

# Monitor 11 of 2023 – Ministerial Response

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## Attorney-General

Reference: MS23-001162

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

By email: [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au)

Dear Senator

I write to the Committee to provide advice on the concerns raised by the Committee in its *Delegated Legislation Monitor 9 of 2023*, tabled in the Senate on 6 September 2023. Specifically, the Committee sought my advice with respect to the conferral of discretionary powers and the availability of independent merits review under the *National Anti-Corruption Commission Regulations 2023* (the Regulations).

Thank you for taking the time to review the Regulations and raising your concerns. I enclose detailed advice with respect to your enquiries.

I trust this information will assist the Committee in its consideration of the Regulations.

Yours sincerely

  
**THE HON MARK DREYFUS KC MP**

22 / 9 /2023

**Encl. Enclosure A – Detailed advice**

**The Committee requests the Attorney-General's advice as to:**

- **what factors the relevant decision-maker must take into account when exercising their discretion under the above provisions; and**
- **whether any safeguards and limitations apply to the exercise of these powers, and whether such safeguards are contained in law or policy.**

The *National Anti-Corruption Commission Regulations 2023* (the Regulations) provide for a financial legal assistance scheme under Part 4 in relation to non-parliamentarians and Part 5 in relation to parliamentarians.

*Conferral of discretionary powers – Part 4 of the Regulations*

The factors the relevant decision-maker must consider when exercising discretion under subsections 13(3), 14(2) and section 15 of the Regulations are contained in the *Commonwealth Guidelines for Legal Financial Assistance 2012* (the Commonwealth Guidelines).

The Commonwealth Guidelines also contain safeguards and limitations on the decision-maker's discretion under these provisions, as outlined below.

Part 4

Part 4 of the Regulations enables the Attorney-General to approve applications for legal financial assistance for non-parliamentarians in relation to legal representation at a NACC hearing or an application for judicial review. Discretion to grant assistance is a common feature of other Commonwealth legal financial assistance schemes. The discretion allows applications to be considered on a case-by-case basis, promoting fairness and equity of access to the justice system.

The Attorney-General has discretion to grant legal financial assistance if they are satisfied that it would involve substantial hardship to the person to refuse the application, or the circumstances of the case are of such a special nature that the application should be granted.

Under the Commonwealth Guidelines, applications under Part 4 will be assessed in accordance with specified criteria. This includes an assessment of the applicant's financial means to meet the cost of the legal action, the availability of funds and reasonableness of the grant amount requested.

The application will be assessed in accordance with the information submitted by the applicant or on their behalf, as well as the department's obligations under the *Public Governance, Performance and Accountability Act 2013*. The decision maker may decide the weight that should be given to each matter relevant to the circumstances of the case (section 5.1(3) of the Commonwealth Guidelines). These factors limit the scope of the discretionary powers conferred under Part 4 of the Regulations.

The Commonwealth Guidelines also contain safeguards for the exercise of discretionary powers under Part 4 of the Regulations. Under the Commonwealth Guidelines, decision-makers are required to comply with the *Commonwealth Grants Rules and Guidelines 2017* (CGRGs). In particular, under the CGRGs, information on individual grants of legal financial assistance under Part 4 of the Regulations must be reported on GrantConnect no later than 21 calendar days after the grant agreement takes effect. This transparency and accountability measure ensures public access to timely information about individual grants. Secondly, the CGRGs and the Commonwealth Guidelines require officials to establish ongoing monitoring and management arrangements to ensure the grant of relevant money is being appropriately managed.

*Conferral of discretionary powers – Part 5 of the Regulations*

The broad discretions conferred on decision-makers under sections 20 and 21 of the Regulations align with those under the *Parliamentary Business Resources Regulations 2017*. These discretions are necessary to ensure that parliamentarians can access assistance that is broadly equivalent to that available to non-corporate Commonwealth entity employees and ministerial

staff under Appendix E of the *Legal Services Directions 2017*, which would otherwise be available to current and former Ministers and Assistant Ministers under the PBR Regulations.

Part 5 of the Regulations establishes a scheme for current and former parliamentarians to apply for legal financial assistance in relation to an eligible matter. Section 17 of the Regulations defines an eligible matter as follows:

- any matter arising under or in relation to the Act (other than a prosecution for an offence under the Act); or
- an application or proposed application to the Federal Court for an order of review under the ADJR Act.

To approve the grant of legal financial assistance, under section 20 of the Regulations, the approving official must be satisfied that:

- the parliamentarian's involvement in the matter arose only because of their role as a parliamentarian; or
- that their involvement in the matter relates to the performance or non-performance of their duties as a parliamentarian; and
- it is appropriate to provide the assistance.

The Regulations do not specify any particular matters the decision-maker must consider when determining whether it is appropriate to provide the assistance under paragraph 20(2)(b). This is consistent with the scope of eligible matters under section 17.

Subsection 20(5) of the Regulations provides the decision-maker a discretion to defer whether to approve payment of legal financial assistance until the eligible matter reaches a point at which the approving official considers it is appropriate to make the decision. The Regulations do not limit the matters to which the approving official may have regard in making a deferral decision under subsection 20(5). As outlined above, this discretion is appropriate to allow flexibility to consider applications on a case-by-case basis.

The Part 5 scheme is informed by the existing legal financial assistance scheme for current and former Ministers under the *Parliamentary Business Resources Regulations 2017* (PBR Regulations). The PBR Regulations confer similarly broad discretions on the relevant decision-makers as those contained in the Regulations – for example:

- the discretion to impose conditions on the approval of legal financial assistance (subsection 21(1)) and to assess the reasonableness of costs (subsection 21(2)) reflects the discretion with respect to these matters under the PBR Regulations; and
- the ability for the approving official to reduce legal financial assistance in certain circumstances and defer a decision until it is appropriate to make is also consistent with the PBR Regulations.

