



AUSTRALIAN  
SENATE

Senate Standing Committee for the  
Scrutiny of Delegated Legislation

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13 May 2021

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

Via email: [Minister.Colbeck.DLO@health.gov.au](mailto:Minister.Colbeck.DLO@health.gov.au)

CC: [parliamentary.committees@health.gov.au](mailto:parliamentary.committees@health.gov.au)

Dear Minister,

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

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. The committee has identified scrutiny concerns in relation to the above instrument, and the committee seeks your advice in relation to this matter.

***Significant matters in delegated legislation***  
***Parliamentary oversight***

Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment, which should be included in primary, rather than delegated, legislation. In addition, Senate standing order 23(3)(k) requires the committee to scrutinise each legislative instrument as to whether it complies with any ground relating to the technical scrutiny of delegated legislation. This includes whether an instrument limits parliamentary oversight.

The instrument makes arrangements relating to the Serious Incident Response Scheme (SIRS) for residential aged care.

Division 4 of the instrument relates to reportable incidents. Section 15NA defines or clarifies the meaning of 'reportable incidents' for the purposes of subsection 54-3(4) of the *Aged Care Act 1997* (Aged Care Act), and section 15NB sets out what is not a 'reportable incident'. The remainder of Division 4 prescribes related measures such as how and when providers must report any reportable incidents.

As a matter of technical scrutiny, the committee is required to scrutinise each legislative instrument as to whether it contains matters more appropriate for parliamentary enactment.

Providers of residential aged care must report such reportable incidents to the Aged Care Quality and Safety Commission (the Commission). The committee is concerned that the instrument deals with significant matters arising from defining the scope of a reportable incident, which appears to

be integral to the operation of the SIRS and its objective of preventing abuse and neglect of older Australians in residential aged care.

From a scrutiny perspective, the committee is particularly concerned about section 15NB which modifies the definition of 'reportable incident' in section 54-3 of the Aged Care Act by providing that, despite the provisions of the Act, the following are not 'reportable incidents':

- the use of physical restraint or chemical restraint in relation to a residential care recipient if:
  - the use of physical restraint or chemical restraint is in a transition care program in a residential care setting; and
  - the use is in the circumstances in sections 15F and 15G (relating to the use of physical and chemical restraints as a last resort); and
- an incident that results from the residential care recipient deciding to refuse to receive care or services offered by the approved provider.

The committee notes that the explanatory statement explains that it is appropriate for these matters to be in delegated legislation as they 'relate to operational matters such as process and procedure', and 'allow for responsiveness in the changing aged care environment'. The explanatory statement further explains that this flexibility will protect residential aged care recipients from abuse by facilitating prompt responses to unforeseen risks.

However, given the seriousness of such events occurring in the aged residential care context, the committee considers that the matters set out in sections 15NA and 15NB are more appropriate for parliamentary enactment. In relation to the modifications to the definition of 'reportable incident' in section 15NB in particular, it is not clear why flexibility is required in relation to these modifications given that it appears that these exceptions to the definition of 'reportable incident' may not change over time. The committee therefore considers that these modifications should be included in the primary legislation to enable full parliamentary scrutiny of what may be enduring exceptions to the definition of 'reportable incident'.

**The committee therefore requests your advice as to:**

- **why it is considered necessary and appropriate to use delegated legislation, rather than primary legislation, to define the concept of a 'reportable incident' for the purposes of the Serious Incident Response Scheme; and**
- **whether the modifications to the definition of 'reportable incident' in section 15NB of the instrument can instead be set out on the face of the Aged Care Act.**

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 **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](mailto: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**