



AUSTRALIAN
SENATE

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

Parliament House, Canberra ACT 2600
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17 June 2021

Senator the Hon Anne Ruston
Minister for Families and Social Services
Parliament House
CANBERRA ACT 2600

Via email: dlos@dss.gov.au


Dear Minister,

Student Assistance Regulations 2021 [F2021L00201]

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 these matters.

The committee has corresponded informally with your department in relation to this instrument and thanks the department for its ongoing assistance and engagement with the committee's concerns. The committee now seeks your advice in relation to the below issues which remain unresolved.

Parliamentary oversight

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.

Sections 5, 6, 13, 16, 19 and 20 of the instrument appear to incorporate the ABSTUDY Policy Manual and sections 5, 24, 25, 27 and 28 of the instrument appear to incorporate the Assistance for Isolated Children Scheme Guidelines. It appears from the explanatory statement that these documents are incorporated as existing from time to time.

The committee has scrutiny concerns that incorporation of these documents in this manner, which are used to define key terms and concepts in the instrument, raises the prospect of changes being made to the law in the absence of parliamentary scrutiny. In this context, the committee notes these are departmental policy documents that can be easily changed. The committee does not consider that a desire for flexibility or more streamlined regulations is, of itself, an appropriate justification for leaving the definition of key terms and concepts to documents that are incorporated as existing from time to time.

The committee's scrutiny concerns are heightened in this instance as the terms that are defined by reference to these policy documents are used in prescribing an event for the purposes of subsection 48(1) of the *Student Assistance Act 1973* (the Act). Failure to notify the department within 14 days of the happening of such an event could result in a penalty of 12 months imprisonment, in accordance with subsection 49(1) of the Act.

In light of these scrutiny concerns, the committee requests your advice as to why it is considered necessary and appropriate to define key terms and concepts by reference to documents that are not subject to parliamentary scrutiny, as opposed to defining these terms and concepts on the face of the instrument.

Clarity of drafting and legal certainty

Senate standing order 23(3)(e) requires the committee to scrutinise each instrument as to whether its drafting is defective or unclear. Senate standing order 23(3)(k) requires the committee to scrutinise each instrument on other technical scrutiny grounds including whether an instrument provides legal certainty.

The committee is typically concerned with instruments which are not drafted clearly to the extent that this affects the meaning or interpretation of the instrument. Instruments and their explanatory statements should be clear and intelligible to all persons interested in or affected by them, not only those with particular knowledge or expertise. Key terms should be clearly defined to remove any potential confusion or misunderstanding.

The instrument prescribes events for the purposes of the obligation to notify happening of certain events in subsection 48(1) of the Act.

Paragraphs 14(1)(c), 16(1)(d) and 16(1)(e) prescribe as an event the situation where a person 'becomes aware' that something is 'likely' to occur. Similarly, subsections 19(3), 19(4) and 27(3) prescribe events where a person becomes 'aware' something is 'reasonably likely' to occur. In addition, subsection 19(5) provides that an ABSTUDY payee is taken to be aware of something if he or she 'ought reasonably to know of it'.

Each phrase appears to have a subjective character and neither the instrument nor the explanatory statement provides guidance for interpretation or meaning.

In addition, paragraph 26(a) prescribes as an event when certain payments become 'receivable' in respect of the student. Although 'receivable' is defined in section 5, the explanatory statement does not address the implications of the specified payments being receivable by a student who is not aware of that fact.

From a scrutiny perspective, the lack of clarity in relation to the interpretation of the above provisions is particularly concerning as section 49 of the Act provides that it is an offence to contravene subsection 48(1). This offence is subject to a maximum penalty of imprisonment for 12 months.

The committee is concerned that these provisions are not sufficiently clear and do not provide certainty in relation to ascertaining when an event has occurred and when an affected person will be required to report its occurrence. Persons affected by instruments should be afforded certainty of the requirements of when they must report under the law.

The committee would therefore appreciate your advice as to whether the instrument can be amended to prescribe the events in more certain terms, so that a person who is subject to these requirements may clearly understand when they are required to report under the 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 **1 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