# The Hon Greg Hunt MP
## Minister for Health and Aged Care

Ref No: MC21-022759

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

28 July 2021

Dear Senator Concetta

I refer to your correspondence of 14 July 2021 on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation concerning the *Aged Care Legislation Amendment (Serious Incident Response Scheme) Instrument 2021*.

In your letter you sought advice in relation to the Committee's view that the instrument may include significant matters more appropriate for parliamentary enactment. I have enclosed advice in response to the Committee's request.

Thank you for writing on this matter.

Yours sincerely

Greg Hunt

Encl (1)

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

**ADVICE TO THE SENATE STANDING COMMITTEE FOR THE SCRUTINY OF DELEGATED LEGISLATION – AGED CARE LEGISLATION AMENDMENT (SERIOUS INCIDENT RESPONSE SCHEME) INSTRUMENT 2021 [F2021L00222]**

On 14 July 2021, the Senate Standing Committee for the Scrutiny of Delegated Legislation (Committee) requested further advice in relation to the *Aged Care Legislation Amendment (Serious Incident Response Scheme) Instrument 2021* (Instrument).

From 1 April 2021, the Instrument amended the *Quality of Care Principles 2014* (Quality of Care Principles), as well as other instruments, to specify arrangements for the purposes of the Serious Incident Response Scheme (SIRS).

The Committee's letter of 14 July 2021 has sought further advice in relation to new subsections 15NA(11) and 15NB(3) of the Quality of Care Principles (inserted by Item 1 of Part 1 of Schedule 1 to the Instrument).

New subsection 15NA(11) of the Quality of Care Principles provides that the expression 'unexplained absence of the residential care recipient from residential care services of the provider' in paragraph 54-3(2)(f) of the *Aged Care Act 1997* (Act) means an absence of the residential care recipient from the residential care services in circumstances where there are reasonable grounds to report the absence to police.

New subsection 15NB(3) of the Quality of Care Principles provides that, despite subsection 54-3(2) of the Act, an incident is not a reportable incident if the incident results from the residential care recipient deciding to refuse to receive care or services offered by the approved provider.

**Significant matters in delegated legislation**
**Parliamentary oversight**

**The Committee requests the Minister's advice as to:**

- **Whether the modifications to the definition of 'reportable incident' in subsection 15NA(11) of the instrument can be provided for the Act, rather than in delegated legislation; and**
- **Whether the exception to the definition of 'reportable incident' in subsection 15NB(3) of the instrument can be provided for the Act, rather than in delegated legislation.**

The Committee has raised concerns that new subsections 15NA(11) and 15NB(3) of the Quality of Care Principles are contained in delegated legislation. The Committee is concerned that these provisions modify the operation of the Act, and has noted that it is not clear in its view why these provisions were not included on the face of the Act.

As noted in previous correspondence to the Committee on the Instrument, unlike other expressions included in new section 15NA of the Quality of Care Principles, new subsection 15NA(11) is not inclusive, due to the specific nature of the type of incident, and the certainty required for implementation. Subsection 15NA(11) ensures clarity on the circumstances where it would be appropriate to notify the Aged Care Quality and Safety Commission (Commission) about the unexplained absence of a residential care recipient.

Through consultation on the SIRS, it was clear from the sector, including consumer advocacy groups that it was not appropriate for every single unexplained absence to be a reportable incident under the scheme. New subsection 15NA(11) limits the definition so that an incident is not reportable to the Commission where a consumer is absent, although it is not out of

character for them to be away from the service, and the provider considers that the individual has the ability to look after themselves and make their own choices.

Also noted in previous correspondence to the Committee on the Instrument, new subsection 15NB(3) of the Quality of Care Principles was included to ensure that the rights of residential care recipients are maintained, specifically their autonomy and choice. While it is not expected that situations accounted for under subsection 15NB(3) will occur frequently, it was raised as an important inclusion by stakeholders, including consumer advocates, when consulting on the arrangements under the SIRS.

Both new subsections 15NA(11) and 15NB(3) of the Quality of Care Principles have been included to ensure that the rights of residential care recipients are not limited through the implementation of the SIRS. The Government considers it necessary and appropriate to include these matters in delegated legislation to ensure the flexibility for prompt modifications, should the arrangements have any unintended consequences, that may result in paternalistic measures or other implications that may affect the health, safety, well-being, quality of life and dignity of residential care recipients.

As also noted in previous correspondence to the Committee on the Instrument, the Government also considers it necessary and appropriate for these matters to be included in delegated legislation to ensure ease of interpretation and implementation by having detailed arrangements in one place. Further, similar arrangements are present in subsections 16(2) and (4) of the *National Disability Insurance Scheme (Incident Management and Reportable Incidents) Rules 2018*, upon which the legislative design for the SIRS is based.

