Ministerial responses — Report 10 of 2021[1]

1 This can be cited as: Parliamentary Joint Committee on Human Rights, Ministerial responses, *Report 10 of 2021*; [2021] AUPJCHR 105.

The Hon Greg Hunt MP
Minister for Health and Aged Care

Ref No: MS21-000802

Dr Anne Webster MP
Chair
Parliamentary Joint Committee on Human Rights
PO BOX 6100
Parliament House
CANBERRA ACT 2600

22 JUN 2021

Dear Dr Webster

Thank you for your correspondence on behalf of the Parliamentary Joint Committee on Human Rights concerning the Aged Care and Other Amendments Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021 (Royal Commission Response Bill No. 1). I have responded to the issues raised in the Human rights scrutiny report 7 of 2021, dated 16 June 2021.

As stated in the scrutiny report the Royal Commission Response Bill No. 1 provides that the *Quality of Care Principles 2014* can make provisions for the requirements of approved providers of residential aged care (approved providers) for the use of restrictive practices. The operationalised specific details of approved provider requirements have been included in the proposed amendments to the Quality of Care Principles. The exposure draft of the principles, the Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 is now publicly available on the Department of Health's website and should be read in conjunction with the Royal Commission Response Bill No.1.

Behaviour Support Plans
From 1 September 2021, the proposed amendments to the Quality of Care Principles will introduce new responsibilities for approved providers to implement behaviour support plans for care recipients that need them. Under these responsibilities, a restrictive practice may not be used unless assessed as necessary in the behaviour support plan. The only exception to this is where there is a situation which may be deemed an emergency. The Quality of Care Principles specify details of what needs to be included in a behaviour support plan, including having best practice behaviour support strategies that are responsive to the care recipient's needs and seek to reduce or eliminate the need for restrictive practices. These supports should be individualised and address the underlying causes of the behaviours of concerns, while safeguarding the quality of life of care recipients.

Behaviour support plans also need to specify where the use of a restrictive practice has been assessed or necessary and where a restrictive practice is being used. While approved health practitioners (a medical practitioner, nurse practitioner or registered nurse) may assess a restrictive practice as necessary, it is important to note that comprehensive behaviour support planning and management is intended to reduce the use of restrictive practices.

Behaviour support plans should be developed in consultation with the care recipient, their nominated representative, any relevant health practitioners, and their restrictive practice substitute decision-maker if the care recipient lacks the capacity to provide informed consent.

The intention of these provisions in the Quality of Care Principles is to ensure the approved provider takes a more preventative approach in relation to the use of restrictive practices by considering alternative strategies in the first instance, while examining and seeking to understand the cause of the behaviours. The approved provider should consider any past events or experiences that led to behaviours of concern to help prevent future behaviours of concern occurring that may be related to these causes or triggers.

If a behaviour support plan includes a restrictive practice that has been assessed as necessary, any use of a restrictive practice must be reviewed regularly or as soon as practicable after any change in the care recipient's circumstances. This includes any circumstance where a restrictive practice is used in an emergency. Any changes in behaviour should mean that the use of the restrictive practice should be reconsidered and reduced or stopped as soon as practicably possible.

Who can assess a restrictive practice as necessary?
The proposed amendments to the Quality of Care Principles set that an approved health practitioner who has day-to-day knowledge of the care recipient can assess that the use of a restrictive practice, other than chemical restraint, is necessary and that the care recipient poses a risk of harm to themselves or others. An approved health practitioner is defined as medical practitioner, a nurse practitioner or a registered nurse as defined by the *Health Insurance Act 1973*. Additionally, these assessments need to be documented.

The proposed amendments to the Quality of Care Principles set that only a medical practitioner or nurse practitioner can assess whether a chemical restraint is necessary. These professions are required to comply with their appropriate professional codes of practice and any applicable state and territory legislation in the state they practice. Prescribing medical or nurse practitioners are required to document the reason they have prescribed medication for the purpose of chemical restraint and they must have obtained informed consent from the care recipient or, if the care recipient lacks capacity, from their restrictive practice substitute decision-maker.

If medication has been prescribed as a chemical restraint, approved providers must engage with the prescribing practitioner and the care recipient to communicate the impact and effectiveness of the restraint and any conditions around its use. The approved provider is required to satisfy themselves that the prescribing practitioner has obtained informed consent for the use of the medication as a chemical restraint.

Emergency use of restrictive practices
The term 'emergency' in new subsection 54-10(2) is not expressly defined, and therefore has its ordinary meaning. In aged care the scope of emergency situations can be quite broad and adopting a prescriptive definition is likely to result in unintended consequences and may exclude situations of genuine emergency. This could foreseeably have the impact of placing the safety, health and wellbeing of care recipients and others at risk.

An emergency situation only applies while there is an immediate risk or harm to a care recipient or other person. Once this risk has ceased the emergency situation has passed, emergencies are not intended to last for long periods of time and are not a mechanism for approved providers to justify the continuous use of a restrictive practice.

If a restrictive practice is required after the immediate risk of harm has passed, this would be considered ongoing use and is not subject to emergency exemptions. Additionally, ongoing use of a restraint requires informed consent prior to its use.

