high-level guidance regarding these matters on the face of the primary legislation.[10]

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1 Schedule 1, item 4 proposed sections and subsections 1222K(5), 1230(5), 1230R, 1231A(4), 1233H(5) 1233L(4) 1234G, 1234J(4), 1234K and 1241A(6) and schedule 3, item 14, proposed subsection 243F(6). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

2 Proposed subsection 1222K(5).

3 Proposed subsection 1230(5).

4 Proposed section 1230R.

5 Proposed subsection 1231A(4).

6 Proposed subsection 1233H(5).

7 Proposed subsection 1233L(4).

8 Proposed section 1234G, subsection 1234J(4) and section 1234K.

9 Proposed subsection 1241A(6) and proposed subsection 243F(6).

10 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2022*, pp. 4-6.

Assistant Treasurer's response[11]

2.3 The Assistant Treasurer advised:

> The Corporate Collective Investment Vehicle (CCIV) framework creates a new type of company for funds management in Australia, designed to be an alternative to the commonly used trust-based managed investment scheme.
>
> The regulation-making powers included in this Bill were carefully crafted to provide for appropriate regulatory accompaniment to the CCIV framework to ensure its workability and consistency with the intended objective of the Bill.
>
> While I note that the Committee has generally not considered a desire for administrative flexibility or consistency with existing legislation to be sufficient justification for the inclusion of regulation-making powers, it remains my view that, in the circumstances outlined in the explanatory memorandum, this flexibility is critical to ensuing that the CCIV framework operates as intended. In particular, this is the case for the operation of CCIV s and sub-funds, such as the rules governing the liabilities of a sub-fund, and rules regarding the holding of the assets of a sub-fund. The ability to respond in a timely manner to gaps, ambiguities, or unintended consequences resulting from the application of such rules is essential to the workability of the CCIV framework.

Committee comment

2.4 The committee thanks the Assistant Treasurer for this response. The committee notes the Assistant Treasurer's advice that the regulation-making powers included in the bill were carefully crafted to provide for appropriate regulatory accompaniment to the Corporate Collective Investment Vehicle (CCIV) framework to ensure its workability and consistency with the intended objective of the bill.

2.5 The committee also notes the Assistant Treasurer's advice that this flexibility is critical to ensuing that the CCIV framework operates as intended. The Assistant Treasurer advised that this is particularly the case for the operation of CCIVs and sub-funds, such as the rules governing the liabilities of a sub-fund, and rules regarding the holding of the assets of a sub-fund. The Assistant Treasurer further advised that the ability to respond in a timely manner to gaps, ambiguities, or unintended consequences resulting from the application of such rules is essential to the workability of the CCIV framework.

2.6 The committee notes that the Assistant Treasurer has not provided a justification beyond a general desire for administrative flexibility in relation to the

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11 The Assistant Treasurer responded to the committee's comments in a letter dated 10 March 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 2 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

provisions raised by the committee in its initial comment. Further, no specific details regarding why administrative flexibility would be required for any specific provision has been provided. It therefore remains unclear to the committee why at least high-level guidance regarding some of these matters could not be included on the face of the primary legislation. The committee does not consider that the Assistant Treasurer's response has adequately addressed the committee's scrutiny concerns.

2.7 The committee draws this matter to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation.

2.8 In light of the fact that this bill has already passed both Houses of the Parliament the committee makes no further comment on this matter.

Henry VIII clause—modification of primary legislation by delegated legislation[12]

2.9 In *Scrutiny Digest 1 of 2022* the committee requested the Assistant Treasurer's more detailed advice regarding:

- why it is considered necessary and appropriate to allow regulations made under proposed subsection 1243A(1) to modify any provision of proposed Chapter 8B or the *Corporations Act 2001* more generally; and
- whether the bill can be amended to provide at least high-level guidance constraining the scope of this broad modification power, for example, by providing that before the Governor-General makes regulations for the purposes of proposed subsection 1243A(1), the minister must be satisfied that the modifications would be consistent with the objects set out in the bill.[13]

Assistant Treasurer's response[14]

2.10 The Assistant Treasurer advised:

> I note the Committee's concern regarding the inclusion of subsection 1243A(1) of the Bill. However, my view is that this provision, which would allow for regulations to modify the proposed Chapter 8B of the *Corporations Act 2001*, is essential for quickly addressing unforeseen or changing circumstances. Failing to address these circumstances in a timely manner would lead to inappropriate or anomalous outcomes inconsistent with the

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12 Schedule 1, item 4, proposed section 1243A. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

13 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2022*, pp. 6-7.

