



AUSTRALIAN
SENATE

**Senate Standing Committee for the
Scrutiny of Delegated Legislation**

Parliament House, Canberra ACT 2600
02 6277 3066 | sdlc.sen@aph.gov.au
www.aph.gov.au/senate_sdlc

8 October 2020

Senator the Hon Richard Colbeck
Minister for Aged Care and Senior Australians
Parliament House
CANBERRA ACT 2600

Via email: Senator.Colbeck@aph.gov.au

CC: Minister.Colbeck.DLO@health.gov.au;
parliamentary.committees@health.gov.au

Richard

Dear Minister,

Contenance Aids Payment Scheme 2020 [F2020L00758]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all legislative instruments subject to disallowance, disapproval or affirmative resolution by the Senate against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and the committee seeks your advice in relation to this matter.

Availability of independent merits review

Senate standing order 23(3)(i) requires the committee to examine each legislative instrument as to whether it unduly excludes, limits or fails to provide for independent review of decisions affecting rights, liberties, obligations or interests.

Where an instrument empowers a decision-maker to make discretionary decisions with the capacity to affect rights, liberties, obligations or interests, the committee ordinarily expects that those decisions should be subject to independent merits review.

Decisions made by the secretary under sections 21 and 22 of the instrument to approve a responsible person in relation to an individual, and to direct the Chief Executive Medicare to decline to make a continence aids payment scheme payment to an organisation, appear to be discretionary decisions affecting the rights and interests of individuals and would therefore be suitable for independent merits review. However, neither the instrument nor the explanatory statement indicates whether these decisions are reviewable.

While sections 14 and 15 of the *National Health Act 1953* (the Act) provide for merits review by the Administrative Appeals Tribunal (AAT) of decisions made by the Chief Executive Medicare that an applicant or participant is not eligible to participate in the scheme, the Act is silent in relation to other decisions, including in relation to the decisions

that may be made by the secretary under sections 21 and 22 of the instrument. The committee does not consider the fact that the Act specifically provides for merits review of some decisions excludes the provision of merits review for other decisions. The committee therefore considers that it is open under the Act for the instrument to provide for access to independent merits review by the AAT of decisions made under sections 21 and 22 of the instrument.

Accordingly, the committee requests your advice as to:

- **what characteristics of the decisions made by the secretary under sections 21 and 22 of the instrument justify the exclusion of independent merits review, by reference to the established grounds set out in the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*; or**
- **if the decisions are considered suitable for independent merits review, whether the instrument can be amended to provide for independent merits review by the Administrative Appeals Tribunal of decisions made under sections 21 and 22.**

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **22 October 2020**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair

Senate Standing Committee for the Scrutiny of Delegated Legislation



SENATOR THE HON RICHARD COLBECK

Minister for Aged Care and Senior Australians

Minister for Youth and Sport

Ref No: MS20-001201

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

28 OCT 2020

Dear Chair *Concetta,*

Thank you for your correspondence of 8 October 2020 regarding the Senate Standing Committee for the Scrutiny of Delegated Legislation (Committee) concerns with the *Continence Aids Payment Scheme 2020* (CAPS Instrument).

I have considered the Committee's request and agree to amend the CAPS Instrument to provide for internal merits review for the decisions in sections 21 and 22.

The Department of Health, in consultation with the Australian Government Solicitor considers the possibility of any request for reviews under section 21 and 22 of the CAPS Instrument to be of such low risk that it does not require independent merits review by the Administrative Appeals Tribunal (AAT). The eligibility for CAPS is very clear, all applications must be supported by a GP and no further assessment is made by the Department of Health and any eligibility questions arising from an applicant's concession card status are determined by the Department of Social Services before an application to the CAPS program can be made.

I would also like to advise the Committee that Services Australia, who administer the CAPS payments on behalf of the Department of Health, has confirmed that the Secretary to date has never been required to make a decision under sections 21 and 22 of the CAPS Instrument.

Finally, Section 14 and 15 of the *National Health Act 1953* limit the types of decisions under the CAPS Instrument that may be subject to AAT review, and that without an express power for the CAPS Instrument to provide for this, the instrument cannot otherwise confer power on the AAT to review decisions under the scheme.

If you wish to discuss this response to the Committee's questions then please contact Chris Carlile, Assistant Secretary, Hearing and Disability Interface Branch on (02) 6289 2727.