The proposed amendments to the Quality of Care Principles detail the responsibilities that must be met following the emergency use of restrictive practices. This includes:

- informing the restrictive practices substitute decision maker about the use of the restrictive practice, if the care recipient lacked capacity to consent to the use of the restrictive practice
- documenting the reasons for the restrictive practice and the alternative strategies that were considered or used prior.

These responsibilities must be met as soon as practicable after the restrictive practice starts to be used.

During an emergency approved providers must still seek to ensure the least restrictive form of a restrictive practice is being applied and that it is used for the shortest time possible. Approved providers must also continually seek to consider whether an alternative strategy can be used and whether the restrictive practice can be reduced or stopped. These requirements are intended to ensure the use of restrictive practices are reduced and the inappropriate use of restrictive practices are eliminated.

Approved providers should be actively engaged in care recipients' behaviour support planning, which should significantly reduce the occurrence of emergencies. Approved providers must consider and manage triggers for care recipients' behaviour to prevent an emergency in the care planning for care recipients.

In practice, the Aged Care Quality and Safety Commission (the Commission) will be able to question the circumstances in which emergency use of a restrictive practice was activated.

Informed consent arrangement for the use of restrictive practices
The proposed amendments to the Quality of Care Principles inserts a new term, *restrictive practices substitute decision-maker.* A restrictive practices substitute decision-maker, for a restrictive practice in relation to a care recipient, means a person or body that, under the law of the state or territory in which the care recipient is provided with aged care, can give informed consent to the following if the care recipient lacks the capacity to give that consent:

- The use of the restrictive practice in relation to the care recipient; and
- If the restrictive practice is chemical restraint, the prescribing of medication for the purpose of using the chemical restraint.

State and territory legislation regulates who can give informed consent to the use of a restrictive practice and the prescribing of medication for the purpose of using that medication as a chemical restraint. The proposed amendments to the Quality of Care Principles do not affect the operation of any law of a state or territory in relation to restrictive practices. They seek to complement and clarify those state and territory laws that protect individuals from interference from their personal rights and liberties.

Care recipients must provide informed consent to the use of a restrictive practice wherever possible. If a care recipient does not have capacity to consent, consent must be obtained from someone with authority to provide it, in this case, a restrictive practices substitute decision-maker.

Informed consent must be obtained before the restrictive practice is used, unless the restrictive practice is necessary in an emergency. If the use of a restrictive practice was used in an emergency and the care recipient lacked capacity to consent to the use of the restrictive practice, the restrictive practice substitute decision-maker must be informed as soon as practicable after the restrictive practice starts to be used.

If the ongoing use of a restrictive practice is assessed as necessary, informed consent for the ongoing use of the practice is required. Perpetual or ongoing approval cannot be given to the use of a restrictive practice. The care recipient or their restrictive practice substitute decision maker may withdraw their consent at any time. Therefore, the approved provider should take steps to regularly communicate with the care recipient or their restrictive practices substitute decision-maker, and obtain informed consent contemporaneously.

Monitoring and review of the use of a restrictive practice
The proposed amendments to the Quality of Care Principles stipulate that the use of restrictive practice must be regularly monitored, reviewed, and documented.

An approved provider must monitor a care recipient while a restrictive practice is being used, including monitoring of the following:

- signs of distress or harm
- side effects and adverse events
- changes in mood or behaviour
- changes in well-being, including the care recipient's ability to engage in activities that enhance quality of life and are meaningful and pleasurable
- changes in the care recipient's ability to maintain independent function (to the extent possible), and
- changes in the care recipient's ability to engage in activities of daily living (to the extent possible).

The proposed amendments to the Quality of Care Principles will also outline how the use of restrictive practices are to be reviewed, which includes consideration of:

- the outcome of its use and whether the intended outcome was achieved
- whether an alternative strategy could be used to address the care recipient's behaviours of concern
- whether a less restrictive form of the restrictive practice could be used to address the care recipient's behaviours of concern
- whether there is an ongoing need for its use, and
- if the restrictive practice is chemical restraint—whether the medication prescribed for the purpose of using the chemical restraint can or should be reduced or stopped.

An approved provider must also review a behaviour support plan for a care recipient and make any necessary revisions on a regular basis and as soon as practicable after any change in the care recipient's circumstances.

Additionally, the use of a restrictive practice must also be continually monitored, reviewed and documented. If there is a change to a care recipient's circumstances or behaviour, a review should be completed to understand what has changed and whether the existing strategies remain best practice for the care recipient. This includes any circumstance where a restrictive practice is used in an emergency.

If these strategies are no longer effective, new strategies need to be considered and trialled, noting that care needs change over time and can be affected by other factors in the residential care setting.

Approved providers must seek to ensure the least restrictive form of a restrictive practice is being applied and that it is used for the shortest time possible. Approved providers must also continually seek to consider whether an alternative strategy can be used and whether the restrictive practice can be reduced or stopped. These requirements are intended to ensure the use of restrictive practices are reduced and the inappropriate use of restrictive practices are eliminated.

From 1 July 2021 all use of restraint, including the use of anti-psychotics will be reported to the Department of Health through My Aged Care under the National Aged Care Mandatory Quality Indicator Program.