While the Government considers that it is appropriate that these arrangements are held in delegated legislation at this time, the legislative arrangements for the SIRS (including the structure of provisions) will be reviewed as part of the project to introduce a new Aged Care Act. In response to the final report of the Royal Commission into Aged Care Quality and Safety, the Government announced that work would commence on a new Aged Care Act that will underpin the fundamental and generational reform across aged care, with consumers at the core. The new Aged Care Act will replace the existing Act, meaning all current arrangements will be repealed, and re-drafted under the new Act's structure. The Government will have a greater understanding of the operation of the SIRS when developing the arrangements under the new Act. The Committee's views will also be taken into consideration as part of that project.

At this point in time, it is appropriate that new subsections 15NA(11) and 15NB(3) of the Quality of Care Principles are held in delegated legislation, rather than the Act. The SIRS is a new scheme, and flexibility during its early stages will ensure that the scheme's aim can be fully realised. Given that both provisions have been included to uphold the rights of residential care recipients, the ability to carefully and promptly respond to any issues or short fallings is of utmost importance to the effective operation of the scheme.

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

MC21-006118

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

Dear Chair

Thank you for your letter of 4 August 2021, regarding your consideration of the Australia's Foreign Relations (State and Territory Arrangements) Rules 2020 (the Rules).

You have reiterated the Senate Standing Committee for the Scrutiny of Delegated Legislation's request that the Rules be amended to provide that they repeal within five years from commencement.

In response to the Committee's request, I agree to progress an amendment to the Rules to this effect.

Thank you, once again, for your interest in the Rules.

Yours sincerely

**MARISE PAYNE**

10 AUG 2021

# THE HON MICHAEL SUKKAR MP

**Assistant Treasurer**
**Minister for Housing**
**Minister for Homelessness, Social and Community Housing**


Ref: MS21-001750

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

Dear Senator

Thank you for your correspondence of 14 July 2021 concerning the *Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021*.

In that letter, the Committee requested my advice about:

- why it is considered necessary and appropriate to expand the discretion that the ACNC Commissioner may exercise in determining whether a registered charity complies with the governance standards under section 45.15 of the principal instrument;
- the scope of the powers that the ACNC Commissioner may exercise under the instrument;
- the nature and source of any limitations or safeguards on the exercise of the ACNC Commissioner's discretionary powers under section 45.15, including whether they are set out in law or policy; and
- how the instrument is compliant with the implied freedom of political communication.

I have set out my response in the Annexure to this letter.

I trust this information will be of assistance to you.

Yours sincerely

The Hon Michael Sukkar MP


Parliament House Canberra ACT 2600 Australia
Telephone: 61 2 6277 7230

**Annexure**

**Amendment to governance standard three**

As stated in the explanatory statement, the purpose of the *Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021* (the Regulations) is to:

- give the public trust and confidence that a registered entity is governed in a way that ensures its on-ongoing operations and the safety of its assets, through compliance with Australian laws; and

- address uncertainty about when engaging in or actively promoting certain kinds of unlawful activity may affect an entity's entitlement to registration under the *Australian Charities and Not-for-profits Commission Act 2012* (the Act).

Governance standard three currently requires charities to comply with Australian laws. Acting lawfully protects a charity's assets, reputation, and the people it works with. This standard does not impose a new burden on charities as they are already required to comply with all Australian laws. Rather the intent of the standard is to allow the ACNC to investigate serious breaches of the law and take enforcement action, if required, to improve organisational governance and protect trust and confidence in the charities' sector.

To this end, governance standard three, as it existed prior to these amendments, provided that registered charities must not engage in conduct that may be dealt with as an indictable offence or a breach of law that has a civil penalty of 60 penalty units or more. In drafting the law, the policy intent was to enable the ACNC Commissioner to take appropriate action where a charity has engaged in a serious criminal offence but carve out less serious offences that do not concern the proper governance of a registered charity (such as traffic infringements).

The amendments to governance standard three empower the ACNC Commissioner to investigate and take enforcement action, if appropriate, in situations where a registered charity engages in or actively promotes serious unlawful acts of trespass, vandalism, theft, assault or threatening harm. These amendments are required because the existing scope of governance standard three has led to inconsistent outcomes for certain unlawful conduct. This is because there is inconsistency between the laws of the states and territories with respect to which unlawful activities are classified as indictable or summary offences. The practical effect of these inconsistencies is that the ACNC Commissioner is unable to take appropriate action in cases where some charities are being misgoverned, potentially threatening trust and confidence across the whole sector. In turn, this undermines public trust and confidence in the ACNC as an effective regulator.

