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12 February 2021

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

By email: sdlc.sen@aph.gov.au

Dear Senator

RE: Family Law Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020 [F2020L01361]

Federal Circuit Court Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020 [F2020L01362]

I refer to your letter of 4 February 2021 in relation to recent amendments to the *Family Law Rules 2004* and the *Federal Circuit Court Rules 2001*, made by a majority of Judges in each of the Family Court of Australia and Federal Circuit Court of Australia respectively, to introduce the Notice of Child Abuse, Family Violence or Risk.

The Notice of Child Abuse, Family Violence or Risk is the form that is filed at the commencement of parenting proceedings in family law where parties must report any allegations of child abuse, family violence or other risks to children. If certain allegations are made, the courts are obliged under the *Family Law Act 1975* (Cth) to report the allegations contained in the Notice to child welfare authorities in the relevant State or Territory.

Prior to the rule amendments, the form was different in each court, and whilst compulsory upon filing in the Federal Circuit Court, was only filed in the Family Court if an allegation of child abuse or family violence was made. The new form is also an improvement on previous versions, as it asks questions about a broader variety of risk factors, including substance misuse, mental ill-health, threats of harm, safety at court and wellbeing, and allows the courts to capture data about these risk factors for the first time which will enable to court to better understand and respond to those risks. The form was developed in consultation with external stakeholders including child welfare agencies and legal professional bodies and has been positively received.

The new form ensures that in both courts, the same, enhanced information is available to Judges with respect to risk, at the earliest possible stage in the proceedings, to inform their decision making in the best interests of the child. To that end, it is a critical document for the courts in identifying and responding to child abuse, family violence and other risk factors that may be present in parenting proceedings.

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In relation to the first question that is posed in your letter of 4 February 2020, given the time constraints in which a reply was necessary, the Courts are unable to provide a considered response and will answer in due course. However it should be noted that, pursuant to subsection 9(4) of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), a failure to provide a statement of compatibility with human rights does not affect the validity, operation or enforcement of a legislative instrument.

Further, it should be noted that rules of court are critical for the administration of justice and the effective operation of each court. Rules of court can only be made by a majority of judges of the relevant court, and are a manifestation of the judges' collective intention for the court's practice and procedure. It is fundamental that they are able to be amended, modernised and improved as willed by the Judges, in a timeframe appropriate to the urgency or importance of the amendment.

In relation to the second question, the courts can advise that the transitional provisions contained in each amending instrument do not have a retrospective effect, and therefore the Committee does not need to consider whether there would be any disadvantage faced by any person by their retrospective application.

The transitional provisions are designed to ensure that regardless of the stage of proceedings the parties are up to, if they are required to file a risk notification form from the commencement day of the amendment onwards, the form to be used is the Notice of Child Abuse, Family Violence or Risk, and not one of the superseded risk notification forms.

Rule 27.10 of the *Family Law Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020* simply requires that the new Notice be filed with an Initiating Application filed on or after the commencement day, or a Response to an Initiating Application filed on or after the commencement day, even if the Initiating Application was filed before the commencement day. The rule applies to an action to be taken in the future, after the commencement day, by either the Applicant or Respondent.

Similarly, rule 27.11 is dealing with the situation where, in an existing proceeding, an updated form needs to be filed, the form now to be used is the new Notice of Child Abuse, Family Violence or Risk rather than the old form.

Rule 27.12 is dealing with the situation where in an existing proceeding, after the commencement day a party makes an allegation of risk, the form to be filed is the new Notice of Child Abuse, Family Violence or Risk, rather than the old version of the form.

The transitional provisions in the *Federal Circuit Court Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020* are for the same purpose and to similar effect.

Given the rule amendments do not have any retrospective application, the importance of the Notice for assessing risk and the safety of children and vulnerable persons, and the fact that the Notice has been in effect since 31 October 2020, the Courts expect that the Committee's consideration of the instruments will be finalised without delay.

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However should you have any further queries in relation to these rule amendments, please contact my Chambers via email to Ms Jordan Di Carlo, Executive Legal and Policy Adviser: jordan.dicarlo@familycourt.gov.au.