Any use of restrictive practices that is inconsistent with their legislative requirements will need to be reported by an approved provider to the Commission under the Serious Incident Response Scheme. This ensures the Commission is able to focus on the incidents that pose the greatest risk to care recipients.

The Commission's oversight of restrictive practices is being strengthened through the appointment of a Senior Practitioner. Additionally, the Commission's powers will be expanded with the ability to impose civil penalties where an approved provider is not meeting its restrictive practice obligations.

Documenting and reporting restrictive practice use
Aged care providers are required to document and address the care needs of their care recipients under the *Aged Care Act 1997*. However, the proposed amendments to the Quality of Care Principles detail the specific matters required to be documented in relation to the use of restrictive practices and alternative strategies that have been used or considered, including their effectiveness.

Thank you for writing on this matter.

Yours sincerely

Greg Hunt

cc: Senator the Hon Richard Colbeck, Minister for Senior Australians and Aged Care Services

THE HON KAREN ANDREWS MP
MINISTER FOR HOME AFFAIRS

Ref No: MS21-001435

Dr Anne Webster MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

by email: human.rights@aph.gov.au

Dear Dr ~~Webster~~ Anne

Thank you for your correspondence of 24 June 2021, on behalf of the Parliamentary Joint Committee on Human Rights (the Committee), regarding *the Crimes Legislation Amendment (Economic Disruption) Regulations 2021* [F2021L00541].

The purpose of this legislative instrument is to allow the Official Trustee in Bankruptcy to recoup costs, charges, expenses and remuneration incurred in exercising its statutory functions, duties and powers. It also updates definitions, repeals duplicate sections and specifies certain offences as serious offences for the purposes of the *Proceeds of Crime Act 2002* (POC Act). Specifically, the Regulations amend the definition of 'serious offence' to include various offences relating to child sexual abuse for the purposes of the POC Act. This has the effect of expanding the application of that Act.

In Parliamentary Joint Committee on Human Rights Report 8 of 2021, the Committee notes that:

- the proceeds of crime legislation provides law enforcement agencies with important and necessary tools in the fight against crime. In this regard, the committee considers that the measure likely pursues a legitimate objective and would appear to be rationally connected to this objective. However, in the absence of a foundational human rights assessment of the POC Act, the committee notes that it is difficult to assess the adequacy of the safeguards identified in the statement of compatibility.

In relation to the above, the Committee has sought my advice as to whether the measure is proportionate. My response for the Committee's consideration is attached and addresses why, to the extent these Regulations, in amending the definition of what constitutes a 'serious offence', limit rights to a fair trial, and fair hearing, and the right to privacy, are proportionate in achieving a legitimate objective.

I appreciate the extension until 16 July 2021, in which to provide the response.

Yours sincerely

KAREN ANDREWS

15 / 7 / 2021

Response to the Parliamentary Joint Committee on Human Rights (PJCHR) Scrutiny Report 8 of 2021

Crimes Legislation Amendment (Economic Disruption) Regulations 2021 [F2021L00541]

Rights to a fair trial and fair hearing and privacy

Committee Comment

The Committee noted at paragraph 1.43 that the Regulations, which amend the definition of what constitutes a 'serious offence' for the purposes of the *Proceeds of Crime Act 2002* (POC Act), likely pursue a legitimate objective and would appear to be rationally connected to that objective.

At paragraph 1.39, the Committee raised concerns about the proportionality of this measure with respect to the right to a fair trial, the right to a fair hearing, and the right to privacy.

The Committee requested advice from the Minister as to whether the measure is proportionate.

Response

The Regulations are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. To the extent that these measures may limit those rights and freedoms, such limitations are reasonable, necessary and proportionate in achieving legitimate objectives, for the following reasons:

<u>The POC Act is civil in nature</u>

The restraint and forfeiture powers available to law enforcement where property is linked to, or a person commits, a 'serious offence' (as expanded by the Regulations) are properly characterised as civil for the purposes of international human rights law. Proceedings under the POC Act are subject to civil rules of evidence and are conducted in accordance with civil, not criminal, procedure.

The Committee's *Guidance Note 2* states that the test for whether a penalty can be classified as 'criminal' relies on three criteria:

- the domestic classification of the penalty
- the nature and purpose of the penalty, and
- the severity of the penalty.

On the domestic classification of the penalty, section 315 of the POC Act expressly provides that the relevant restraint and forfeiture powers are characterised as civil in nature under Commonwealth law.

On the nature and purpose of the penalty, the predominant purpose of the POC Act is not to deter or punish persons for breaching laws. Paragraphs 5(a)-(ba) of that Act make it clear that the focus is primarily on remedying the unjust enrichment of persons who profit at society's expense, while paragraphs (d)-(da) are focussed on the removal of illicit funds from the legitimate economy. In addition, actions taken under the POC Act make no determination of a person's guilt or innocence and can be taken against assets without finding any form of culpability against a particular individual (see sections 19 and 49 of the POC Act).