**Scope of the ACNC Commissioner's powers under the instrument**

The ACNC Commissioner's powers are set out in the Act. The amendments to governance standard three do not expand, modify, or alter the ACNC Commissioner's powers in any respect. The governance standards support charities in fulfilling their objectives by providing a minimum level of assurance that they meet community expectations in relation to how a charity should be managed.

The steps a charity needs to take to comply with the governance standards varies according to its circumstances, such as its size, the sources of its funding, the nature of its activities and the needs of the public (including members, donors, employees, volunteers, and benefit recipients of the registered entity). It is for this reason that each of the governance standards are framed as principles with each charity deciding how it best to achieve each standard given its individual circumstances.

The amendment to governance standard three is designed consistently with the other standards to reduce the complexity, ensure there is greater flexibility for charities in how they manage their internal affairs, and a greater degree of future-proofing as jurisdictions make changes to their laws over time.

As mentioned in the explanatory statement, the kinds of summary offences that are covered under paragraph 45.15(2)(aa) of the *Australian Charities and Not-for-profits Commission Regulation 2013* include those under an Australian law that relate to trespass to land or premises, vandalism, theft of personal

property, common assault, or threatening violence. Listing every relevant state and territory statute (or part thereof) is neither practical nor appropriate as it would obscure the policy outcome to be achieved by the standard and would require constant revision as states and territories make changes to their statutes over time.

Whether a registered entity complies with the new requirement will depend on whether the elements of the relevant summary offence (including any fault elements) are met and whether any defences are available. In particular, where an element of the offence is not met or where a complete defence (such as the defence of sudden or extraordinary emergency) is available, the registered entity has not engaged in conduct that may be dealt with as a relevant summary offence. For example, if the relevant summary offence relating to entering real property requires intention to be made out as a fault element, and that intention is not present (because for instance, the entity mistakenly entered the property), the registered entity has not contravened the new requirement.

In line with current practices, the ACNC will provide guidance and education to registered charities once the amended standard comes into effect to help them understand and comply with the governance standard. However, to be clear, the ACNC Commissioner does not have discretion to determine the summary offences that are covered or what procedures a charity is required to have in place. Rather, whether a summary offence is covered by this new paragraph depends on whether it is a summary offence under an Australian law and the offence relates to one of the matters prescribed in subparagraph 45.15(2)(aa)(i) to (iv). Similarly, whether a charity's internal controls meet the requirements of the standard is a question of fact as assessed against an objective standard having regard to the individual circumstances of the charity.

*Factors the ACNC Commissioner must consider before seeking advice from a relevant entity*

The Regulations do not introduce a new power for the ACNC Commissioner to seek advice from law enforcement agencies. Consistent with the requirements applying to most regulatory agencies, it is up to each agency to decide if and when to consult other agencies in performance of their statutory functions. Providing regulators with appropriate discretion is necessary because the circumstances of any given case will vary. For example, if a registered entity has reported its non-compliance with the ACNC Commissioner, it may not be necessary, nor appropriate, for the ACNC Commissioner to then seek advice from the relevant law enforcement agency.

Under the requirements set out in the Act, before taking action against a registered entity in relation to non-compliance with a governance standard, the ACNC Commissioner must reasonably believe that non-compliance has occurred or will occur. Whether the ACNC Commissioner's powers are enlivened under the Act are to be assessed against an objective standard. In other words, prior to taking action, the ACNC Commissioner must be satisfied that, based on the facts and evidence before the ACNC Commissioner, a reasonable person would believe that non-compliance has occurred or will occur. In practice, and as covered in the explanatory statement, this generally means that there needs to be sufficient, reliable, and accurate evidence about these matters.

As I noted above, the Regulations do not expand, modify, or alter the ACNC Commissioner's powers which are set out in the Act.

**Limitations and safeguards on the exercise of the ACNC Commissioner's powers**

Under section 45.3 of the *Australian Charities and Not-for-profits Commission Regulation 2013*, the governance standards must be interpreted in a manner that is consistent with the objects of the Act and the requirements set out in section 15-10 of the Act.

This means that the ACNC Commissioner must have regard to a range of matters when performing their statutory functions, including:

- the principle of regulatory necessity;
- the principle of proportionate regulation; and

- the benefits gained from assisting registered entities in complying with and understanding the Act, by providing them with guidance and education.

Where enforcement action is required in relation to the governance standards, the ACNC Commissioner has a range of powers to allow the ACNC Commissioner to provide a proportionate and effective regulatory response. These responses could include providing regulatory advice, education, or a warning notice, enforcing undertakings, issuing directions to comply, or revoking an entity's registration.

