

Monitor 2 of 2022 – Ministerial Responses

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Senator the Hon Simon Birmingham

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

REF: MS22-000018

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

Dear Senator Fierravanti-Wells

I refer to your letter dated 6 December 2021 seeking information about the *Financial Framework (Supplementary Powers) Amendment (Health Measures No. 6) Regulations 2021* [F2021L01430], which inserted item 506 'COVID-19 vaccine claims scheme' in Schedule 1AB to the *Financial Framework (Supplementary Powers) Regulations 1997*.

The Minister for Health and Aged Care, the Hon Greg Hunt MP, who has policy responsibility for the COVID-19 Vaccine Claims Scheme (the Scheme), has provided the attached response to your request for information. Further, I agree to replace the explanatory statement for the *Financial Framework (Supplementary Powers) Amendment (Health Measures No. 6) Regulations 2021* to reflect the reduced claim threshold of \$1,000 under the Scheme, as requested by the Committee and the responsible Minister.

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

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

Yours sincerely

Simon Birmingham

25 January 2022

Financial Framework (Supplementary Powers) Amendment (Health Measures No. 6) Regulations 2021 [F2021L01430]

Response provided by the Minister for Health and Aged Care

The Australian Government agreed that the legislative authority for the COVID-19 Vaccine Claims Scheme (the Scheme), which has been developed to support the rollout of vaccines for managing the pandemic, would be provided under the *Financial Framework (Supplementary Powers) Regulations 1997*.

The *Financial Framework (Supplementary Powers) Amendment (Health Measures No. 6) Regulations 2021* (the Regulations) were made urgently to provide legislative authority to allow the Commonwealth to provide rapid compensation to individuals who have suffered moderate to significant harm following an adverse reaction to a TGA approved COVID-19 vaccine. This approach was taken to support the success of the COVID-19 vaccination program, which is currently underway.

It is essential to maintain confidence in the vaccination program to ensure maximum public participation. The Scheme is an important component to build and maintain public confidence. Extensive consultation and stakeholder engagement have been undertaken to finalise the Scheme Policy document, which is now available publicly on the Department of Health website. The Scheme officially commenced on 13 December 2021 with considerable public interest and claims have already been made.

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) has requested more detailed advice as to the following questions:

Conferral of discretionary powers

- *who will exercise the power to make decisions and recommendations under the COVID-19 Vaccine Claims Scheme, including whether those persons will be required to have the appropriate skills, qualifications and experience to exercise the powers, and for Australian Public Service decision makers, whether there is a requirement for these decision makers to be limited to members of the SES; and*
- *whether any safeguards or limitations apply to the exercise of these powers, and whether these safeguards are contained in law or policy.*

There are three tiers of claims within the Scheme:

1. Tier 1 claims relate to claims between the amounts of \$1,000.00 to \$19,999.99;
2. Tier 2 claims relate to claims of \$20,000.00 or more; and
3. Tier 3 claims relate to claims involving harm that caused, or contributed to, the death of a COVID-19 vaccine recipient.

Under subsection 32D(3) of the *Financial Framework (Supplementary Powers) Act 1997*, the accountable authority of the Department of Health has delegated their powers, functions and duties to certain officials at Services Australia.

Officials at Services Australia administer the Scheme on behalf of the Commonwealth. This is appropriate given Services Australia's extensive experience in assessing and administering Commonwealth claim schemes as part of its core business to government. Trained and dedicated officials at various levels at Services Australia are responsible for assessing and authorising the payment of compensation of eligible Tier 1 claims. Services

Australia will ensure that such officials have the appropriate expertise and training to undertake the assessment and authorisation of payments, consistent with the management of other claim schemes across social, health and child support services.

Services Australia appropriately manages the risk associated with the different claim tiers in accordance with the Scheme Policy. Claims under \$20,000 submitted in accordance with the guidelines are anticipated to be relatively straightforward and like other programs administered by Services Australia will not ordinarily justify a decision being made by a member of the Senior Executive Service (SES). Other claims however are likely to warrant consideration at more senior levels depending on the complexity of the claim and the magnitude of the compensation.