On the severity of the penalty, *Guidance Note 2* provides that a penalty is likely to be considered criminal for the purposes of human rights law if the penalty is imprisonment or a substantial pecuniary sanction. Proceedings under the POC Act cannot in themselves create any criminal liability and do not expose individuals to criminal sanctions (or a subsequent criminal record). Further, orders made under the POC Act cannot be commuted into a period of imprisonment.

On whether the penalty is substantial, the POC Act contains mechanisms to allow an affected party to exclude property from an order where it is not the proceeds or instrument of a crime, or to compensate a person for the lawfully derived component of their property (see, for example, the compensation orders at sections 77 and 94A of the POC Act). This ensures that the property that is ultimately taken from the suspect reflects the quantum that has been derived or realised from crime, ensuring that orders are aimed primarily at preventing the retention of ill-gotten gains, rather than the imposition of a punishment or sanction.

In assessing the POC Act against *Guidance Note 2*, for the reasons stated, it does not meet the criteria for a penalty being classified as 'criminal' and therefore in the Department's view is considered to be civil in nature.

Right to a fair trial and fair hearing

The relevant restraint and forfeiture powers are properly characterised as civil in nature for the purposes of international human rights law. These powers do not engage the criminal process guarantees as set out in Articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR) and are otherwise consistent with the right to a fair trial and fair hearing under the ICCPR.

Proceedings under the POC Act are civil proceedings heard by Commonwealth, State and Territory Courts in accordance with the relevant civil procedures of those courts and under civil rules of evidence. This affords an affected person adequate opportunity to present their case, such that the right to a fair hearing is not limited. The Regulations do not affect the civil court procedures applicable to proceedings under the POC Act.

Affected persons will also be given notice of applications under the POC Act. Where the POC Act allows an order to proceed without notice, there are justifiable reasons for doing so. For example, restraining orders (which are interim in nature) can be made over property *ex parte* to ensure that a subject is not tipped-off to law enforcement suspicions, and cannot dispose of the property before the order can be made.

Right to privacy

The Committee has questioned whether prescribing the offences specified in items 10-18 of the Regulations as 'serious offences' for the purposes of the POC Act is proportionate in achieving its legitimate objectives, noting that a person can be required to forfeit property linked to an offence where they have been acquitted of this offence or their conviction has been subsequently quashed.

As noted in the Explanatory Statement, the Regulations are compatible with the right to privacy. The POC Act already contains extensive safeguards that ensure the Regulations are the "least rights restrictive option" that still achieves the legitimate objective of preserving public order and the rights and freedoms of those subject to serious criminal behaviour.

These include:

- if an individual's property is subject to a restraining order, a court may be able to make allowances for expenses to be met out of property covered by the restraining order (section 24), exclude property from the scope of the order or revoke the order (sections 24A, 29, 42), or refuse to make the order where it is not in the public interest to do so (sections 17(4) and 19(3))
- if an individual's property is restrained and subject to a forfeiture order or automatic forfeiture, a court can exclude the person's interest from the scope of the order or from automatic forfeiture (sections 73, 94 and 102)
- a court can refuse to make an order in relation to an 'instrument' of an offence in certain circumstances, including where making the order is not in the public interest (sections 47(4), 48(2) and 49(4))
- an individual may also seek a compensation order for the proportion of the value of the property they did not derive or realise from the commission of an offence (sections 77 and 94A) or a buy back order (sections 57 and 103), and
- where an individual acquires property that constituted 'proceeds' or an 'instrument' of crime in the legitimate situations outlined under section 330(4), this property ceases to be 'proceeds' or an 'instrument' of crime and generally cannot be subject to restraint or forfeiture. This ensures that third parties who acquire property legitimately are adequately protected.

In addition, section 322 of the POC Act provides persons against whom a confiscation order has been made, or who have an interest in forfeited property, with the right to appeal the order. The POC Act also includes protections preventing the destruction or disposal of property that is under a forfeiture order, forfeited by operation of the Act or is subject to a pecuniary penalty order, a literary proceeds order, or an unexplained wealth order, until the conclusion of any relevant appeal period, except in limited circumstances. This is an important safeguard to ensure that a person's property is not destroyed or disposed of prematurely.

Proceeds of crime authorities are Commonwealth agencies that are bound by an obligation to act as model litigants, and must not commence legal proceedings unless satisfied that litigation is the most suitable method of dispute resolution (paragraph 4.2 of Schedule 1 and Appendix B of the *Legal Services Directions 2017*). They are required to act honestly and fairly in handling litigation, including litigation brought under the POC Act. This requirement includes, but is not limited to, an obligation not to take advantage of a claimant who lacks resources to litigate a claim and not to rely on technical defences except in limited circumstances.

For these reasons, to the extent that the amendments to the Regulations, in amending the definition of what constitutes a 'serious offence', limit the right to a fair trial, the right to a fair hearing, and the right to privacy, those limitations are proportionate to achieving a legitimate objective.

The Hon Greg Hunt MP
Minister for Health and Aged Care

Ref No: MC21-023044

Dr Anne Webster MP
Chair
Parliamentary Joint Committee on Human Rights
human.rights@aph.gov.au

03 AUG 2021

Dear Dr Webster

I refer to your correspondence seeking further information in relation to the Health Insurance (General Medical Services Table) Regulations 2021 (GMST Remake) and the Health Insurance Legislation Amendment (2021 Measures No. 1) Regulations 2021 (Amendment Regulation) in order to assess the relevant human rights implications. I regret the delay in responding.