In deciding whether to revoke registration, the ACNC Commissioner must take account of specific factors including the *nature, significance and persistence* of any non-compliance and what action has been taken by the charity to *address* or *prevent* non-compliance. These matters are set out in subsection 35-10(2) of the Act (and the ACNC Regulatory Approach Statement) and ensure the ACNC Commissioner's actions are proportionate to the problem they are seeking to address. It also ensures the regulatory responses consider the different circumstances of different entities, including the charity's size, revenue and donations received from the public.

The ACNC also has a Regulatory Approach Statement which can be found on its website. The Statement covers the values that underpin the ACNC's regulatory approach and how it will regulate registered entities. Any action taken by the ACNC Commissioner will be consistent with the Statement.

The Statement makes clear that the ACNC operates with a presumption of honesty and applies principles of procedural fairness. In particular, the Statement provides that before the ACNC Commissioner makes a decision in relation to a registered entity, the entity will generally be contacted to clarify matters and to give the entity a reasonable opportunity to address these issues. Registered entities may also seek an internal review of the ACNC's decisions (referred to as an objection decision under the Act).

The ACNC's decisions are also reviewable by the Administrative Appeals Tribunal and the Federal Court of Australia.

**Compliance with the implied freedom of political communication**

The implied freedom of political communication is a limitation on Commonwealth legislative power implied from certain provisions of the Constitution in order to ensure that the Australian people may exercise a free and informed choice as electors. It is well established that the implied freedom of political communication is not an absolute freedom and political communication may be subject to valid legislative restrictions in certain circumstances. The Regulations do not interfere with the implied freedom of political communication as the Regulations relate solely to matters that are unlawful under other Australian laws.

# THE HON ANGUS TAYLOR MP
## MINISTER FOR ENERGY AND EMISSIONS REDUCTION

MC21-004548
03 AUG 2021

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

Dear Chair Connie

I refer to your letter of 17 June 2021, regarding concerns raised by the Senate Standing Committee for the Scrutiny of Delegated Legislation (**the Committee**) in relation to the *Australian Renewable Energy Agency Amendment (2020-21 Budget Programs) Regulations 2021* (**the first 2021 Regulation**).

The first 2021 Regulation was enacted to expand the Australian Renewable Energy Agency's (**ARENA's**) mandate and support it to deliver $192.5 million of 2020-21 Budget programs, which will create more than 1,400 jobs and deliver 16.5 million tonnes of emissions reductions (**the targeted 2020-21 Budget programs**).

On 22 June 2021, the Australian Labor Party and Australian Greens voted to delay the implementation of these emissions reduction measures.

On 30 July 2021, the *Australian Renewable Energy Agency (Implementing the Technology Investment Roadmap) Regulations 2021* (**the second 2021 Regulation**) entered into force. The second 2021 Regulation (among other things) expands ARENA's mandate to support the five Technology Investment Roadmap priority stretch goals and the targeted 2020-21 Budget programs.

The Government has committed to invest $20 billion in new energy technologies by 2030, to drive at least $80 billion of total public and private investment over the decade. This investment will support at least 160,000 new jobs and will be guided by the Technology Investment Roadmap process, and delivered by agencies like ARENA, the Clean Energy Finance Corporation, the Clean Energy Regulator and CSIRO.

While the Committee's correspondence was in relation to the first 2021 Regulation, my advice is also relevant to the second 2021 Regulation.

**Extensive consultation conducted since 2019**

The regulations are the administrative implementation of a policy development process that was consulted on as far back as 2019, well before the regulations were made.

The decision to expand ARENA's mandate has received widespread public support, including from ARENA itself. More than 28 businesses, peak bodies, and climate change groups including the Business Council of Australia, the AiGroup, the National Farmers Federation, ClimateWorks Australia and the Investor Group for Climate Change have also endorsed the expanded mandate.

In September 2019, I appointed an expert panel to provide me with advice on options to unlocking low cost carbon abatement opportunities, in a process that became known as the King Review. The final report of the King Review, released on 14 February 2020, recommended (among other things) that 'existing institutions, for example ARENA and the CEFC, should be provided with an expanded, technology neutral remit so they can support key technologies across all sectors.' In preparing the final report of the King Review, the expert panel consulted with a wide range of industry, research and non-government organisations across a number of sectors.

The Government incorporated the findings of the King Review in its development of the Technology Investment Roadmap. Extensive consultation was undertaken on the Roadmap, with around 500 written submissions received in response to a discussion paper, while more than 150 key stakeholders participated in targeted industry workshops and more than 400 people participated in a public webinar.