Officials at Services Australia have access to appropriate medical officers at the Department of Health as required in order to assess claims. Tier 2 and Tier 3 claims may be referred under the Scheme Policy to these medical officers for initial medical assessment. In addition, officials at Services Australia may refer Tier 2 and Tier 3 claims as well as complex Tier 1 claims for assessment by an independent expert panel. The panel consists of legal service providers, experienced in personal injury claims and administrative law who have been engaged by the Commonwealth to assess claims and to make recommendations in accordance with the Scheme Policy, procured through the Whole of Australian Government Legal Services Panel.

Members of the panel are required to assess claims in accordance with the Scheme Policy and subsequently make detailed written recommendations to the Decision Maker as to whether the claim meets the applicable eligibility requirements of the Scheme, and if so, the amount of compensation payable. Decision makers are delegates of the Secretary of the Department of Health in accordance with section 32D of the *Financial Framework (Supplementary Powers) Act 1997*.

Under the Scheme Policy, a claimant may apply for internal review of the decision made in respect of their claim if the Decision Maker has determined that no compensation was payable, or the claimant is dissatisfied with the amount of compensation determined and offered. The review will be undertaken by another Decision Maker at a more senior level in Services Australia with an appropriate degree of independence from the primary Decision Maker.

Consistent with internal review mechanisms afforded across the Commonwealth, the internal review process established by the Scheme Policy enables claimants to test decisions affecting them. Internal review is a fair, transparent and merits-based mechanism for contesting decisions made under the Scheme. The process is accessible to all claimants without cost or barrier to improve the quality, efficiency and effectiveness of decisions under the Scheme.

Privacy

- *advice as to the nature, scope and extent of personal information that may be collected under the Scheme;*
- *who, or which entities, this information can be disclosed to; and*
- *whether any statutory or other safeguards apply to protect this personal information more broadly, including whether the Privacy Act 1988 applies.*

As part of an application for compensation, claimants are required to provide personal information, including medical information such that the Commonwealth is able to confirm that an injury has occurred as a result of a TGA-approved COVID-19 vaccine, administered through a Commonwealth Government Approved Program, and assess the claim and relevant amounts payable. Personal information will only be collected, used and disclosed with the consent of the claimant.

To verify any claim information, Services Australia may disclose collected personal information to the COVID-19 vaccine recipient's medical practitioners or other treatment providers. Personal information will be de-identified and generated into reports that are sent to the Department of Health and the Australian Government Actuary for monitoring and reporting on the Scheme.

Where there is suspected misconduct on the part of a health practitioner, personal information may be provided to the Australian Health Practitioner Regulation Agency with the consent of the Scheme claimant. We consider that it is a permitted general situation under Australian Privacy Principles 3.4(b), 6.2(c), 8.2(d) and 9.2(d) to use or disclose personal (and sensitive) information in order to take appropriate action in relation to suspected unlawful activity or serious misconduct.

As APP entities, Services Australia and the Department of Health are bound to comply with the *Privacy Act 1988*. Services Australia and Health have jointly commissioned a Privacy Impact Assessment in relation to the Scheme to ensure privacy risks have been identified and addressed throughout the development of the Scheme, and to confirm that the Scheme's implementation will not give rise to unacceptable privacy outcomes.

Availability of independent merits review

- *advice as to whether independent merits review can be provided for decisions made under the Scheme, and if not, a detailed explanation of why an independent merits review is not appropriate.*

The Administrative Appeals Tribunal (AAT) can only review decisions where the legislation specifically states the AAT may review. As the Scheme is not legislated, AAT review is not available. As an alternative, an internal merits review process has been established such that if a claimant is not satisfied with the decision made in respect of their claim, the claimant may seek a reassessment by another Decision Maker at a higher level in the public service (Decision Maker on Review).

Prior to compensation being accepted and a settlement deed being executed, an application for review can be submitted and undertaken by Services Australia. The claimant may provide further evidence or information in support of their claim for review within 28 days of submitting their application for review.

The Decision Maker on Review will review the decision and determine whether the claimant is entitled to compensation and, if so, the amount of compensation that should be paid to the claimant. Services Australia and/or the Decision Maker on Review may involve or seek input from the independent expert panel and/or a relevant medical officer in relation to the review of a claim. The decision of the Decision Maker on Review will supersede and replace the original decision.