The GMST Remake and the Amendment Regulation implemented recommendations by the Medicare Benefits Schedule (MBS) Review Taskforce (Taskforce) on changes to cardiac services, general surgery services and orthopaedic services which were approved by the Australian Government.

As requested, information on the matters which are set out in paragraph 1.51 of the Parliamentary Joint Committee on Human Rights, Human Scrutiny Report, Report 8 of 2021 in relation to the general surgery and orthopaedic changes made in the GMST Remake, and the cardiac changes made in the Amendment Regulation are enclosed.

Further information on the changes made in the GMST Remake and the Amendment Regulation is also available in the accompanying explanatory statements, which are published on the Federal Register of Legislation alongside the legislative instruments.

Thank you for writing on this matter.

Yours sincerely

Greg Hunt

Encl (1)

Information on cardiac changes made in the *Health Insurance Legislation Amendment (2021 Measures No. 1) Regulations 2021*

Query from the Human rights scrutiny report (Report 8 of 2021	Department of Health's response
1.51(a) Whether this instrument reduces the quantum of benefits available for any specific MBS items, that could adversely affect the rebate payable to patients	A total of four cardiac items (38285, 38286, 38274 and 38358), which are for the primary procedural services, have had a schedule fee reduction, and therefore a reduced rebate payable to patients. These reductions on fees have been based on expert advice from the profession and clinical experts. A summary of the fee changes is as follows: • The fee for item 38285 was reduced from $198.95 to $160.55. • The fee for item 38286 was reduced from $179.20 to $144.60 • The fee for item 38274 was reduced from $940.80 to $777.60 • The fee for item 38358 was reduced from $2,957.65 to $2,089.00 The schedule fee has been reduced, based on clinical advice, for two procedural services for the insertion and removal of implanted loop recorders: - the fee for item 38285 has been reduced from $198.95 to $160.55 (a reduction of 20 per cent) - the fee for item 38286 has been reduced from $179.20 to $144.60 (a reduction of 20 per cent). These changes reflect a reduction in the complexity for the insertion and removal of implanted loop recorders due to improvements in technology of the device. These procedures can also now be provided to patients in the outpatient setting, potentially reducing exposure to out-of-pocket cost related to a hospital admission. Item 38274, which is for the transcatheter closure of ventricular septal defect, has been amended to remove the imaging component of the procedure (which is provided under item 55130). Although the schedule fee for item 38274 has been reduced from $940.80 to $777.60, if the provider is required to provide the imaging component, they are able to claim the imaging service under item 55130 (which has an indexed fee $174.10), as well as the fee for item 38274. Under this change, patients will still receive the same total rebate (plus the increase for indexation) prior to the 1 July 2021 changes. Item 38358, which is for the extraction of chronically implanted leads, has been amended to clarify the service is to be performed by an appropriately trained provider. The fee has been amended, as this service is also provided with item 90300, which is for a standby cardiothoracic surgeon to

	ensure patient safety for this complex procedure. Under this change, patients will still receive the same total rebate (plus the increase for indexation) prior to the 1 July 2021 changes.
1.51(b) Where this instrument removes MBS items entirely, whether any of those items are not covered by, or replaced with, alternative MBS items	As part of phase 2 of cardiac changes which were recommended by the MBS Review Taskforce, a total of 59 cardiac items were removed. A significant finding from the review of cardiac services items was the need to modernise the cardiac services section of the MBS to reflect contemporary clinical practice, clarify appropriate use of the items, differentiate clinical indications and ensure patients receive procedures in line with current best practice. The MBS Review Taskforce made 65 recommendations to improve the appropriate use and criteria under which cardiac services are delivered. The items marked for deletion are intended to provide for the following scenarios, either independently or in combination in the revised schedule: o Combine similar surgical procedures o Incentivise advanced techniques o Remove procedures that no longer represent best practice or are unsafe o Reduce low value interventions Therefore, deleted items are captured either in new items or amended items, or are being removed because they no longer reflect current evidence-based practice.
1.51(c) Whether this instrument has the effect of reducing the quantum of benefit for specific medical procedures, including those procedures which are currently covered by multiple MBS items and will now be covered by one item	Apart from the four items which have had an amended fee (items 38285, 38286, 38274 and 38358), the changes to cardiac services, which include the bundling of multiple items into a single item, provide rebates that have been calculated in either a cost neutral way (with the net rebate remaining the same), or an increase to the schedule fee to reflect complexity (and therefore an increase to the patient rebate).
1.51(d) What is the objective sought to be achieved by the instrument and whether this constitutes a legitimate objective (being one which is solely for the purpose of promoting general welfare)	The following changes to cardiac services aim to promote patient welfare: • **Combining similar surgical procedures**: this improve the consistency of billing between providers and therefore the consistency of rebates for patients. • **Incentivising advanced techniques**: higher fees (and therefore rebates) will be provided to encourage providers to employ advanced surgical techniques that improve patient outcomes and reduce complications. • **Removing procedures that no longer represent best practice or are unsafe:** Patients will more likely receive improved interventions and no longer be exposed to outdated techniques that are no longer supported by evidence. • **Reduction in low value interventions:** Patients are much less likely to undergo procedures that are not required or may be better provided for by another service.