In parallel with the release of the Roadmap and the first, annual Low Emissions Technology Statement (**LETS**) in September 2020, the Government announced that ARENA would be provided with an additional $1.4 billion in guaranteed baseline funding through the 2020-21 Budget to support the next generation of technologies that would reduce emissions across all sectors of the economy.

The Government also provided a further $192.5 million for ARENA to deliver the targeted 2020-21 Budget programs, including:

- $71.9 million to support new electric vehicle charging and hydrogen-refuelling infrastructure;
- $24.5 million to support higher productivity and lower emissions in Australia's heavy vehicle fleets;
- $47.0 million to support large energy-using businesses to identify opportunities to adopt new technologies and increase productivity; and
- $52.6 million for microgrids in regional Australia.

In total, $1.62 billion of new funding was provided to ARENA. The Government also clearly signaled its intent to provide ARENA with additional funding to deliver other targeted programs in the future.

The regulations provide ARENA with the necessary power to fully implement the new workload the Government has funded and assigned to it. In this sense the regulation should be seen as machinery in nature, being the administrative implementation of a policy development process dating back to 2019 with substantial consultation throughout the process.

**Authorising legislation allows for non-renewable functions**

ARENA was established by the *Australian Renewable Energy Agency Act 2011* (**the Act**) and commenced operations in 2012. Section 3 sets out the 'main' object (as distinct from a 'sole' object) of the Act. The deliberate use of the word main is an explicit recognition that other objects are being pursued. The choice of the word main is not standard for objects clauses, meaning there is an explicit acceptance of secondary objects: for example, the reduction of greenhouse gas emissions, which is the central purpose of the regulations and fundamental to the constitutional basis for the Act.

Section 3 must be read in the context of the constitutional basis of the Act, articulated at paragraph 14(b), as a measure to contribute to Australia's international greenhouse gas emissions reduction obligations under the United Nations Framework Convention on Climate Change and the Paris Agreement.

Investment in renewable energy is not the only option to reduce emissions to meet those international obligations. For example, the International Energy Agency recently found that more than half of the emissions reductions required to achieve global net zero will come from technologies that are not yet commercial. Through the use of the word 'main' in section 3, Parliament clearly envisaged that there would be other objects of the Act beyond those related to renewable energy, but consistent with the broader emissions reduction obligation.

Paragraph 8(f) of the Act further provides, without limitation to renewable energy, that additional functions may be prescribed through regulations made under section 74 of the Act. Paragraph 8(g) allows for any other functions conferred on ARENA by this Act or any other Commonwealth law, also expressed without any link or limitation to renewable energy.

It is important to note that the authority to prescribe additional functions in paragraph 8(f) of the Act is couched in the broadest possible terms: any other functions that are prescribed by the regulations. This is also borne out in the Explanatory Memorandum to the Bill that preceded the Act, which clarifies that under paragraph 8(f) it will also be possible for regulations to be made conferring additional functions on ARENA. Presumably if Parliament had intended for the exercise of paragraph 8(f) to be limited to the subject matter of renewable energy alone, it would have made this clear in the text of the Act or in the Explanatory Memorandum.

In the absence of clear drafting to limit additional functions to renewable energy technologies, there is no reason to read an implied limitation into paragraph 8(f) on textual grounds. Nor should the objects clause at section 3 of the Act be seen as necessitating any implied limitation on paragraph 8(f). Section 3 provides that the main object of the Act is related to the subject matter of renewable energy.

At a higher level of generality, the Act, when it was enacted in 2011, envisaged an agency that would be funded to perform its functions until its statutory appropriation effectively expired on

30 June 2020. The wider context, for instance as set out in the second reading speech for the Bill that preceded the Act, was that ARENA was part of the Government's program for clean energy and emissions reductions from the start. The Act left open the possibility of ARENA continuing as part of this program beyond 2020, by necessity using new funding and in ways that might require the conferral of additional functions under paragraph 8(f). The regulations are fully consistent with this intent and concern new funding provided to ARENA and not its appropriation under section 64 of the Act.

It is also not the case that the regulations extend the operation of the Act, such that Henry VIII clauses would need to be considered. The regulations do not modify, either directly or indirectly, any of the provisions of the Act. Instead, they confer new functions on ARENA under a power that expressly allows for this to occur. In this regard it can be seen as filling out the detail of an Act rather than extending it.