The discretionary powers in Part 5 are limited by:

- the definition of “eligible matter” in section 17 of the Regulations. This provision requires the decision-maker to first assess whether the application relates to a matter arising under the Act, whether it is a prosecution for an offence against the Act, or whether it is an application or proposed application to the Federal Court for an order of review under the *Administrative Decisions (Judicial Review) Act 1977*; and
- the requirement in subsection 20(2) of the Regulations for the decision-maker to be satisfied that the applicant's involvement in the eligible matter arose only because the applicant is, or has been, a parliamentarian, or that the eligible matter relates to the performance or non-performance by the applicant of their duties as a parliamentarian.

This provision requires the decision-maker to consider the nature of the eligible matter and whether it is sufficiently connected to the applicant's role as a parliamentarian.

The discretionary powers in Part 5 are also subject to the following safeguards:

- the condition in subsection 21(2) of the Regulations requiring the Secretary to certify the costs of an applicant's legal representation and disbursements as reasonable. This condition prevents the approving official's broad discretion to determine when assistance is appropriate from being misused to approve unreasonable expenditure amounts;
- the requirement in section 24 of the Regulations for the Secretary to monitor strategies adopted by the applicant in eligible matters for which financial assistance under Part 5 has been approved, and to inform the approving official if they believe proposed expenditure is unreasonable. This ongoing monitoring requirement similarly prevents the approving official's broad discretion from being misused to approve unreasonable expenditure; and
- the reporting requirements in subsection 25(1) of the Regulations. Paragraph 25(1)(a) of the Regulations requires the Attorney-General to inform each House of the Parliament of each decision to pay legal financial assistance under Part 5, as soon as possible. The Attorney-General must disclose the reasons for the decision and any limits on expenditure. Similarly, paragraph 25(1)(b) requires the Attorney-General to annually table in each House of the Parliament a consolidated statement of expenditure under Part 5 for that financial year. The consolidated statement must specify the expenditure for each matter. These reporting requirements provide transparency and accountability for the exercise of the discretionary powers under Part 5, as it ensures the Parliament and the public can access timely information on decisions to approve legal financial assistance.

**The Committee requests the Attorney-General's advice as to:**

- **whether the decisions under subsections 6(7) and 7(8) (in Part 2) of the instrument are subject to independent merits review and, if not, what characteristics of those decisions justify the exclusion of independent merits review, by reference to the factors set out in the Administrative Review Council's guidance document, *What decisions should be subject to merits review?*; and**
- **what characteristics of the decisions in Part 4 of the instrument justify the exclusion of independent merits review, by reference to the factors set out in the Administrative Review Council's guidance document, *What decisions should be subject to merits review?***

Decisions under subsections 6(7) and 7(8) in Part 2 of the Regulations are not subject to independent merits review.

In accordance with the Administrative Review Council guidance document *What decisions should be subject to merits review?* the decisions under subsection 6(7) and subsection 7(8) are not appropriate for merits review because they require the allocation of a finite resource between competing applicants for legal financial assistance. There is a finite amount of funding available for these purposes. All persons deemed eligible under subsections 6(1) and 7(1) are entitled to be paid the expenses of travel, and accommodation and meals, in order to appear at a hearing. The entitlement is subject to section 8, which provides that no allowance is payable under Part 2 where some or all of those costs are met by the Commission directly.

As there is limited available funding for these purposes, any change to the amount or amounts allocated to one party as a result of overturning an original decision would likely have a direct effect on the allocations for other applicants. It would also create uncertainty for the Commission in distributing funding and has the potential to disadvantage competing applicants, particularly as it could create a situation where funds are not fully or immediately available to all eligible applicants, which could directly impact their statutory entitlements. For these reasons, the decisions under subsection 6(7) and subsection 7(8) are inappropriate for merits review.

In addition, the decision under subsection 7(8) is not appropriate for merits review because it is a decision that automatically follows from a set of circumstances occurring, and leaving no opportunity for a merits review to operate. Under subsection 7(8), the decision-maker is required to limit the expenditure to a predetermined maximum accommodation and meals allowance. These maximum amounts are set out in Table 6A and 6B of the Remuneration Tribunal (Official Travel) Determination 2022. The Determination is incorporated into the Regulations by subsection 7(2). The requirement under subsection 7(8) to reduce the maximum allowance payable to the predetermined amount for accommodation and meals allowance is not a discretion on whether or not to grant the allowance.

For example, if a witness travelled to Canberra, the maximum accommodation and meals allowance would be \$311. If the witness was granted an allowance but incurred expenses greater than \$311, subsection 7(8) would require the decision-maker to reduce the allowance payable to \$311. This means that in practice, the decision-maker has no discretion under subsection 7(8) as it only requires confirmation that the expenses incurred or likely to be incurred are equal to or less than the set amount in the determination. The decision under subsection 7(8) is therefore not a discretion, but is mandatory following a decision to grant an allowance under subsection 7(1), leaving no room for a merits review. Subsection 7(8) is included in the Regulations in this form to ensure the amounts payable to eligible applicants provide a reasonable amount of financial support and are consistent with similar arrangements across the Commonwealth.

Similarly, decisions under Part 4 are inappropriate for merits review for the reasons set out above because they also require the allocation of a finite resource between applicants based on the administered funding allocated for the Part 4 scheme under the Regulations.