	Furthermore, in many instances, service providers will be able to receive rebates for procedures that will now be aligned with Australian and international best practice clinical guidelines.
1.51(e) Whether and how the measures are rationally connected to (that is, effective to achieve) that objective	The majority of the cardiac items from 1 July 2021 will align with the latest Australian and international best practice clinical guidelines. The new cardiac changes made in the regulation amendment sees a change to cardiac procedural services where providers will be required to practice in alignment with the latest evidence-based guidelines that reduce procedural complications, reduce recovery time and improve long-term health outcomes. These changes are supported by the representative stakeholder groups relevant to cardiac service provision.
1.51(f) Whether and how the measures constitute a proportionate means by which to achieve the objective (having regard to whether the measures are accompanied by sufficient safeguards; whether any less rights restrictive alternatives could achieve the same objective; and the possibility of oversight and the availability of review).	The cardiac changes made in the regulation amendment will achieve the objective of providing high-value, evidence-based medicine to the Australian public. These changes are accompanied by sufficient safeguards that allow for revision procedures when required and clear alignment with best practice. The Department of Health will monitor the changes and will conduct a standard post-implementation review in the appropriate timeframes.

Information on general surgery changes made in the *Health Insurance (General Medical Services Table) Regulations 2021*

Query from the Human rights scrutiny report (Report 8 of 2021	**Department of Health's response**
1.51(a) Whether this instrument reduces the quantum of benefits available for any specific MBS items, that could adversely affect the rebate payable to patients	Fee changes arising from implementation of the Government's response to the MBS Review Taskforce (the Taskforce) for general surgery services aim to better reflect the relative complexity of performing the medical procedures provided by the items. Fees were determined based on expert advice from the medical profession, clinical experts and consumer representatives. Five general surgery items (amended items 30388, 30574 and 30443, and new items 30791 and 31585) which provided for laparotomy, appendicectomy, subsequent necrosectomy, cholecystectomy and removal of gastric band have reduced fees in recognition of being simpler procedures relative to existing MBS services. A summary of the fee changes is as follows: • The fee for item 30388 reduced from $1,647.45 to $1,108.20. • The fee for item 30574 reduced from $127.10 to $64.10. • The fee for item 30443 reduced from $762.45 to $668.45.

	• The fee for new item 30791 is $453.35. This item is for a subsequent necrosectomy, which used to be billed under item 30577, which has a current fee of $1,133.30. • The fee for new item 31585 has a fee of $865.85. This item is for the removal of adjustable gastric band, which used to be billed under item 31584 that has a current fee of $1,601.50. Savings generated through the reduced fees for these items have been reinvested into other more complex general surgery items.
1.51(b) Where this instrument removes MBS items entirely, whether any of those items are not covered by, or replaced with, alternative MBS items	The services covered by the removed general surgery items have either been combined into new items; considered to be provided more appropriately under other existing items; or determined to be obsolete as they no longer reflect modern clinical practice.
1.51(c) Whether this instrument has the effect of reducing the quantum of benefit for specific medical procedures, including those procedures which are currently covered by multiple MBS items and will now be covered by one item	The MBS Review aimed to simplify the Medicare Benefits Schedule (MBS) by developing items that represent complete medical services (through the consolidation of similar items). In these cases, fees were determined based on the weighted average of the component services.
1.51(d) What is the objective sought to be achieved by the instrument and whether this constitutes a legitimate objective (being one which is solely for the purpose of promoting general welfare)	The changes to the general surgery items implement the Government's response to the recommendations of the MBS Review Taskforce for general surgery services. The changes promote patient welfare through: • updating services to support evidence-based practice; • providing greater flexibility in procedure approach which will support surgeons to provide best practice treatment tailored to individual patient needs; • combining services that are similar procedures separated by means of access to simplify the MBS and improve billing transparency for patients; or • removing services that no longer represent best practice.
1.51(e) Whether and how the measures are rationally connected to (that is, effective to achieve) that objective	The measure implements the recommendations made by the clinician-led MBS Review Taskforce.
1.51(f) Whether and how the measures constitute a proportionate means by which to achieve the objective (having regard to whether the measures are accompanied by sufficient safeguards; whether any less rights restrictive alternatives could achieve the same objective; and the possibility of oversight and the availability of review).	The implemented recommendations of the Taskforce for general surgery services will contribute to the Government's objective of providing high-value, evidence-based medical services to the Australian public. Consultation with relevant clinical bodies and consumer representatives during implementation provides assurance that the measure is proportionate to the recommendations of the Taskforce. The Department will closely monitor the impact of the changes on patients, in consultation with the sector, through a post implementation review process.