14 The Assistant treasurer responded to the committee's comments in a letter dated 10 March 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 2 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

> policy intention of the CCIV framework, or could indeed render make framework unworkable.
>
> The Government has developed the new regulatory framework for CCIVs in close consultation with relevant experts among industry stakeholders, but it remains a new and as yet untested framework. There remains therefore the possibility that the operation of the Bill in practice may produce unintended or unforeseen results. Including this regulation-making power is critical to ensuring timely and targeted adjustments can be implemented if required.
>
> I note that any regulations made under the provisions identified by the Committee will be subject to Parliamentary scrutiny and disallowance procedures.
>
> Regarding the Committee's request that the Bill be amended to provide high-level guidance regarding the matters identified, it is my view that the regulation-making powers as currently set out have been designed appropriately to ensure the CCIV framework operates in accordance with the objects of the Bill. As the Committee will be aware, the Bill has passed both Houses of Parliament as of 10 February 2022 and received the Royal Assent on 22 February 2022.

Committee comment

2.11 The committee thanks the Assistant Treasurer for this response. The committee notes the Assistant Treasurer's advice that proposed section 1243A is essential for quickly addressing unforeseen or changing circumstances. The Assistant Treasurer also advised that failing to address these circumstances in a timely manner would lead to inappropriate or anomalous outcomes inconsistent with the policy intention of the CCIV framework, or could render the framework unworkable.

2.12 The committee also notes the Assistant Treasurer's advice that the government has developed the new regulatory framework for CCIVs in close consultation with relevant experts among industry stakeholders, but that it nevertheless remains a new and as yet untested framework. The Assistant Treasurer advised that there remains the possibility that the operation of the bill in practice may produce unintended or unforeseen results and that including the regulation-making power is critical to ensuring timely and targeted adjustments can be implemented if required.

2.13 The committee reiterates its view that there are significant scrutiny concerns with enabling delegated legislation to override the operation of legislation which has been passed by the Parliament as such clauses impact on the level of parliamentary scrutiny and may subvert the appropriate relationship between the Parliament and the executive. While the committee notes that the bill establishes a new scheme and acknowledges that changes may be required as the scheme is put into practice, the committee does not consider that this is a sufficient justification for allowing regulations to modify the operation of primary legislation in circumstances where

there is limited guidance regarding this broad modification power on the face of the primary legislation.

2.14 The committee reiterates that delegated legislation, made by the executive, is not subject to the same level of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

2.15 The committee draws this matter to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation.

2.16 In light of the fact that this bill has already passed both Houses of the Parliament the committee makes no further comment on this matter.

Criminal Code Amendment (Firearms Trafficking) Bill 2022

Purpose	The bill seeks to amend the *Criminal Code Act 1995* to double the maximum penalty for existing firearms trafficking offences and introduce new aggravated offences for trafficking 50 or more firearms or firearm parts, or a combination of firearms and firearm parts, within a six-month period within Australia.
Portfolio	Home Affairs
Introduced	House of Representatives on 16 February 2022
Bill status	Before the House of Representatives

Significant penalties[15]

2.17 In *Scrutiny Digest 2 of 2022* the committee requested the assistant minister's detailed advice as to the justification for the significant penalties that may be imposed under proposed sections 360.2, 360.3, 361.2 and 361.3, by reference to comparable Commonwealth offences and the requirements in the *Guide to Framing Commonwealth Offences*.[16]

Assistant Minister's response[17]

2.18 The assistant minister advised:

The Bill:

- doubles the maximum penalty for individuals convicted of existing commonwealth firearms trafficking offences in the Criminal Code from 1 O years imprisonment or a fine of 2,500 penalty units ($550,000) or both, to 20 years imprisonment or a fine of 5,000 penalty units ($1.1 million) or both.
- introduces aggravated firearms trafficking offences to the Criminal Code that carry a maximum penalty of life imprisonment or a fine of

15 Schedule 1, item 1, proposed subsections 360.2(1) and 360.2(2); item 4, proposed subsection 360.3(1); item 5, proposed subsection 360.3(1A); item 9, proposed subsections 361.2(1), 361.2(2), 361.3(1) and 361.3(3). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

16 Senate Scrutiny of Bills Committee, *Scrutiny Digest 2 of 2022*, pp. 31-33.

17 The assistant minister responded to the committee's comments in a letter dated 28 March 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 3 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

7,500 penalty units ($1.6 million) or both, which will apply where a person traffics 50 or more firearms or firearms parts. or a combination of both.

The Guide

Part 3.1.1 of the Guide provides that a maximum penalty should aim to provide an effective deterrent to the commission of an offence, and should reflect the seriousness of the offence. Further to this, a high maximum penalty is justifiable where there are strong incentives to commit an offence, or where the consequences of committing the offence is particularly dangerous or damaging.

There is considerable financial incentive to engage in firearms trafficking. Firearms are a key enabler for transnational serious and organised crime, and are in high demand among organised crime groups and criminals. The cost of buying firearms in the illicit market is generally higher than in the licit market, generating significant profit for illicit market vendors. In 2018, a joint law enforcement operation between the United States and Australia recovered a number of illegal firearms in Australia which had been purchased on the darknet with Bitcoin. As an indication of the profits available, a handgun that would cost $500 USD in the licit market cost $3,400 USD on a darknet illicit market.