The availability of this internal review process is intended to ensure that administrative decisions in relation to the Scheme are correct and in accordance with the Scheme Policy. The objective is to ensure fair treatment of all persons affected by a decision, and consistency, openness and accountability of decisions made. Judicial review of any decision made under the Scheme is also available under section 39B of the *Judiciary Act 1903* and section 75(v) of the Constitution. The basis for seeking review under these mechanisms is broadly the same as the grounds on which judicial review may be sought under section 5 of the *Administrative Decisions (Judicial Review) Act 1976*.

Matters more appropriate for parliamentary enactment

- *whether the Scheme can be established via primary legislation, and if not, a detailed explanation of why it is considered necessary and appropriate to use delegated legislation, rather than primary legislation, to establish the Scheme.*

The COVID-19 pandemic outbreak is continuing and it is essential to encourage the Australian population to get vaccinated and to continue obtaining booster doses as recommended by Australian public health experts. A key element of the vaccination effort is to assure the population that compensation is available for persons who experience an adverse side effect and suffer loss or injury as a result of a TGA-approved COVID-19 vaccine administered through a Commonwealth Government Approved Program. The decision to establish a ‘no fault compensation scheme’ was also intended to address concerns expressed by relevant medical, insurance and business sectors who were essential to support such a large public health undertaking in delivering vaccines to Australians and reducing the potential transmission and negative health outcomes that would be resultant from a less vaccinated population.

For this reason, a Schedule 1AB item was created urgently in parallel with the COVID-19 vaccine rollout, to provide legislative authority for payments to be made to eligible claimants, rather than being established through primary legislation given the risk that primary legislation may not have been made in the calendar year. The Government was compelled to reassure the public urgently during the pandemic. Similar to other COVID-19 related programs, the Government concluded that the most effective mechanism for the urgent establishment of the Scheme was under the Financial Framework (Supplementary Powers) legislation.

Importantly, the Scheme does not involve the kinds of considerations outlined in paragraph 1.10 of the Legislation Handbook that usually dictate the use of primary legislation, such as appropriations of money; provisions imposing obligations on individuals or organisations to undertake certain activities; or the imposition of taxes and offences. Similarly, the Scheme does not involve the features outlined at principle (j) of the Scrutiny Guidelines issued by the Committee in February 2020, which also go to this issue.

Parliamentary oversight

- *whether at least a high-level indication as to the total amount of funding that is expected to be expended on the Scheme can be provided to the Parliament while the Regulations are still subject to disallowance, noting the importance of effective parliamentary oversight of executive expenditure.*

We appreciate the critical importance of effective oversight of executive expenditure. However, anticipating funding by the nature of claims that might be made is extremely

difficult. Present statistics indicate that a very small number of persons vaccinated required medical treatment or died following the administration of the vaccine, but those events are not necessarily directly related. The number of hospitalisations and reported side effects are possibly indicative, in addition to approximately 15,000 persons registering their interest in making a claim. However, these parameters are not representative of claims that may necessarily succeed under the Scheme.

Parliamentary oversight

- *advice as to why crucial aspects of the Scheme, including the eligibility criteria, evidentiary requirements, the process for making a claim and the list of conditions for which a claim may be (or may not be) payable will be determined by guidelines and materials that are not legislative instruments subject to disallowance by Parliament;*

Details of the Scheme have been determined by guidelines (Scheme Policy document, Scheme Overview and Frequently Asked Questions) published on the Department of Health website in the interests of transparency.

The COVID-19 Vaccine Claims Scheme Policy document, as published on the Department of Health website, together with the Scheme Overview and Frequently Asked Questions, provides transparency on the eligibility, evidentiary and compensation payable under the Scheme. The development of these documents, in consultation with legal experts and following review of similar schemes with a legal basis, such as workers compensation, was undertaken to provide patients and potential claimants with assurance that there is an avenue for compensation in the event one of the eligible clinical conditions or harm is experienced following an approved COVID-19 vaccination. The development of this material was expedited to ensure that it could enable the Scheme opening in December 2021 in support of those impacted.

In the context of an evolving global pandemic, the ability to quickly respond and reflect any changes in the policy direction or scope of the Scheme is critical. Flexibility is necessary to ensure, for example, that additional clinical conditions may be added to the Scheme or new evidence affecting eligibility criteria may be specified as is necessary in the circumstances. This is intended to achieve the policy objective to ensure that compensation is payable to persons affected as appropriate.