Information on orthopaedic changes made in the *Health Insurance (General Medical Services Table) Regulations 2021*

Query from the Human rights scrutiny report (Report 8 of 2021	**Department of Health's response**
1.51(a) Whether this instrument reduces the quantum of benefits available for any specific MBS items, that could adversely affect the rebate payable to patients	Fee changes to items for orthopaedic surgery arising from the implementation of the Government's response to recommendations of the MBS Review Taskforce (the Taskforce) aim to better reflect the relative complexity of performing the relevant medical services. Fees were determined based on expert advice from the medical profession, clinical experts and consumer representatives. One orthopaedic surgery item (49527) has a reduced fee from $1,650.65 to $1,371.25, to better reflect the intended purpose of the item descriptor for the provision of minor revision knee replacement procedures. The fee has been reduced because the described procedure is now less complex, relative to the more complex revision knee replacement (49533). This reduction of this fee was based on expert advice from the profession and clinical experts. Savings generated through this fee reduction have been reinvested into item 49533.
1.51(b) Where this instrument removes MBS items entirely, whether any of those items are not covered by, or replaced with, alternative MBS items	The services covered by the removed orthopaedic items have either been combined into new items; considered to be provided more appropriately under other existing items; or determined to be obsolete as they no longer reflect modern clinical practice.
1.51(c) Whether this instrument has the effect of reducing the quantum of benefit for specific medical procedures, including those procedures which are currently covered by multiple MBS items and will now be covered by one item	The MBS Review aimed to simplify the Medicare Benefits Schedule (MBS) by developing items that represent complete medical services (through the consolidation of similar items). In these cases, fees were determined based on the weighted average of the component services.
1.51(d) What is the objective sought to be achieved by the instrument and whether this constitutes a legitimate objective (being one which is solely for the purpose of promoting general welfare)	The changes to the orthopaedic items implement the Government's response to the recommendations of the MBS Review Taskforce for orthopaedic services. The changes promote patient welfare through: • updating services to support evidence-based practice; • providing greater flexibility in procedure approach which will support surgeons to provide best practice treatment tailored to individual patient needs; • combining services that are similar procedures separated by means of access to simplify the MBS and improve billing transparency for patients; or • removing services that no longer represent best practice.
1.51(e) Whether and how the measures are rationally connected to (that is, effective to achieve) that objective	The measure implements the recommendations made by the clinician-led MBS Review Taskforce.

1.51(f) Whether and how the measures constitute a proportionate means by which to achieve the objective (having regard to whether the measures are accompanied by sufficient safeguards; whether any less rights restrictive alternatives could achieve the same objective; and the possibility of oversight and the availability of review).	The implemented recommendations of the Taskforce for orthopaedic services will contribute to the Government's objective of providing high-value, evidence-based medical services to the Australian public. Consultation with relevant clinical bodies and consumer representatives during implementation provides assurance that the measure is proportionate to the recommendations of the Taskforce. The Department will closely monitor the impact of the changes on patients, in consultation with the sector, through a post implementation review process. In addition, given the scale and complexity of the changes made to the orthopaedic items, the post-implementation review process will be expedited to ensure there are no unintended consequences or service gaps for patients.

Senator the Hon Marise Payne
Minister for Foreign Affairs
Minister for Women

MC21-004870

Dr Anne Webster
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear ~~Chair~~ Anne

Thank you for your letter of 24 June 2021 regarding the human rights compatibility of various instruments (together, the Instruments) made under Part 4 of the *Charter of the United Nations Act 1945* (the Act).

The Act and the Instruments made under the Act, provide the Australian government with the power to apply counter-terrorism financial sanctions to give effect to decisions of the United Nations Security Council. The document at Attachment A responds to the request for further advice made by the Parliamentary Joint Committee on Human Rights (the Committee) in *Report 8 of 2021* (the Report).

I note the recommendations for changes to Australia's United Nations sanctions regimes which the Committee made in *Report 9 of 2016, Report 6 of 2018* and *Report 2 of 2019.* The Government is satisfied that Australia's United Nations sanctions regimes are compatible with human rights. The Government has no immediate plans to adopt the measures proposed by the Committee in paragraph 1.74 of the Report but will keep its sanctions regimes under review.

I trust the information provided will assist you in concluding your consideration of the Instruments.

Yours sincerely

MARISE PAYNE

Encl. Attachment A

Attachment A

Response to Parliamentary Joint Committee on Human Rights
Human Rights Scrutiny Report 8 of 2021 (23 June 2021)

Report

On 26 May 2021, DFAT registered on the Federal Register of Legislation (FRL) 21 legislative instruments made under Part 4 of the *Charter of the United Nations Act 1945* (the Act). Of these legislative instruments, 12 included listings of individuals while the other nine listed only entities. It is the 12 legislative instruments that list individuals (the legislative instruments) that are the subject of the Committee's Report.

To assess the human rights compatibility of these legislative instruments, the Committee sought further information, in particular:

- whether any of the individuals subject to listing under these legislative instruments have been, at any time during their listing, in Australia, and if so, how many;
- how many of the listings in these legislative instruments are currently valid; and
- noting that that the *Legislation Act 2003* provides that a legislative instrument will not apply before the instrument is registered to the extent that a person's rights would be disadvantaged, what remedies, if any, does a person, against whom action has been taken pursuant to these listings, have.