In addition to the financial incentive, a further incentive driving organised groups and criminals to obtain illegal firearms is the absence of any record of being a lawful firearm owner. This can then deflect initial attention of law enforcement in any gun related crimes. There is also the possibility that organised crime groups and criminals can gain a reputational advantage from possessing or having access to a weapons cache.

Firearms trafficking is a serious crime that poses an ongoing and potentially long term threat to the safety of all members of the Australian community. Once in the illicit market, firearms can be accessed by criminals and used in the commission of serious and violent crimes. Illegally trafficked firearms or firearm parts are generally untraceable, can remain within the illicit market for decades and can be used in multiple crimes over their lifespan. They enable organised crime groups to protect their interest and be more lethal in their activities.

The combined effect of increased maximum penalties for existing firearms trafficking offences, as well as the introduction of life imprisonment penalties for the proposed aggravated offences, will provide a strong deterrent against firearms traffickers and their facilitators in organised crime, while reducing the incentives to commit these offences. Additionally, these penalties reflect the community's expectations and the serious consequences of firearm-related crime.

Comparable Commonwealth offences

Comparable offences under the Criminal Code that carry similar maximum penalties to those proposed in respect of the substantive firearms trafficking offences included in the Bill are:

- trafficking marketable quantities of controlled drugs (section 302.3);
- cultivating or selling marketable quantities of controlled plants (section 303.5 and section 304.2 respectively);
- manufacturing marketable quantities of controlled drugs (section 305.4); and
- importing and exporting marketable quantities of border controlled drugs or border controlled plants (section 307.2).

Each of these offences carry a maximum penalty of 25 years imprisonment (five more than proposed for existing firearms trafficking offences), or 5,000 penalty units ($1.1 million) or both.

Additionally, the offences of cultivating commercial quantities of controlled plants (section 303.4), selling commercial quantities of controlled plants (section 304.1), manufacturing commercial quantities of controlled drugs (section 305.3), and importing and exporting commercial quantities of border controlled drugs or border controlled plants (section 307.1) each have penalties of imprisonment for life or 7,500 penalty units, or both. These are in line with the penalty for the proposed aggravated firearms and firearm parts trafficking offence.

The proposed increased maximum penalties for existing firearms trafficking offences, and the proposed penalties for the new aggravated offences, are analogous with the maximum penalties applied to serious drug offences. This indicates the serious social and systemic harms posed by both forms of trafficking and supply. In each case, the offender's behaviour gives rise to harmful and potentially deadly outcomes.

The increased penalties proposed by the Bill would also more closely align the Commonwealth's maximum penalties with maximum penalties for trafficking offences in the States and Territories. For example, in NSW firearms trafficking offences can attract a maximum sentence of 20 years' imprisonment (section 51 *Firearms Act 1996* (NSW)), while in the ACT repeated firearms trafficking offences within a 12-month period can also attract a maximum penalty of 20 years' imprisonment (section 220 *Firearms Act 1996* (ACT)).

Committee comment

2.19 The committee thanks the assistant minister for this response. The committee notes the assistant minister's advice that the combined effect of increased maximum penalties for existing firearms trafficking offences, as well as the introduction of life imprisonment penalties for the proposed aggravated offences, will provide a strong deterrent against firearms traffickers and their facilitators in organised crime, while also reducing the incentives to commit these offences. The assistant minister advised

that this strong deterrent is necessary in the context of the significant financial incentive to engage in firearms trafficking and the links between firearms trafficking and serious and organised transnational crime. The assistant minister also advised that the increased penalties reflect the community's expectations as well as the serious consequences of firearm-related crime.

2.20 Finally, the assistant minister advised that the maximum penalties seeking to be imposed under the bill are comparable to similar offences already in existence under the *Criminal Code Act 1995* (the Criminal Code), including in relation to trafficking, manufacturing, importing or exporting controlled drugs and cultivating, selling, importing or exporting controlled plants. The assistant minister advised that firearms trafficking is analogous to serious drug and controlled plant offences due to the serious social and systemic harms posed by both forms of trafficking and supply. The assistant minister further advised that increasing the penalties in relation to firearms trafficking offences in proposed sections 360.2, 360.3, 361.2 and 361.3 of the Criminal Code would also more closely align the maximum penalties in Commonwealth law with the maximum penalties for trafficking offences that already apply in the states and territories.

2.21 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the assistant minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.22 In light of the detailed information provided, the committee makes no further comment on this matter.