Yours sincerely

Richard Colbeck



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12 November 2020

Senator the Hon Richard Colbeck
Minister for Aged Care and Senior Australians
Parliament House
CANBERRA ACT 2600

Via email: Senator.Colbeck@aph.gov.au
CC: Minister.Colbeck.DLO@health.gov.au;
parliamentary.committees@health.gov.au


Dear Minister,

Contingence Aids Payment Scheme 2020 [F2020L00758]

Thank you for your response of 28 October 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation in relation to the above instrument.

The committee considered your response at its private meeting on 11 November 2020 and has resolved to seek your further advice about the issues outlined below.

Availability of independent merits review

The committee welcomes your undertaking to provide for internal review of decisions made under sections 21 and 22 of the instrument; however, the committee reiterates its longstanding scrutiny view that it does not consider internal review to be an appropriate substitute for independent merits review.

In your response you advised that there is a low risk of any request for reviews of these decisions and that to date no decisions have been made under sections 21 or 22 of the instrument. While acknowledging this advice, the committee does not consider the low risk of review is an appropriate justification for the exclusion of independent merits review.

You also advised that sections 14 and 15 of the *National Health Act 1953* (the Act) limit the types of decisions under the instrument that may be subject to review by the Administrative Appeals Tribunal. However, as noted in my initial letter, the committee does not consider the fact that the Act provides for merits review of some decisions excludes the provision of merits review for other decisions. In this regard, the committee has long considered that the failure of an enabling Act to provide for independent merits review is not, of itself, a sufficient justification for failing to provide for independent merits review of discretionary decisions. Furthermore, the enabling provision for the instrument

(section 12 of the Act) does not appear to specifically exclude the provision of independent merits review beyond what is provided for in sections 14 and 15 of the Act.

Finally, the committee notes that your response did not explicitly address whether there is any justification for the exclusion of independent merits review of decisions made under sections 21 and 22 of the instrument, by reference to the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*.

Accordingly, the committee requests your further advice as to whether the instrument can amended to provide for independent merits review by the Administrative Appeals Tribunal of decisions made under sections 21 and 22.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **26 November 2020**.

Finally, please note that, in the interests of transparency your undertaking to amend the instrument will be recorded in the *Delegated Legislation Monitor*, and that this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair

Senate Standing Committee for the Scrutiny of Delegated Legislation



SENATOR THE HON RICHARD COLBECK

Minister for Aged Care and Senior Australians

Minister for Youth and Sport

Ref No: MS20-001337

24 NOV 2020

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 correspondence of 12 November 2020 concerning the Senate Standing Committee for the Scrutiny of Delegated Legislation (Committee) concerns with the *Continence Aids Payment Scheme 2020* (CAPS Instrument).

The Committee has sought my further advice as to whether the CAPS Instrument can be amended to provide for independent merits review by the Administrative Appeals Tribunal (AAT) of decisions made under sections 21 and 22 of the CAPS Instrument.

As discussed in my letter of 28 October 2020, I am advised that sections 14 and 15 of the *National Health Act 1953* (NH Act) may operate to limit (by implication) the types of decisions that may be subject to AAT review under the CAPS Instrument. However, I note the Committee's view that it does not consider that the fact that the NH Act specifically provides for merits review of some decisions excludes the provision of merits review for other decisions.

I have considered the matters raised in your correspondence and will seek to amend the CAPS Instrument to provide for merits review by the AAT of decisions made under sections 21 and 22 of the Instrument, in addition to internal review. However, there would remain a risk that an instrument providing for AAT review of decisions not covered by section 14 or 15 of the NH Act may be invalid. To address this risk, I have asked the Department of Health to progress amendments to the NH Act to put this issue beyond doubt.

I will advise the Committee when the amendments have been made to the CAPS Instrument.

Yours sincerely

Richard Colbeck



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3 December 2020

Senator the Hon Richard Colbeck
Minister for Aged Care and Senior Australians
Parliament House
CANBERRA ACT 2600

Via email: Senator.Colbeck@aph.gov.au
CC: Minister.Colbeck.DLO@health.gov.au;
parliamentary.committees@health.gov.au

Dear Minister,

Continance Aids Payment Scheme 2020 [F2020L00758]

Thank you for your response of 24 November 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument.

The committee considered your response at its private meeting on 2 December 2020. On the basis of your advice, the committee has concluded its examination of the instrument.

The committee welcomes your undertaking to amend the instrument to provide for independent merits review by the Administrative Appeals Tribunal of decisions made under sections 21 and 22 of the instrument. The committee also welcomes your broader undertaking to progress amendments to the *National Health Act 1953* to expressly provide that instruments which are made under sections other than sections 14 and 15 of the Act, are not invalid as a consequence of providing for independent merits review.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

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