Yours sincerely

The Honourable Justice Alstergren
Chief Justice
Family Court of Australia
Chief Judge
Federal Circuit Court of Australia

The Hon Christian Porter MP
Attorney-General
Minister for Industrial Relations
Leader of the House

MC21-002366

Senator the Hon Concetta Fierravanti-Wells
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Dear ~~Chair~~ Lorna

Thank you for your letter of 22 January 2021 regarding the *Legislation (Deferral of Sunsetting—Telecommunications Universal Service Obligation (Standard Telephone Service—Requirements and Circumstances) Determination) Certificate 2020* (the Certificate

The Committee has requested further advice as to:

- how the deferral of the sunsetting determination meets the requirements of subparagraph 51(1)(b)(i) of the *Legislation Act 2003*; and
- why it was considered that consultation with persons likely to be affected by the instrument was not required.

Requirements of subparagraph 51(1)(b)(i) of the Legislation Act 2003

Under subparagraph 51(1)(b)(i) of the Legislation Act, I may issue a certificate deferring the sunsetting date of an instrument by six, 12, 18 or 24 months, where I am satisfied that the instrument would be likely to cease to be in force within 24 months after its sunsetting day.

The Certificate extends the operation of the *Telecommunications Universal Service Obligation (Standard Telephone Service—Requirements and Circumstances) Determination (No. 1) 2011* (the Determination) for a further 24 months beyond its original sunsetting date of 1 April 2021.

The Determination sets out the conditions for a reasonable request for a standard telephone service under the Universal Service Obligation (USO), which is a statutory requirement under the *Telecommunications (Consumer Protection and Service Standards) Act 1999.* In December 2018, the Government announced the USO would be subsumed by a wider Universal Guarantee (USG), which covers broadband as well as voice services. The Government also committed to retain the USO until there were robust and proven alternatives, while undertaking to explore better ways to deliver the USG over time. Considerable work on USO reform has been undertaken and further work is ongoing with Telstra and the industry more broadly.

In making the application the then Minister for Communications, Cyber Safety and the Arts advised that he was seeking the deferral so that current work to reform the USO could proceed without distraction. He further advised that he sought the deferral on the basis that the Determination would likely cease to be in force by 1 April 2023 as he would either remake or repeal the Determination within that timeframe.

Accordingly, I considered that a 24 month deferral of sunsetting date of the Determination would allow sufficient time for a decision to be made on whether to remake the Determination as part of the USO or repeal the determination. In addition, I was satisfied that the application met the requirements of subparagraph 51(1)(b)(i) of the Legislation Act, that the Determination would be likely to cease to be in force within 24 months after the sunsetting day. This is consistent with the policy intent of the sunsetting regime, to ensure that legislative instruments should be kept up to date and only remain in force so long as they are needed.

Consultation with persons affected

Certificates of deferral are machinery in nature and enable legislative instruments that would otherwise sunset to remain in force for a further, but strictly limited, period of time. Deferrals are most commonly used to enable an effective review of whether the deferred instrument continues to be fit for purpose in the current legal environment and whether it will continue to be fit for purpose taking into account anticipated policy or legislative changes.

I understand that the proposed deferral of the Determination was raised with Telstra (as the current universal service obligation provider) before the deferral, and subsequently with the Australian Communications Consumer Action Network (ACCAN), the peak consumer group in the sector. I am advised that no concerns were raised by these bodies.

As the deferral certificate is machinery in nature, I consider that further consultation is unnecessary. This will minimise the administrative burden on stakeholders associated with additional consultation in relation to the deferral. Of course any replacement determination would be subject to parliamentary oversight, including whether adequate consultation occurred with persons likely to be affected by the determination.

In addition, the operation and possible reform of the USO has been the subject of extensive consideration and public consultation since 2015. This includes the 2015 Regional Telecommunications Review, a 2016-17 review by the Productivity Commission, work by then Department of Communications and the Arts in 2017-18 and the 2018 Regional Telecommunications Review. This work culminated in December 2018, when the Government announced that the USO would be subsumed into a wider USG.

The Government also indicated in December 2018 it would continue to work with consumers and industry on ways to improve the new USG over time. This ongoing work involves frequent engagement with ACCAN and other members of the Regional, Rural and Remote Consumer Coalition. It is clear from this engagement they continue to support the current USO, of which the Determination is a key element. While there continues to be industry interest in USO reform, this goes to larger questions of efficient delivery rather than what constitutes a 'reasonable request' for a USO service. The Determination itself has not attracted significant comment in its last 10 years of operation.

Thank you again for bringing the Committee's concerns to my attention, and I trust this information is of assistance. As the Determination is administered by the Minister for Communications, Urban Infrastructure, Cities and the Arts, I have copied him in to this response.