National Security Legislation Amendment (Comprehensive Review and Other Measures No. 1) Bill 2021

Purpose	This bill seeks to amend the: • *Intelligence Services Act 2001*; • *Criminal Code Act 1995*; • *Crimes Act 1914*; • *Australian Passports Act 2005*; • *Foreign Passports (Law Enforcement and Security) Act 2005*; • *Office of National Intelligence Act 2018*; • *Inspector-General of Intelligence and Security Act 1986*; • *Australian Security Intelligence Organisation Act 1979*; and • *Telecommunications (Interception and Access) Act 1979*. This bill seeks to implement the government response to a number of recommendations of the *Comprehensive Review of the Legal Framework of the National Intelligence Community (Comprehensive Review)*. The measures in the bill seek to improve the legislative framework governing the National Intelligence Community by addressing key operational challenges facing the Australian Security Intelligence Organisation, the Australian Secret Intelligence Service, the Australian Signals Directorate, the Australian Geospatial-Intelligence Organisation, the Defence Intelligence Organisation and the Office of National Intelligence.
Portfolio	Home Affairs
Introduced	House of Representatives on 25 November 2021
Bill status	Before the House of Representatives

Broad delegation of administrative powers[18]

2.23 The committee initially scrutinised this bill in *Scrutiny Digest 1 of 2022* and requested the minister's advice.[19] The committee considered the minister's response in *Scrutiny Digest 2 of 2022* and requested the minister's further advice as to:

- the level of staff members who, in practice, it is expected will be delegated the power to give emergency authorisations under proposed subsections 9D(1)–(3); and
- whether the bill could be amended to:
    - require that an agency head, when making a delegation under proposed subsection 9D(14), must be satisfied that the person has the appropriate training, qualifications or experience to appropriately exercise the delegated power; and
    - limit the delegation of an agency head's responsibilities under proposed subsections 9D(4) or (5) to members of the Senior Executive Service.[20]

Minister's response[21]

2.24 The minister advised:

> Due to the sensitive nature of the operational activities involved, I will not comment on the specific levels of staff members who may be delegated the power to give emergency authorisations under proposed subsections 90(1)-(3).
>
> As I stated in my previous response to the Committee, there is a strong operational need for this power to be devolved to ensure that appropriate decisions can be made quickly where there is an imminent threat to an Australian person's safety. The new emergency authorisation is for the limited scenario in which an immediate or near-immediate response is required. Introducing additional delay into the authorisation process could make the new authorisation framework unworkable and potentially defeat its purpose by putting Australians at further risk. Crucially, the scenario is also limited to where it is reasonable to believe that the Australian person

18 Schedule 1, item 2, proposed subsection 9D(14). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

19 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2022*, pp. 8-10.

20 Senate Scrutiny of Bills Committee, *Scrutiny Digest2 of 2022*, pp. 88-91.

21 The minister responded to the committee's comments in a letter dated 28 March 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 3 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

would consent to the production of intelligence about them if they were able to do so.

Overseas staff operate in a variety of contexts, with differing levels of seniority. Officers in the field are often best placed to assess the immediacy of a threat, and the best way to gather intelligence to assist an Australian person whose safety is at risk.

In practice, decisions would likely be made by the most senior officer in the relevant location. However, the level of these officers can differ between locations. The delegation ensures it is possible for suitable individuals in the relevant location and time zone to make decisions if required.

In the unlikely circumstance that the most senior officer is not available, the operational need for approval by a more junior officer to act immediately in a potentially life or death situation, coupled with the need for fast consideration by the agency head and responsible Minister, outweighs any limited risks posed by a more junior staff member being delegated this power in the very limited circumstance where an Australian person is at imminent risk overseas.

The requirement that the power be expressly delegated by the agency head in writing, rather than conferred automatically to all, or a class of, agency staff, ensures the agency head will have regard to the appropriateness of the officers being authorised at the time of granting the delegation. In practice, the agency head will only delegate the power to issue emergency authorisations to those officers he or she considers to possess the necessary skills and training to make time critical judgments about the production of intelligence. Further, officers will be required to comply with any written directions given by the agency head when exercising a power, performing a function or discharging a duty under the delegation.

For these reasons, it is not necessary to amend the Bill to include additional decision-making criteria in the proposed delegation power in Schedule 1.

Finally, the Committee requested more detailed advice as to whether Schedule 1 of the Bill could be amended to limit the delegation of an agency head's responsibilities under proposed subsections 9D(4) or (5) to members of the Senior Executive Service.

The responsibilities under proposed subsections 9D(4) and (5) include requirements to notify the responsible Minister, Inspector-General of Intelligence and Security (IGIS), the Attorney-General and the Minister responsible for administering the *Australian Security Intelligence Organisation Act 1979* (the ASIO Minister). These requirements ensure that responsible Ministers maintain visibility, that the IGIS can properly exercise its oversight function, and that the Attorney-General and ASIO Minister are made aware of threats to security.