In conferring the power to prescribe functions by regulations, Parliament recognised that any functions so conferred would need to be consistent with Commonwealth legislative heads of power under the Constitution and would be a disallowable legislative instrument under the *Legislation Act 2003*. This avoids any reason or need to artificially read down the general words which provide for the power to confer functions by regulations and impose limitations not present in the text of paragraph 8(f).

Finally, and importantly, this is not the first time paragraph 8(f) has been used to prescribe additional functions unrelated to renewable energy. The *Australian Renewable Energy Agency Regulation 2016* (the 2016 Regulation), as enacted under paragraph 8(f) and section 74 of the Act, granted to ARENA a new function of working with the CEFC to administer the Clean Energy Innovation Fund (the CEIF). The CEIF is a $200 million investment fund that specialises in furthering early-stage clean energy companies and technologies (not just renewable energy technologies). It is noteworthy that the 2016 Regulation, which first took ARENA beyond the subject matter of renewable energy, has been in place without challenge for over five years. It was not subject to any criticism by the then Senate Standing Committee on Regulations and Ordinances in its Delegated Legislation Monitors when made.

For these reasons, I advise that there is no sound reason to find an implied limitation in the otherwise general words of paragraph 8(f). It follows that the regulations are not beyond power and should not be held to be invalid in any way.

**Delegated legislation the most appropriate form of implementation**

You have also expressed a view that the first 2021 Regulation might effect a change significant enough to have required implementation through primary rather than secondary legislation.

While the changes effected by the regulations were capable, as a matter of law, of being made through legislation or regulation, there are strong policy reasons to enact them through regulations. Chief amongst these was timeliness in delivering on Government commitments and addressing greenhouse gas emissions in Australia.

As outlined above, the regulations provide ARENA with the power to fully implement programs announced in the 2020-21 Budget and to support the five stretch goals identified in

the first LETS. The programs commenced on 1 July 2021, while the LETS has been in effect since September 2020. It was necessary for ARENA to be given the power to implement these Government priorities as soon as possible, and regulations were identified by the Department of Industry, Science, Energy and Resources as the most effective means of doing so.

The subject matter of the regulations is also well-suited to being implemented through secondary legislation. The four targeted programs are time limited programs for the expenditure of a fixed budget, and as such are not open-ended or permanent.

Finally, the Government has committed to publish new LETS on an annual basis. The priorities articulated in the LETS will necessarily evolve over time in response to developments in technology, among other things. It follows that the regulations will need to be updated from time-to-time to reflect future LETS.

For these reasons, I advise it was both necessary and appropriate to use regulations rather than legislation to effect these changes.

Thank you for bringing the Committee's concerns to my attention.

Yours sincerely

ANGUS TAYLOR

# Senator the Hon Simon Birmingham

Minister for Finance
Leader of the Government in the Senate
Senator for South Australia


REF: MS21-000736

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the
Scrutiny of Delegated Legislation
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Dear Senator Fierravanti-Wells Connie,

I refer to your letter dated 14 July 2021 seeking information regarding the appropriateness of establishing the Commonwealth Disability Support for Older Australians (DSOA) program in primary legislation (table item 470 in Part 4 of Schedule 1AB to the *Financial Framework (Supplementary Powers) Regulations 1997*).

The Minister for Health and Aged Care, the Hon Greg Hunt MP, has provided the following advice, on behalf of the Minister for Senior Australians and Aged Care Services, Senator the Hon Richard Colbeck, who has policy responsibility for the DSOA program, in relation to the Committee's request for information.

In 2019, the Department of Health undertook a review of the Commonwealth Continuity of Support (CoS) Programme. The CoS Programme delivered services to older Australians who were receiving specialist disability services when the National Disability Insurance Scheme (NDIS) was rolled out in their area but were ineligible for the NDIS due to their age (as outlined in respective Bilateral Agreements between the Commonwealth and each state for the transition to a full NDIS). The review identified the potential for several improvements and resulted in the introduction of the replacement DSOA program from 1 July 2021.

Once fully rolled out, the DSOA program will deliver improved parity with the NDIS by changing the way services are delivered to be more individualised and align funding levels for in-scope services to those used under the NDIS. This ensures that DSOA clients are not disadvantaged over NDIS participants, as service providers will receive the same amount of funding for each in-scope service type.


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The DSOA program currently supports just under 3,000 older people with disability. To be eligible for DSOA, a person must have been receiving services under the CoS Programme. As the NDIS is now fully rolled out, access to CoS and DSOA is now closed to new entrants. Over time, as people move to the aged care system, or through death, the number of people supported by DSOA will reduce to zero.

While significant funding is attached to the program over the short to medium term, this is due to the current client base being high needs. In this regard, the DSOA program is an important program as it maintains disability support for a specific cohort of significantly vulnerable Australians, including supporting clients with complex needs to live at home or in a supported accommodation and to access increased support as their needs change.