Yours sincerely

The Hon Christian Porter MP
Attorney-General
Minister for Industrial Relations
Leader of the House

CC. The Hon Paul Fletcher MP, Minister for Communications, Urban Infrastructure, Cities and the Arts

The Hon Darren Chester MP

Minister for Veterans' Affairs
Minister for Defence Personnel

MC20-004852

27 JAN 2021

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

Dear Senator Concetta

Thank you for your correspondence of 10 December 2020 on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee), requesting further advice in relation to the *Veterans' Affairs (Treatment Principles – Rehabilitation in the Home and Other Amendments) Determination 2020* (Rehabilitation in the Home Instrument).

The Committee requests further advice as to whether the Rehabilitation in the Home Instrument could be amended to either:

- provide for the independent merits review of decisions made by the Commissions to accept financial responsibility for a Rehabilitation in the Home program; or, if not,
- expressly provide that such decisions do not involve the exercise of discretion.

This letter responds to these two questions.

Amendment of the Rehabilitation in the Home Instrument to provide for independent merits review

The relevant primary legislation which enables the making of the Rehabilitation in the Home Instrument does not permit merits review of determinations of the type made in relation to this Instrument. This means that the Rehabilitation in the Home Instrument cannot contain a provision which is not authorised by the relevant primary legislation.

For the purposes of the *Veterans' Entitlements Act 1986* (VEA), a determination made under or in connection with new Principle 7.7B.3 of the Treatment Principles is made under Part V of the VEA. No merits review is available under the VEA in respect of such decisions. It would therefore be inconsistent with the primary legislation for the Rehabilitation in the Home Instrument to provide for review of determinations that are not capable of being reviewed under the Act itself. The instrument-making power would not extend to this.

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For the purposes of the *Military Rehabilitation and Compensation Act 2004* (MRCA), a determination made under or in connection with new Principle 7.7B.3 of the MRCA Treatment Principles is made under Chapter 6, Part 3 of the MRCA. The effect of paragraph 345(2)(h) of the MRCA is that merits review is not available in relation to determinations made under that Part. No instrument-making power in section 286 could support such review being made available.

In these circumstances, therefore, neither the VEA nor MRCA permits a determination made under the respective Treatment Principles to be subject to merits review. Moreover, to include an express merits review provision would be beyond the power and scope of the empowering primary legislation.

Detail as to availability of merits review under the VEA

Specific provisions of the VEA provide that merits review is available in respect of particular categories of decision.

For the purposes of the VEA, a determination made under or in connection with new Principle 7.7B.3 of the Treatment Principles is made under Part V of the VEA (section 84 in particular) as:

- Section 89 empowers the Repatriation Commission (the Commission) to enter into arrangements for the provision of treatment;
- Section 90 confers an instrument making-power upon the Commission in equivalent terms to that provided for in section 286 of the MRCA;
- Under section 84, the Commission may exercise powers that are broadly similar to those conferred on the MRCC by section 287 of the MRCA; in particular, the Commission may accept financial responsibility for some kinds of treatment arranged by others that are mentioned in section 90(1B)(a) (which is equivalent in terms to section 286(1)(h)) and specified in the determination: section 84(3A).

No merits review is available under the VEA in respect of decisions under Part V.

Detail as to availability of merits review under the MRCA

Unlike the VEA, the MRCA provides in general terms for the categories of decisions where merits review is available. Section 345 of the MRCA provides that only certain determinations may attract the merits review process that Chapter 8 of that Act provides.

Relevantly, merits review is only available in relation to 'original determinations' under the MRCA, that are not determinations of the kind listed in subsection 345(2) of that Act. That is, subsection 345(2) provides a list of determinations that are not considered 'original determinations' for the purposes of the MRCA and which are not subject to merits review.

Paragraph 345(2)(h) provides that determinations 'under Chapter 6 Part 3' are excluded from the list of determinations that are considered 'original determinations'.

Chapter 6 Part 3 incorporates the provision of treatment through the MRCA Treatment Principles. The Commission may arrange for treatment to be provided to an entitled person (section 287). One of the ways that the Commission may arrange for treatment to be provided is in accordance with a treatment determination made under section 286. In making a decision applying the new Principle 7.7B.3, the Military Rehabilitation and Compensation Commission (MRCC) is determining that it will accept financial responsibility for the provisions of treatment in specified circumstances; that is – in substance – a determination under section 287.

Determinations made under the new Principle 7.7B.3 are therefore characterised as being made under Chapter 6 Part 3. This means that merits review of such determinations are excluded by the Act itself.

As a consequence, the instrument-making power under section 286 of the MRCA cannot support merits review being made available under the Treatment Principles.

