



AUSTRALIAN
SENATE

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

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13 May 2021

The Hon Greg Hunt MP
Minister for Health and Aged Care
Parliament House
Canberra 2600 ACT

Via email: Minister.Hunt.DLO@health.gov.au

CC: rezana.berman@health.gov.au


Dear Minister,

National Health (Data-matching) Principles 2020 [F2021L00006]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. As advised in my letter dated 28 April 2021, the committee secretariat has been liaising with your department in relation to potential scrutiny concerns in the above instrument. The committee has now considered the instrument with the benefit of the department's advice, and has resolved to seek further formal advice from you in relation to the matters outlined below.

Availability of independent merits review

Senate standing order 23(3)(i) requires the committee to consider whether an instrument unduly excludes, limits or fails to provide for the independent review of decisions affecting rights, obligations or interests.

Subsection 18(6) of the instrument provides that the Chief Executive Medicare must take such steps (if any) as are reasonable in the circumstances to correct personal information that has been matched by the Chief Executive Medicare or by an authorised Commonwealth entity if the relevant individual requests that the Chief Executive Medicare corrects the information. This appears to enable the Chief Executive Medicare to exercise discretion in determining what reasonable steps may be taken.

However, neither the instrument nor the explanatory statement indicates whether such decisions are subject to independent merits review.

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. The committee therefore expects the explanatory statement to any instrument including such powers to explain whether independent merits review is available.

If merits review is not available, the committee expects the explanatory statement to identify the characteristics of the relevant decisions which justify their exclusion from merits review with reference to the Administrative Review Council's guide, *What decisions should be subject to merit review?*

The committee understands that the view of the Department is that decisions made under subsection 18(6) of the instrument are not appropriate for merits review and that this is in line with the Administrative Review Council's guidelines. However, the committee's scrutiny concerns remain in relation to this matter.

The committee notes that the privacy of individuals may be impacted through the use of personal information under subsection 18(6). It is unclear from the explanatory statement whether the Information Commissioner may have oversight and review obligations in relation to the use and correction of personal information under this subsection.

The committee would therefore appreciate your advice as to:

- **whether decisions made by the Chief Executive Medicare under subsection 18(6) are subject to independent merits review; and if not, what characteristics of the decision justifies 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?*; and**
- **whether the Information Commissioner has a merits review function in this context.**

Parliamentary oversight – technical standards are not legislative instruments

Senate standing order 23(3)(k) requires the committee to consider whether an instrument complies with any other ground relating to the technical scrutiny of delegated legislation. This includes where significant elements of a scheme are set out in non-legislative instruments.

Section 6 of the instrument provides that the Chief Executive Medicare must prepare and maintain, in writing, technical standards to govern the conduct of each authorised data-matching program. In matching information under subsection 132B(1) of the *National Health Act 1953* for an authorised data-matching program, the Chief Executive Medicare and an authorised Commonwealth entity must comply with the technical standards for the program. Further, the committee understands that the technical standards are not intended to be published.

The committee understands that the Department's position is that these technical standards are administrative as opposed to legislative in character. However, the committee notes subparagraph 8(4)(b)(i) of the *Legislation Act 2003* (Legislation Act) which specifies that an instrument is a legislative instrument if any provision of the instrument "determines the law or alters the content of the law, rather than determining particular cases or particular circumstances in which the law, as set out in an Act or another legislative instrument or provision, is to apply, or is not to apply".

The committee considers that the technical standards appear to be determining the content of the law, as subsection 132B(3) of the *National Health Act 1953* requires an authorised Commonwealth entity to comply with the technical standards. Therefore, it is the committee's view that the technical standards provided for by this instrument ought to be considered legislative instruments as they appear to satisfy the above definition in the Legislation Act.

The committee would therefore appreciate your advice as to:

- **why it is considered that the technical standards are not legislative instruments; and**
- **why it is considered appropriate that the technical standards are not subject to publication.**

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. As previously advised, noting that the 15th sitting day after the instrument was tabled in the Senate was 11 May 2021, the committee gave a notice of a motion to disallow the instrument on that day 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 **27 May 2021**.

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