Requiring these obligations to only be fulfilled by members of the Senior Executive Service (SES) could have the counter-productive effect of delaying provision of the information and documentation to the responsible

> Minister, IGIS, Attorney-General and ASIO Minister due to SES having a wide remit of responsibilities and significant competing priorities for their time.
>
> Enabling, in appropriate circumstances, non-SES officers to provide these notifications, for example when SES or a senior officer is not available, will maximise opportunities for Ministerial and IGIS oversight. and will ensure that the Attorney-General and the ASIO Minister are made aware of threats to security as soon as possible.
>
> For these reasons it is not necessary or appropriate to amend the Bill to limit certain elements of the delegation power to members of the SES.

Committee comment

2.25 The committee thanks the minister for this response. The committee notes the minister's advice that there is a strong operational need for the power to give emergency authorisations to be devolved to ensure that appropriate decisions can be made quickly where there is an imminent threat to an Australian person's safety. The minister also advised that in practice, decisions would likely be made by the most senior officer in the relevant location and the level of these officers can differ between locations. The minister noted that the delegation ensures it is possible for suitable individuals in the relevant location and time zone to make decisions if required.

2.26 The committee also notes the minister's advice that the requirement that the power be expressly delegated by the agency head in writing, rather than conferred automatically to all, or a class of, agency staff, ensures the agency head will have regard to the appropriateness of the officers being authorised at the time of granting the delegation. The minister also advised that in practice, the agency head will only delegate the power to issue emergency authorisations to those officers he or she considers to possess the necessary skills and training to make time critical judgments about the production of intelligence. The minister further advised that officers will be required to comply with any written directions given by the agency head when exercising a power, performing a function or discharging a duty under the delegation.

2.27 The committee also notes the minster's advice that, in relation to proposed subsections 9D(4) and (5), requiring these obligations to only be fulfilled by members of the Senior Executive Service (SES) could have the counter-productive effect of delaying provision of the information and documentation to the responsible minister, IGIS, Attorney-General and ASIO Minister due to SES having a wide remit of responsibilities and significant competing priorities for their time.

2.28 The committee further notes the minister's advice that enabling, in appropriate circumstances, non-SES officers to provide these notifications, for example when SES or a senior officer is not available, will maximise opportunities for ministerial and IGIS oversight and will ensure that the Attorney-General and the ASIO Minister are made aware of threats to security as soon as possible.

2.29 While noting the minister's advice, the committee continues to have scrutiny concerns regarding the broad power for agency heads to delegate their powers and

functions under proposed subsection 9D(14). For example, if in practice, only the most senior officers in a location would likely exercise the emergency authorisation powers in proposed subsections 9D(1)–(3), it remains unclear why the bill could not limit the delegation of these powers to only senior officers, unless particularly exceptional circumstances exist.

2.30 Additionally, if in practice, the agency head will only delegate their powers to officers with appropriate skills and experience, it is unclear to the committee why this is unable to be included on the face of the primary legislation to provide additional legislative assurance that any delegation would be appropriate. The committee has generally not accepted a reliance on administrative practice to be a sufficient justification for a lack of safeguards on the face of the primary legislation.

2.31 It also remains unclear to the committee why the power of an agency head to delegate their responsibilities under proposed subsection 9D(4) or (5) could not be limited to relevant members of the Senior Executive Service without compromising the ability of the agency to ensure that the minister and IGIS are efficiently informed.

2.32 The committee reiterates that its scrutiny concerns in this instance are heightened by the significant nature of the powers involved, the fact that emergency authorisations may remain in force for up to six months, and the potential impacts on an individual's privacy that may be a consequence of their use.

2.33 From a scrutiny perspective, the committee considers that the bill should be amended to require that an agency head, when making a delegation under proposed subsection 9D(14), must be satisfied that the person has the appropriate training, qualifications or experience to appropriately exercise the delegated power, function or duty.

2.34 The committee otherwise draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of the broad delegation power relating to emergency authorisations in proposed subsection 9D(14).

Security Legislation Amendment (Critical Infrastructure Protection) Bill 2022

Purpose	This bill seeks to protect the essential services all Australians rely on by uplifting the security and resilience of our critical infrastructure.
Portfolio	Home Affairs
Introduced	House of Representatives on 10 February 2022
Bill status	Currently before the Senate

Significant matters in delegated legislation[22]

2.35 In *Scrutiny Digest 2 of 2022* the committee requested the minister's advice as to why it is considered necessary and appropriate to leave each of the above matters to delegated legislation.[23]

Minister's response[24]

2.36 The minister advised:

> A disruption to critical infrastructure could have serious implications for business, governments and the community, affecting supply and service continuity, and damaging economic growth.
>
> The reforms in the Security Legislation Amendment (Critical Infrastructure Protection) Bill 2022 (the SLACIP Bill) will uplift the security and resilience of Australia's critical infrastructure by requiring industry to identify and mitigate security risks. These reforms are a key action under Australia's Cyber Security Strategy 2020 and are part of a range of measures the Australian Government is putting in place to strengthen Australia's ability to manage and respond to security risks across critical infrastructure sectors.
>
> The reforms will enhance the security and resilience of Australia's critical infrastructure, in line with the threats posed in the world today and be better prepared to tackle those into the future, by requiring certain

22 Schedule 1, items 13, 29, 43 and 49, proposed sections 5, 8, 12AKA, 30AB, 30AH, 30AKA, 30CJ, 30CN, 30CS, 30CY. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

23 Senate Scrutiny of Bills Committee, *Scrutiny Digest 2 of 2022*, pp. 42-44.

24 The minister responded to the committee's comments in a letter dated 28 March 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 3 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

responsible entities to adopt and maintain a critical infrastructure risk management program. This will strengthen the resilience of essential services by embedding preparation, prevention and mitigation activities into ongoing business practices.