Amendment of the Rehabilitation in the Home Instrument to include an express provision that the determinations under 7.7B.3 do not involve the exercise of discretion

The Committee has alternatively suggested that the Rehabilitation in the Home Instrument should be amended to provide an express provision that determinations under new Principle 7.7B.3 do not involve the exercise of discretion.

This would be inappropriate as it would not accurately reflect the intended operation of the program. The program is designed to be a client-centred, coordinated and case managed approach to rehabilitation care that is based on clinical need. As part of this approach, the needs of clients will be assessed throughout the program to ensure that rehabilitation is provided appropriately. Decision makers will need to make a bona fide assessment whether the program recommended by a provider for an individual client meets the requirements of the instrument.

In most instances there will be little to no discretion exercised by a delegate of the Commissions. As I have previously noted, the delegate is limited to ensuring that the person meets other non-medical criteria and the assessment by the provider of the veteran's needs will govern the services that are provided.

The Committee has suggested there is some element of discretion in accepting financial liability for clients to receive Rehabilitation in the Home treatment under paragraph 7.7B.3. This may relate to the requirement under paragraph 7.7B.3(c), where:

> (c) in deciding whether to accept financial responsibility for the provision of Rehabilitation in the Home program, the Commission must take into account whether the medical and allied health services provided as part of the Rehabilitation in the Home program duplicate the medical and allied health services the entitled person is receiving under other provisions of the Treatment Principles (double dipping).

To this extent, the Committee is correct that there is some element of discretion. However, this discretion is limited to ensuring that there is no potential for double-dipping by providers. It is important to recognise that the client will receive the service, whether it is funded under the Rehabilitation in the Home program or under the other provisions of the Treatment Principles.

The nature of the program, and the ability of decision-makers to assess new evidence, mitigates the need for a formal merits review. Limiting the ability of decision-makers to exercise discretion in the very few cases that might require it would unnecessarily fetter the Program's ability to quickly adapt to meet the client's needs.

For the reasons above it is not considered appropriate to insert a provision that there is no discretion that will be exercised.

Informal Review

In line with previous correspondence, and despite the lack of a formal merits review mechanism, delegates of the Commissions will informally review the eligibility of clients that provide new evidence to support new decisions under the Treatment Principles. The important point for affected clients is that there must be sufficient evidence to support the making of a new decision.

I hope that this detailed explanation will alleviate the Committee's concerns.

Thank you for taking the time to bring this matter to my attention.

Yours sincerely

DARREN CHESTER

The Hon Darren Chester MP

Minister for Veterans' Affairs
Minister for Defence Personnel

MC21-000467

15 FEB 2021

Senator the Hon Concetta Fierravanti-Wells
Chair
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Parliament House
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Dear Senator

Thank you for your correspondence of 5 February 2021 on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) requesting urgent advice in relation to the *Veterans' Affairs (Treatment Principles – Rehabilitation in the Home and Other Amendments) Determination 2020* (Rehabilitation in the Home Instrument).

The Committee requested an undertaking to amend the Rehabilitation in the Home Instrument to provide for independent merits review of decisions to accept financial responsibility under the Rehabilitation in the Home program, and to make any necessary amendments to the *Veterans' Entitlements Act 1986* and the *Military Rehabilitation and Compensation Act 2004*.

The Committee's concerns have led to reconsideration of the design of the Rehabilitation in the Home program. Given the timeframe for the Senate to consider the Notice of Motion to Disallow the Rehabilitation in the Home Instrument, the Repatriation Commission and the Military Rehabilitation and Compensation Commission (the Commissions) revoked the Rehabilitation in the Home Instrument on 12 February 2021.

Following advice from the First Parliamentary Counsel, the Commissions are also intending to amend the Treatment Principles, and this will occur before 22 February 2021 (the date the period for disallowance ceases). These amendments will remove the provisions relating to the Rehabilitation in the Home program from the Treatment Principles, which is a necessary step as they have already commenced.

Taking both these steps will allow time to accommodate the Committee's concerns as part of the program re-design. If the Commissions determine a new instrument is required, it will incorporate merits review if access to the Rehabilitation in the Home program is to be determined through a discretionary decision-making process. A minor amendment to the existing instrument was not considered to be sufficient to address the concerns of the Committee.

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For the Committee's awareness, at this stage no clients have been accepted into the program, and no contractual arrangements have been entered into with providers. Therefore, there is no adverse effect from revoking the instrument at this time, amending the Treatment Principles and reviewing the program's design.

Thank you for taking the time to write.

Yours sincerely

DARREN CHESTER