The Committee also sought advice on whether further consideration had been given to previous recommendations made by the Committee about the operation of the counter-terrorism financial sanctions regime established under Part 4 of the Act.

Response

The Department of Foreign Affairs and Trade (the Department) will ensure that a Statement of Compatibility with Human Rights is prepared for all future counter-terrorism financial sanctions listings to assist the Committee with its consideration of the human rights implications of such listings.

All listings included in the legislative instruments registered on 26 May 2021 have been validly made in accordance with the requirements of the Act. The legislative instruments have been registered to put beyond doubt any question as to the enforceability of the validly made listings contained within the instruments. The legislative instruments have been registered in the same form in which they were first published in the Commonwealth Gazette and, therefore, include both current and historical listings dating back to 2001. The legislative instruments include 37 individuals currently subject to Australian counter-terrorism financial sanctions. None of these individuals have been in Australia at any time during their listing. The legislative instruments also contain the names of individuals whose listings have since lapsed or been revoked.

As required by regulation 40 of the *Charter of the United Nations (Dealing with Assets) Regulations 2008*, all persons and entities subject to financial sanctions under Australian sanctions law are set out in a Consolidated List, available on the DFAT website.

Registration of these listings as legislative instruments does not alter the scheme established by the Act or any rights owed to persons under the scheme to seek review or revocation of a listing, or compensation for persons wrongly affected. To the extent that a person considers that they were disadvantaged as a result of action taken in reliance on a listing that person may seek judicial review of the action. Any such application would be determined on a case by case basis.

The Department acknowledges the Committee's advice that the instruments are subject to disallowance. At the time of registration, DFAT acted on advice that the instruments were not subject to disallowance, noting that the instruments give effect to Australia's obligations under international law. In this regard, and in response to the Committee's broader comments about the operation of the scheme more generally, it is important to note that the framework established by Part 4 of the Act gives effect to Australia's obligations under United Nations Security Council (UNSC) Resolution 1373 (Resolution 1373) and provides a robust and agile framework to counter the financing of terrorism.

Australia is required to give effect to UNSC resolutions as a matter of international law. Consistent with these obligations, the Minister is required under international law to list an individual or entity for counter-terrorist financial sanctions if reasonably satisfied that the listing criteria are met.

The listing criteria for counter-terrorism financial sanctions are set out in Resolution 1373 and implemented in Australia law by Regulation 20 of *United Nations (Dealing with Assets) Regulations 2008*, which provides that:

> *the Minister must list a person or entity if the Minister is satisfied that the person or entity is a person or entity mentioned in paragraph 1 (c) of Resolution 1373;*

that is:

> a person who commits, or attempts to commit, terrorist acts or participates in or facilitates the commission of terrorist acts;
>
> an entity owned or controlled directly or indirectly by such persons; or
>
> a person or an entity acting on behalf of, or at the direction of such persons and entities.

Counter-terrorism financial sanctions listings are publicly available. Historically, and in accordance with the process set out in the Act, they have been gazetted in the Commonwealth Gazette. As noted above, all persons and entities currently subject to targeted financial sanctions, including individuals subject to counter-terrorism financial sanctions, are listed on the Consolidated List, which is available on DFAT's website.

In recognition of the potentially significant implications of counter-terrorism financial sanctions decisions, section 15A of the Act provides for the automatic repeal of listings after three years, if not otherwise continued by the Minister deciding to relist. The automatic repeal mechanism does not prevent the Minister from reviewing a listing at any time. In advance of any relisting, the Department invites submissions from affected persons or their authorised representatives to inform the Minister's decision.

A person can apply at any time to have their listing revoked or seek judicial review of a listing decision. The Act does not provide for merits review. The exclusion of merits review in relation to sanctions-related decisions is warranted by the seriousness of the foreign

policy and national security considerations involved, as well as the sensitive nature of the evidence relied on in reaching those decisions.

The Government considers that counter-terrorism financial sanctions listings are subject to the appropriate level of reporting, transparency and oversight given their nature as international obligations. The listings are subject to: automatic repeal after three years unless continued by the Minister deciding to relist; Senate Estimates scrutiny; parliamentary disallowance; parliamentary committee scrutiny; Independent National Security Legislation Monitor self-initiated 'own motion reviews'; Joint Standing Committee on Foreign Affairs and Trade requests for private briefings; and judicial review.

The Act provides the Minister with certain permit granting powers, consistent with the scope of UNSCR 1373 and subsequent relevant resolutions, including UNSC Resolution 1452 (2002) (UNSCR 1452). The Minister has a broad discretion to issue, on her own initiative, permits authorising the provision of specified assets to a listed person or the use of or dealing with assets owned or controlled by a listed person. Requests by asset owners or holders for authorisation to use or deal with assets owned or controlled by listed persons must be for basic expense dealings, contractual dealings or extraordinary expense dealings. The restrictions in relation to authorised dealings, as set out in Part 3 of the *Charter of the United Nations (Dealing with Assets) Regulations 2008*, are in accordance with our international obligations under UNSCR 1373 and UNSCR 1452.

The Government is satisfied that Australia's United Nations sanctions regimes are compatible with human rights. The Government keeps its sanctions regimes under regular review.