The regulatory framework that would be established by the SLACIP Bill relies on delegated legislation where necessary to ensure that the statutory framework remains appropriately flexible and adjustable, with a focus on minimising the regulatory impact on entities. With technologies and industries constantly evolving, the proposed rule-making powers in the Bill would enable the Minster to ensure all critical infrastructure assets are included, now and into the future. The rule-making powers provided for in the Bill are essential to ensure the framework is flexible and responsive.

The Government has consulted extensively in the development of this Bill, and will continue to engage across critical infrastructure sectors on the requirements that will underpin the Risk Management Program. Consistent with this approach, and in line with recommendation 9 of the Parliamentary Joint Committee on Intelligence and Security's Advisory Report on the Security Legislation Amendment (Critical Infrastructure) Bill 2020 and Statutory Review of the Security of Critical Infrastructure Act 2018 (the PJCIS Advisory Report), the draft Security of Critical Infrastructure (Critical infrastructure risk management program) Rules (LIN 22/018) 2022 (the draft Rules) have been included at Attachment C to the SLACIP Bill's Explanatory Memorandum.

Following commencement of the amendments in the Bill, the Minister would be required to undertake a period of mandatory consultation of no less than 28 days on the proposed draft rules. The Minister will consider any submissions and may then choose to make a rule that will commence at a time of my choosing following mandatory consultation. This will allow the obligation to apply only to those sectors without appropriate existing Commonwealth regulations to ensure implementation does not impose any unnecessary burden.

Relevantly, the Minister is not permitted, when making rules, to exceed the principles set out in the primary legislation, and all rules are appropriately subject to parliamentary scrutiny and disallowance.

Additional comments specific to each of the matters identified by the Committee at paragraph 1.150 of Digest 2 of 2022 are set out below, for the Committee's consideration.

…amend section 5 to repeal and replace the definition of 'data storage or processing service' and provide that this can include a service specified in the rules and that the rules may also prescribe that a service is not a data storage or processing service

In line with recommendation 7 of the PJCIS Advisory Report, the definition of 'data storage or processing service' in the Bill has been informed by extensive consultation across sectors, to ensure it appropriately captures

relevant assets. Paragraphs (a) and (b) of the definition provide for certain services expressly in the legislation; however, it is necessary to include a rule-making power alongside this to ensure that the framework is sufficiently flexible to encompass future developments in relation to data storage and processing services, and to incorporate services that are not already covered by paragraphs (a) and (b) but might be identified in the course of ongoing consultation with stakeholders after the amendments in the SLACIP Bill are enacted.

As noted at paragraph 43 of the Bill's Explanatory Memorandum, the rule-making power in paragraph (c) of the new definition of 'data storage or processing service' will allow the Minister to make rules specifying additional services as data storage or processing services to ensure that technical advancements in this field, which are occurring rapidly, can also be appropriately included in the scope of the definition.

Relevantly, the new definition also provides that the rules may prescribe that a specified service is not a 'data storage or processing service'. This provides for the Minister to carve-out a service from the scope of the definition, if required.

…amend section 8 to provide an exemption to when an entity will be a direct interest holder in circumstances specified in the rules

The *Security of Critical Infrastructure Act 2018* (SOCI Act) currently exempts moneylenders from responsibilities under the legislation, in circumstances where that moneylender or the custodial or depository services are not in a position to influence or control a critical infrastructure asset.

However, consultation on the reforms has revealed that there is a risk that the current provision does not operate as intended - that is, for the moneylenders and custodial or depository services exemption to only apply prior to a moneylender and custodial or depository services enforcing a security over the critical infrastructure assets and thereby gaining influence or control over that asset. In those circumstances, it is considered appropriate that a moneylender or custodial or depository services should be treated the same as any other direct interest holder.

The SLACIP Bill will ensure that the moneylenders and custodial or depository services exemptions operates as originally intended. Consultation on the reforms has also revealed that custodial services and other similar entities should also be exempt from responsibilities under the legislation where those entities are in a position to directly or indirectly influence or control a critical infrastructure asset. The SLACIP Bill therefore includes a new rule-making power to future-proof the legislation and provide the Minister with sufficient flexibility to respond to developments in this area of law.

