

**Monitor 1 of 2024 – Ministerial Responses**

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## Senator the Hon Katy Gallagher

Minister for Finance  
Minister for Women  
Minister for the Public Service  
Senator for the Australian Capital Territory

REF: MS23-001286

Senator Linda White  
Chair  
Senate Standing Committee for the  
Scrutiny of Delegated Legislation  
Parliament House  
CANBERRA ACT 2600

Dear Senator <sup>huda</sup>White

I refer to a request received from the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) on 30 November 2023. The request relates to the Financial assistance scheme for respondents to applications brought under *the Family Law (Child Abduction Convention) Regulations 1986* (the Scheme) prescribed in the *Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 1) Regulations 2023*.

In particular, the Committee raised concerns about the justifications for excluding merits review for the Scheme and the adequacy of the explanatory materials.

The Attorney-General, the Hon Mark Dreyfus KC MP, who has policy responsibility for the Scheme has provided the information in the attached response.

I have copied this letter to the Attorney-General.

Yours sincerely

Handwritten signature of Katy Gallagher in blue ink.

**Katy Gallagher**

12.12.23

**Attorney-General's response to the request of the Senate Standing Committee for the Scrutiny of Delegated Legislation Committee – *Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 1) Regulations 2023 [F2023L01417]* establishing legislative authority for government spending on the financial assistance scheme for respondents to applications brought under the *Family Law (Child Abduction Convention) Regulations 1986***

The Committee has requested advice as to whether further justification can be provided for the exclusion of independent merits review for this legal financial assistance scheme (the Scheme), by reference to the established grounds set out in the Administrative Review Council guidance document, *What decisions should be subject to merit review?* (ARC guide).

As noted in the explanatory statement, a right to apply for a review must be specifically assigned by legislation (*Administrative Review Council Best Practice Guide 5 – Accountability*). As the new Scheme is a non-statutory scheme, there is no overarching legislation that includes a right to apply for a review.

The ARC guide provides that decisions relating to the allocation of a finite resource, from which all potential claims for a share of the resource cannot be met, are generally considered by the Council to be inappropriate for merits review. Decisions that come within this exception must involve the following two parts:

- an allocation of finite resources, and
- an allocation that has already been made to another party would be affected by overturning the original decision.

Further justification in relation to both requirements is outlined below.

*a) allocation of finite resources*

In accordance with the ARC guide, decisions made in relation to grants under the Scheme are not appropriate for merits review because they require the allocation of finite resources between individual applicants for legal financial assistance.

There is a finite amount of funding available under the appropriation for the *Financial assistance towards legal costs and related expenses* program each financial year for the provision of grants. In the 2023-24 financial year, the Budget allocation for the program is \$6.9 million. The appropriation is fixed, with any increase to funds in the appropriation requiring consideration through Government budget processes. In line with the Commonwealth Grants Policy Framework, grants cannot exceed the amount of available funds.

Individual applicants are assessed against eligibility and assessment criteria in relevant guidelines, which is why the Scheme is classified as an open non-competitive grants program. However, to determine whether to make the grant, and to determine the grant amount, the guidelines will require the decision-maker to take into account the total funds available for all grants under the appropriation and the number of other eligible grants made or likely to be made under the appropriation. The fact that an applicant meets the specified criteria does not guarantee them funding or that they will be granted the entire amount of funding that they seek. This is to ensure that there are sufficient funds available for other meritorious applications submitted during the year, given that it is not possible to predict the demand on the Scheme or number of grants under the program in any given financial year.

*b) an allocation that has already been made to another party would be affected by overturning the original decision*

As there is limited available funding under the appropriation, any change to the amount or amounts allocated to one party as a result of overturning an original decision can be expected to have a direct effect on the allocations for other Scheme applicants. All subsequent decisions to approve a grant on the basis that there was available funding in the appropriation would be called into question, and other eligible and meritorious grants would either need to have funding removed or reduced so that the department does not overspend its appropriation.

If there were to be merits review available, the Administrative Appeals Tribunal could overturn decisions not to fund applications, or not to fully fund applications and substitute decisions to provide higher amounts of financial assistance.

This would inhibit the Attorney-General's Department's (the department) ability to manage the overall funding Scheme, as the department would not have certainty about the amount of money that had been committed from the appropriation, and therefore also no certainty about the amount of funds that remained available.

If decisions about funding could be overturned and increased upon merits review, this could have the effect of exhausting the funds available in the financial year, meaning that the department could not approve funding for any new applications, including highly meritorious applications.

It would also mean that the department could have significantly overspent the program for any applications approved in the interim period leading up to the merits review decision. In the absence of a decision by the Government to provide additional funding, which could not be assured, this would likely need to be resolved by revisiting existing grant arrangements with other applicants, and reducing, terminating or overturning allocations in order to fit within the funding envelope.

Further complications would be caused in the inevitable case that merits review decisions were not made within the same financial year, as there would be less flexibility to move funds or deal with the complexity that merits review would add to the administration of the Scheme.

#### *Additional considerations*

External merits review would also create uncertainty for decision makers deciding on grant amounts with reference to the availability of funds, and may disadvantage other applicants competing for the same funds, if other applications are undergoing merits review. Undertaking merits review would delay decision-making on other grant applications, undermining the ability of the Scheme to meet its objective to provide prompt legal financial assistance to a vulnerable cohort. The exclusion of independent merits review for this Scheme is consistent with the approach taken for all other legal financial assistance schemes under the appropriation.

On this basis, decisions made in relation to grants under the Scheme are not appropriate for merits review in accordance with paragraphs 4.11-4.15 of the ARC guide.

### *Other safeguards*

The ARC guide provides that even though such decisions should not be reviewed, administrative accountability in relation to such allocative decisions should be given greater emphasis, including ensuring that:

- the processes of allocating funds are fair,
- the criteria for funding are made clear, and
- decisions are made objectively.

Consistent with best practice decision making, where there are issues with an application prior to a decision being made, the department will provide the applicant an opportunity to respond to that issue before finalising its assessment of the application for the relevant decision maker. The guidelines for the Scheme will set out clear funding criteria. The department will ensure objective decision-making, with a departmental officer assessing each application on its merits, and the decision-maker considering consistent factors in deciding whether to approve the grant.

Internal review will be available for departmental decisions. Applicants are made aware of the availability of internal review in the grant decision letter. They are invited to provide updated or new information in support of their review request. Where an internal review is undertaken, a different decision maker will consider the application afresh, including any updated or new information provided by the applicant. Internal review requires reconsideration of the original decision, and as such, may result in a different outcome, subject to the same considerations around the availability of funds.

Judicial review is also available, including under the *Administrative Decisions (Judicial Review) Act 1976*. This provides an avenue for applicants to seek review of a decision if natural justice had not been provided.