However, DSOA is not a structural part of the Commonwealth's response to disability services. In the long term, people with similar levels of functional impairment over their lifetime are likely to become NDIS participants and will remain in the NDIS beyond age 65, unless they elect to transfer to the aged care system.

The legislative environment for DSOA is unchanged from the legislative environment used for the predecessor CoS Programme. Primary legislation is not considered necessary when compared to other programs such as the NDIS. This is on the basis that DSOA program funding is delivered through grants, there is no ongoing eligibility criteria, and that the program has a relatively short life span (as the number of people supported by the DSOA program will eventually reduce to zero).

Notwithstanding this, providers under the DSOA program are overseen by the NDIS Quality and Safeguards Commission. Jurisdiction was extended to DSOA on 29 June 2021 through the *National Disability Insurance Scheme (NDIS Provider Definition) Amendment Rules 2021.*

I have copied this letter to the Minister for Health and Aged Care and the Minister for Senior Australians and Aged Care Services.

Thank you for bringing the Committee's comments to the Government's attention.

Yours sincerely

**Simon Birmingham**

27 July 2021

**Senator the Hon Anne Ruston**

**Minister for Families and Social Services**
**Minister for Women's Safety**
**Senator for South Australia**
**Manager of Government Business in the Senate**

Ref: MC21-005332

Senator the Hon Concetta Fierravanti-Wells
Chair of Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

Dear Senator ~~Fierravanti-Wells~~ Connie

Thank you for your letter dated 24 June 2021 on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation requesting further advice on the Paid Parental Leave Rules 2021 [F2021L00384] (PPL Rules).

In your letter, the committee sought further advice in relation to the following:

- **Privacy:**
  - What factors will be considered in determining whether a person has a 'genuine and legitimate interest in the information' for each covered disclosure set out in Subdivision B of Division 2 of Part 9 of the PPL Rules
- **Adequacy of explanatory materials:**
  - Whether the statement of compatibility can be amended to include detail on how the instrument engages the right to privacy.
- **Modifications to primary legislation/Parliamentary oversight:**
  - Why it is considered necessary and appropriate to use delegated legislation, rather than primary legislation, to extend the operation of the Act to law enforcement officers and defence force members;
  - Whether the instrument can be amended to provide that Part 11 ceases within three years after commencement; and
  - Whether there is any intention to conduct a review of the relevant provisions to determine if the remain necessary and appropriate, including whether it is appropriate to include the provisions in delegated legislation.
- **Clarity of drafting:**
  - Whether subsection 11(6) is correctly drafted; and if not,
  - Whether subsection 11(6) can be redrafted to provide greater clarity as to its intended operation.

I am providing the following information to assist the committee.

**Privacy**

Section 55 of the PPL Rules prescribes factors that the Secretary must be satisfied of before certifying that a disclosure of information is necessary in the public interest, including that the person to whom the information will be disclosed has a genuine and legitimate interest in the information. Subdivision B of Division 2 of Part 9 sets out the covered disclosures. Of these, only five are new additions to the grounds already set out in the former Paid Parental Leave Rules 2010.

Identifying whether a person to whom information is to be disclosed has a genuine and legitimate interest in the information is a case by case judgement by a decision-maker, based upon the circumstances surrounding the proposed disclosure. It will be informed by the purpose of the disclosure, and is intended to minimise the information disclosed by identifying whether the disclosure needs to include particular information in order for it to be effective. This provides an additional level of surety, and informs the decision-maker's ultimate decision as to whether the disclosure is necessary in the public interest.

A range of protected information is held by my department and Services Australia for PPL purposes. This includes identifying information for claimants and other persons, sensitive information relating to birth and potentially broader health, caring arrangements for children, employment, and financial information. Only certain aspects of this information will likely be relevant to any particular disclosure.

The factors to be considered in determining whether the person has a genuine and legitimate interest in the information will vary for each of the covered disclosures. For example, a person's name, address and state of mind may be all that is necessary if information is being released because of a threat to life, health or safety under new section 56. However, research, statistical analysis and policy development may need additional information in order to allow identified aspects of the population to be analysed.