…amend section 12KA to provide that the rules may prescribe specified assets that are critical to the administration of an Australian domain name

system or requirements for an asset to be critical to the administration of an Australian domain name system…

An asset is a 'critical domain name system' under section 12KA of the SOCI Act where it meets the following criteria:

- the asset is managed by an entity that is that is critical to the administration of an Australian domain name system (see subsection 12KA(2) and section 16 of the *Security of Critical Infrastructure (Definitions) Rules 2021* (the Definitions Rules)): paragraph (1)(a) of the definition; and
- the asset is used in connection with an Australian domain name system: paragraph (1)(b) of the definition.

As noted at paragraph 117 of the Bill's Explanatory Memorandum, this amendment follows consultation with .au Domain Administration Limited (auDA), the entity responsible for the administration of the '.au' country code Top Level Domain, and the Department of Infrastructure, Regional Development, Transport and Communications. These entities raised concerns that the construction of the current definition may capture irrelevant assets used in connection with the administration of an Australian domain name system (e.g. accounting software or event management systems).

In this context, the purpose of the new rule-making power in the SLACIP Bill is to provide greater certainty on what assets are 'critical to the administration of an Australian domain name system'. A rule-making power currently exists under subsection 12KA(2) of the SOCI Act to prescribe the entities that are critical to the administration of an Australian domain name system. Section 16 of the Definitions Rules currently prescribe Domain Administration Ltd (ABN 38 079 009 340) and the entity that administers the '.au' country code Top Level Domain for this purpose.

With the amendment to section 12KA in the SLACIP Bill, an asset used by these entities in connection with an Australian domain name system will need to be prescribed in rules made by the Minister to be a critical domain name system.

…insert proposed section 30AB to provide that Part 2A of the bill applies to assets specified in the rules and that the rules may exempt assets from Part 2A for a certain period of time

Proposed section 30AB allows for a nuanced, sector- or asset-specific approach to be taken to the application of the obligations contained in new Part 2A. In determining whether to make rules to apply the obligations to certain critical infrastructure assets, the Minister is likely to consider whether any existing requirements or arrangements appropriately deliver the same outcomes as intended by the critical infrastructure risk management program.

The assets that are critical education assets are an example of a class of critical infrastructure asset with appropriate regulatory requirements or arrangements in place. The Australian Government and Australia's higher education providers have jointly formed the University Foreign Interference Taskforce (UFIT) to enhance safeguards against the risk of foreign interference. The UFIT will deliver the same outcomes as intended by the critical infrastructure risk management program obligation for critical education assets. The Government does not intend to 'switch on' any of the positive security obligations (including Part 2A) for critical education assets.

As noted at paragraph 135 of the Explanatory Memorandum, this reflects the range of regulatory obligations that already exist in relation to some classes of critical infrastructure assets, and the obligations that may exist in relation to future critical infrastructure assets that are identified, and the Government's commitment to avoid duplicating regulation. In the event that any of these alternative regulatory regimes were to be found wanting, the Government will reserve the ability to 'switch on' any or all of the positive security obligations, including the critical infrastructure risk management program (Part 2A), to address any gaps and ensure that entities are subject to suitable and reasonable regulation.

…insert proposed section 30AH, which leaves a number of elements in relation to critical infrastructure risk management programs to the rules

Proposed section 30AH would define the requirements for a critical infrastructure risk management program. Adoption and compliance with a critical infrastructure risk management program will ensure responsible entities have a comprehensive understanding of the threat environment and develop processes and procedures to respond effectively to the risk of any hazard impacting the availability, confidentiality, reliability and integrity of their asset. This is central to the reforms proposed in the SLACIP Bill.

Under proposed paragraph 30AH(1)(c), the critical infrastructure risk management program must comply with any requirements specified in rules made by the Minister under section 61 of the SOCI Act. Any such rules will be a legislative instrument, appropriately subject to parliamentary scrutiny, and publicly available on the Federal Register of Legislation (https://www.legislation.gov.au).

The rules will be used to provide further requirements on how the principles based obligations set out in subparagraphs (1)(b)(i)-(iii) are to be implemented. Given the array of critical infrastructure assets that may be subject to the obligation to adopt and maintain a critical infrastructure risk management program, now and into the future, this mechanism will be crucial for ensuring the program is implemented in a risk-based and proportionate manner while still achieving the desired security outcomes and avoiding any unnecessary burden.

Importantly, proposed subsections 30AH(2)-(12) provide further clarity as to the scope of the rule-making power. The rules may be of general application or may relate to one or more specified critical infrastructure

assets, allowing appropriately for a flexible, nuanced approach (subsection 30AH(2)). It is also important to note that proposed subsection 30AH(6) sets out factors the Minister must have regard to in specifying rules under proposed subsection 30AH(1)(c). This would ensure that any rules made for the purposes of the critical infrastructure risk management program are appropriate in all the circumstances, while avoiding unnecessary duplication and regulatory burden for responsible entities.

