



12 August 2021

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

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

Dear Minister,

Aged Care Legislation Amendment (Serious Incident Response Scheme) Instrument 2021 [F2021L00222]

Thank you for your response of 28 July 2021 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 August 2021 and has resolved to seek your further advice about the issues outlined below.

Significant matters in delegated legislation

Parliamentary oversight

Thank you for your further advice regarding new subsections 15NA(11) and 15NB(3) of the Quality of Care Principles, inserted by this instrument.

You have advised that new subsection 15NA(11) aims to clarify the circumstances in which it would be appropriate to notify the Aged Care Quality and Safety Commission (the Commission) about the unexplained absence of a residential care recipient. You advised that this provision was included in the instrument following consultation which indicated that it was not appropriate for every single unexplained absence to be reported to the Commission. You also advised that new subsection 15NB(3) aims to ensure that the rights of recipients of aged care are maintained, in particular their autonomy and choice.

Regarding both new subsections, you have reiterated that they are in delegated legislation rather than primary legislation to provide flexibility and allow for prompt modification if the measures have any unintended consequences.

You further advised that the legislative arrangements for the Serious Incident Response Scheme (SIRS) will be reviewed as part of a project to introduce a new Aged Care Act. The new Act will replace the existing Act and result in all existing instruments being repealed and redrafted under the new Act's structure.

While the committee appreciates your detailed advice, it remains concerned that the instrument deals with significant matters relating to the scope of what is considered to be a 'reportable incident'. The committee reiterates that the meaning of 'reportable incident' is integral to the operation of the SIRS and its objective of preventing abuse and neglect of older Australians in residential aged care.

As you may be aware, on 16 June 2021 the Senate resolved to amend standing order 23 to reinforce the committee's scrutiny principles regarding delegated legislation which amends or modifies the operation of primary legislation. The committee therefore intends to rigorously pursue this type of scrutiny concern in accordance with the mandate provided by the Senate.

The committee has long been concerned with provisions in delegated legislation which modifies the operation of primary legislation, particularly where those modifications appear to substantially depart from the original provision.

The committee therefore expects the explanatory statement to any modification instrument to comprehensively justify the nature and scope of the relevant modifications. When these provisions are included in delegated legislation, it is the committee's longstanding view that these provisions should cease to operate no more than three years after they commence. This is to ensure a minimum degree of regular parliamentary oversight.

In addition, as per the committee's guidelines, the committee considers that the explanatory statement should advise of any upcoming reviews which to determine if the provisions remain necessary and appropriate, including whether it is appropriate to include the provisions in delegated legislation.

In light of the committee's ongoing concerns that instrument deals with significant matters relating to the scope of what is considered to be a 'reportable incident', from a scrutiny perspective, the committee considers that the instrument should cease to operate three years after commencement. If it becomes necessary to extend the operation of these provisions, the committee considers that this should be done by amending the primary legislation or via a subsequent legislative instrument that is subject to disallowance and parliamentary scrutiny.

In light of the above, the committee requests your further advice as to:

- **the expected timeframe and scope for the project to introduce a new Aged Care Act and whether this information can be included in the explanatory statement to this instrument; and**
- **whether the provisions inserted into the Quality of Care Principles 2014 by the instrument will sunset on 1 October 2024 in accordance with section 50 of the *Legislation Act 2003*.**

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. Noting that the 15th sitting day after the instrument was tabled in the Senate was 4 August 2021, the committee gave a notice of 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 **26 August 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