



14 July 2021

Senator the Hon Richard Colbeck
Minister for Senior Australians and Aged Care Services
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 21 June 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 14 July 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 advice that the overarching definition of 'reportable incident' is contained in primary legislation under subsection 54-3(2) of the *Aged Care Act 1997* (the Act). You have advised that in most instances the definitions and clarifications of terms under section 15NA of the instrument are inclusive and do not override or modify the overarching definition in the Act. The only expression that is not inclusive is 'unexplained absence of a residential care recipient from residential care services of the provider' under new subsection 15NA(11).

Paragraph 54-3(2)(h) of the Act provides that a reportable incident includes an 'unexplained absence of the residential care recipient from the residential care services of the provider'. The instrument provides that the expression in paragraph 54-3(2)(h) instead means 'an absence of the residential care recipient from the residential care services in circumstances where there are reasonable grounds to report the absence to police'. This is a significant modification to the provision in the Act. The committee has long been concerned with provisions in delegated legislation which modify the operation of primary legislation, particularly where those modifications appear to substantially depart from the original provision.

In relation to subsection 15NB of the instrument, which modifies the definition of 'reportable incident' by setting out what is not a reportable incident, you have advised that these modifications are included in delegated legislation to allow flexibility in tailoring the operation of the scheme and allowing for unintended consequences to be addressed. You have also advised that subsection 15NB(2) will be revised in July 2021 to align with other changes.

The committee appreciates the further information about the inclusion of subsection 15NB in delegated legislation. However, the committee considers that subsection 15NB(3), which provides that 'an incident is not a reportable incident if the incident results from the residential care recipient deciding to refuse to receive care or services offered by the approved provider', significantly impacts on the definition of 'reportable incident'. For this reason, the committee remains concerned about its inclusion in delegated, rather than primary, legislation.

The committee is particularly concerned that the significant modifications to the primary legislation in subsection 15NA(11) and 15NB(3) of the instrument have been made within months of the passage of the Aged Care Legislation Amendment (Serious Incident Response Scheme and Other Measures) Bill 2020 through the Parliament, and the commencement of the Act on 1 April 2021. It is not clear to the committee why these provisions were not included on the face of the bill.

The committee therefore requests your advice as to:

- **whether the modification to the definition of 'reportable incident' in subsection 15NA(11) of the instrument can be provided for in the *Aged Care Act 1997*, rather than in delegated legislation; and**
- **whether the exception to the definition of 'reportable incident' in subsection 15NB(3) of the instrument can be provided for in the *Aged Care Act 1997*, rather than in delegated legislation.**

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 **28 July 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