…insert proposed section 30AKA which provides that entities must have regard to matters set out in the rules when determining to adopt, review or vary a critical infrastructure risk management program

As noted at paragraph 237 of the Explanatory Memorandum, a key theme of the information received from industry stakeholders during consultation was that the critical infrastructure risk management program obligation needs to be flexible and adaptable to the business processes and environment of an individual responsible entity.

In this context, it is appropriate that proposed section 30AKA provides for matters relevant to adopting, reviewing or varying a critical infrastructure risk management program to be set out in the rules.

Proposed subsection 30AKA(7) provides that rules made for subsections 30AKA(1), (3) or (5) may be of general application, or relate to one or more specified critical infrastructure assets. These provisions would allow for varying matters to be specified for different types of critical infrastructure assets and industry sectors.

The amendments in the SLACIP Bill dealing with the critical infrastructure risk management program would require responsible entities of critical infrastructure assets to adopt and maintain a written critical infrastructure risk management program. This is intended to uplift core security practices in relation to the management of critical infrastructure assets by ensuring responsible entities take a holistic and proactive approach toward identifying, preventing and mitigating risks from all hazards.

The Department has worked closely with industry to develop sector-agnostic, principles-based rules which will provide guidance for developing risk management programs, and the specific risks and hazards that should be considered. Where possible, the requirements under the risk management program would recognise or build on existing regulatory frameworks, seeking to minimise the regulatory burden on industry. This would ensure that if an existing regulation already exceeds the relevant risk management program requirement, there is not a duplicative set of obligations in place. This approach reflects clear feedback from industry that the responsible entity is best placed to understand the risks to an asset, and to develop appropriate risk practices.

Importantly, proposed section 30AKA does not act to limit the matters to which the responsible entity may have regard - and that the matters an entity may have regard when adopting, reviewing or varying a critical

infrastructure risk management program are not restricted to matters specified in the rules.

…require that incident response plans, cyber security exercises, evaluation reports and vulnerability assessments all comply with requirements set out in the rules

There are four different legislative mechanisms that would implement the enhanced cyber security obligations outlined in proposed Part 2C of the SOCI Act, as provided for in the SLACIP Bill:

- incident response planning obligations (proposed Division 2 of Part 2C);
- cyber security exercises (proposed Division 3);
- vulnerability assessments (proposed Division 4); and
- access to system information (proposed Division 5).

Committee comment

2.37 The committee thanks the minister for this response. The committee notes the minister's advice that the regulatory framework that would be established by the bill relies on delegated legislation where necessary to ensure that the statutory framework remains appropriately flexible and adjustable, with a focus on minimising the regulatory impact on entities. The minister has also provided more specific information for each of the provisions raised by the committee. This further information generally reiterates the desire for flexibility and notes the consultation that has, or will, occur in relation to the making of delegated legislation.

2.38 The committee reiterates its consistent scrutiny view that matters which may be significant to the operation of a legislative scheme should be included in primary legislation unless sound justification for the use of delegated legislation is provided. The committee has generally not accepted a desire for administrative flexibility of itself to be a sufficient justification for leaving significant matters to delegated legislation. It remains unclear to the committee why at least high-level guidance regarding these matters could not be included in the primary legislation.

2.39 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.40 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving a number of significant elements of the proposed enhanced regulatory framework for Australian critical infrastructure assets to delegated legislation.

2.41 The committee also draws this matter to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation.

Chapter 3

Scrutiny of standing appropriations

3.1 Standing appropriations enable entities to spend money from the Consolidated Revenue Fund on an ongoing basis. Their significance from an accountability perspective is that, once they have been enacted, the expenditure they involve does not require regular parliamentary approval and therefore escapes parliamentary control. They are not subject to approval through the standard annual appropriations process.

3.2 By allowing the executive government to spend unspecified amounts of money for an indefinite time into the future, provisions which establish standing appropriations may, depending on the circumstances of the legislation, infringe on the committee's terms of reference relating to the delegation and exercise of legislative power.

3.3 Therefore, the committee has determined that, as part of its standard procedures for reporting on bills, it should draw Senators' attention to bills that establish or amend standing appropriations or establish, amend or continue in existence special accounts.[1] It will do so under provisions 1(a)(iv) and (v) of its terms of reference, which require the committee to report on whether bills:

> (iv) inappropriately delegate legislative powers; or
>
> (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.[2]

3.4 The committee notes there were no bills introduced in the relevant period that establish or amend standing appropriations or establish, amend or continue in existence special accounts.

Senator Dean Smith
Acting Chair

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1 The Consolidated Revenue Fund is appropriated for expenditure for the purposes of special accounts by virtue of section 80 of the *Public Governance, Performance and Accountability Act 2013*.

2 For further detail, see Senate Standing Committee for the Scrutiny of Bills *Fourteenth Report of 2005*.