- *advice as to whether there is a cap on the amount of compensation that can be provided under the Scheme;*

There is no cap on the amount of compensation payable by the Scheme. Suggested benchmarks on some elements of compensation are included in the Scheme Policy, similar to comparable elements under the *Civil Liability Act 2002*, with benchmarks established for others such as for 'Pain and Suffering'.

However, the independent expert panel, in their professional and expert opinion, may recommend to the Decision Maker within Services Australia, different payment amounts to the benchmark amount specified in the guidance, taking into account the particular circumstances of a claim.

- *further details about who is eligible for compensation under the Scheme, including whether family members or others who are financially dependent on those harmed*

or who have died after being vaccinated, are eligible for compensation under the Scheme;

For Tier 1 and Tier 2 claims, a person who received a TGA approved COVID-19 vaccine through a Commonwealth Government Approved Program (COVID-19 Vaccine Recipient) is eligible for compensation if the COVID-19 Vaccine Recipient:

- has suffered COVID-19 vaccine related harm or COVID-19 vaccine administration related harm excluding specified injuries (listed in the Policy document); and was admitted to hospital as an inpatient for treatment related to the harm suffered (unless the COVID-19 Vaccine Recipient meets the hospitalisation requirement waiver).

For a Tier 3 claim, an estate representative, authorised representative or family representative may be eligible to make a claim. Any amounts payable for a Tier 3 claim are made to an executor or an administrator of the deceased COVID-19 Vaccine Recipient's estate. Family members or others who are financially dependent on those who have died after being vaccinated may be eligible for compensation subject to the will of the deceased COVID-19 Vaccine Recipient and other relevant beneficiaries.

- *advice as to whether a person who receives compensation through the Scheme will be barred from bringing a common law action for damages or pursuing any other alternate pathways to obtain compensation;*

A person who receives compensation through the Scheme will not be barred from bringing a common law action for damages or pursuing any other alternate pathways to obtain compensation. However, a person who receives payment through the Scheme will be required to sign a deed of settlement agreeing to repay any amount received in relation to the harm where compensation is subsequently obtained outside the Scheme for the same harm (with the exception of life insurance for those recipients who have died). It is viewed as not appropriate for someone to benefit financially twice from the same harm and therefore the deed is designed to ensure the taxpayer does not fund compensation if it is also obtained through the courts or from alternative means.

- *advice as to whether a person could apply for compensation under the Scheme after having received compensation through any other insurance schemes, such as accident or sickness insurance;*

The Scheme is not intended to replace existing workers compensation arrangements. It also does not remove an individual's right to pursue workers compensation if eligible or seek to litigate in relation to an adverse outcome from vaccination. However, the Scheme will provide claimants with a more efficient administrative option to seek compensation and an outcome similar to a court process, rather than having to undertake a complex and costly court process.

Where a person has received payments through a workers compensation scheme in relation to the same injury (with the exception of life insurance for Tier 3 claims), those payments would be taken into account in reducing compensation paid under the Scheme, so that the claimant is not compensated twice. As outlined above, if compensation for the same harm is subsequently obtained outside the Scheme, the claimant may be required to repay the Commonwealth.

- *justification for why the above matters should not be subject to parliamentary scrutiny;*

I reiterate that, in the limited time available to establish the compensation scheme to achieve the broader public good, it was necessary to create a new item in Schedule 1AB to the *Financial Framework (Supplementary Powers) Regulations 1997*. The new item appropriately supports immediate expenditure so that persons who have suffered harm are eligible to seek appropriate compensation. In this regard, the Scheme is intended to be simple and easily adaptable administratively, should there be any changes to the policy direction to achieve the policy objective.

- *whether a replacement explanatory statement will be registered to reflect the reduced claim threshold of \$1,000.*

I have requested the Minister for Finance to approve a revised explanatory statement to reflect the reduced claim threshold of \$1,000, and otherwise to address the issues that require further clarification, should the Committee consider that a revised explanatory statement is necessary. In the meantime, the Scheme Policy documents are now published on the Department of Health website for transparency.

I trust the above information clarifies for the Committee the intent of the Scheme and its administration.