I note that for many of the covered purposes, the intended recipients, or class of recipients, are inherent in the nature of the purpose. For example:

- under section 61 (Ministerial briefing), a disclosure may only be made to a person involved in briefing a Minister (covered by subsection 55(2));
- under section 62 (Missing person), a disclosure may only be made to a court, coronial inquiry, Royal Commission, Department or other authority of the Commonwealth or a State or Territory;
- under section 67 (Reparations), a disclosure may only be made to a Department or authority of the Commonwealth, a State or Territory; and
- under section 68 (Child protection agencies), a disclosure may only be made to a child protection agency of a State or Territory;
- under section 69 (Public Housing Administration), a disclosure may only be to a Department or authority of a State or Territory, or an agent or contracted service provider of a Department or authority of a State or Territory;
- under section 71 (APS Code of Conduct investigations), a disclosure would only be necessary if it were made to a person whose role was to investigate or make a decision on a suspected breach of the APS Code of Conduct.

Where the intended recipient of a disclosure of information covered by Subdivision B is not specifically restricted by the wording of the provision, this has been done to avoid unintentionally preventing a disclosure of information from being made in relation to some future, unforeseen circumstances in which it would be preferable for a disclosure to be made.

As an example, the types of factors that are considered when determining whether a person has a genuine and legitimate interest in the information for section 65 (Research, statistical analysis and policy development) include:

- Would the person be involved in eligible research, statistical analysis or policy development (the purposes) for which the information is required? This includes:
    - a person who would use the information directly for one or more of the three purposes permitted under the section;
    - a person who would provide ancillary services to support the purpose(s) for accessing the information – for example a person:
        - reviewing the quality of the information;
        - conducting data integration;
        - transmitting information from one secure location to another; or
        - reviewing outputs to determine whether there is a risk of a person being identified.
- Has the person been nominated by a legal entity which has requested access to the information for purposes permitted under the section?
- Is a legal entity requesting access to the information for purposes permitted under this section and is it a reputable legal entity?

**Adequacy of explanatory materials**

I agree that the right to privacy under Article 17 of the International Covenant on Civil and Political Rights is engaged by Part 9 of the PPL Rules. I will undertake to update the explanatory statement to address how the right to privacy is engaged.

My department has data protections in place that safeguard the use of data (including data that might be disclosed under the additional purposes in the PPL Rules), including:

- the use of only de-identified data when conducting research, statistical analysis and policy development;
- the application of the separation principle during data integration, which keeps identifying and analytic data separate; and
- the requirement for Accredited Integrating Authorities to be used for high risk projects.

**Modifications to primary legislation and Parliamentary oversight**

Scope for the PPL Rules to modify the operation of the primary *Paid Parental Leave Act 2010* (the Act) was necessary in order to maximise the number of persons who could receive their parental leave pay directly from the entity that generally pays their salary, regardless of the nature of their relationship with that entity. The comprehensive set of rules set out in the Act use concepts specific to an employment relationship to explain the employer's obligations. These would not apply to relationships, which are not that of employer and employee without modification. The nature of modification will vary depending upon the relationship to be identified. As a result, it is appropriate that this is provided for by allowing the PPL Rules to modify the Act, giving flexibility to accommodate different circumstances.

As you note, Part 11 of the PPL Rules makes modifications to the Act to empower the Secretary to make employer determinations in relation to:

- the Police Commissioner and law enforcement officers of states other than Queensland or the Australian Capital Territory;
- the Crown in right of Queensland and Queensland law enforcement officers,
- the AFP Commissioner, and
- the Chief of the Defence Force and a person who is a defence force member.

I note that you have suggested that the application of the PPL Rules should be self-limited in this respect, repealing after a three year operation. It is in the interests of affected paid parental leave recipients that they have certainty of the full duration of their paid parental leave arrangements (which may now span two years), as to how their parental leave pay would be paid.

All these organisations requested they be specified in the PPL Rules to enable them to pay their officers and members their paid parental leave entitlements directly. Services Australia is in regular contact with these organisations about these arrangements, and they are obliged to keep my department informed if any concerns are raised with the PPL Rules or their operation, or any unintended outcomes result. This would allow the PPL Rules to be modified or repealed accordingly where warranted.

I share the committee's concerns that there should be sufficient Parliamentary oversight of provisions of this nature, but in this instance, monitoring arrangements are more appropriate than an earlier sun setting of the instrument and the uncertainty that would create.

**Clarity of drafting**

Subsection 11(6) is missing "or" after paragraph (a) and paragraph (b). My department has contacted the Office of Parliamentary Counsel, and they have agreed they will use their power under Drafting Direction No.44 to make minor, technical and editorial changes, to amend the PPL Rules 2021 to fix this omission. This will ensure that the conditions that apply to a secondary claimant (such as a partner) to qualify for a flexible PPL day are clear and clarify any ambiguity in the drafting language.

Thank you for bringing the Committee's concerns to my attention. I trust this information is of assistance.

Yours sincerely

Anne Ruston

30 / 7 / 2021