



The Hon Greg Hunt MP
Minister for Health and Aged Care

Ref No: MC21-022759

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

28 July 2021

Dear Senator

A handwritten signature in blue ink that reads 'Concetta'.

I refer to your correspondence of 14 July 2021 on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation concerning the *Aged Care Legislation Amendment (Serious Incident Response Scheme) Instrument 2021*.

In your letter you sought advice in relation to the Committee's view that the instrument may include significant matters more appropriate for parliamentary enactment. I have enclosed advice in response to the Committee's request.

Thank you for writing on this matter.

Yours sincerely

Greg Hunt

Encl (1)

cc: Minister for Senior Australians and Aged Care Services,
Senator the Hon Richard Colbeck

**ADVICE TO THE SENATE STANDING COMMITTEE FOR THE SCRUTINY OF
DELEGATED LEGISLATION – AGED CARE LEGISLATION AMENDMENT
(SERIOUS INCIDENT RESPONSE SCHEME) INSTRUMENT 2021 [F2021L00222]**

On 14 July 2021, the Senate Standing Committee for the Scrutiny of Delegated Legislation (Committee) requested further advice in relation to the *Aged Care Legislation Amendment (Serious Incident Response Scheme) Instrument 2021* (Instrument).

From 1 April 2021, the Instrument amended the *Quality of Care Principles 2014* (Quality of Care Principles), as well as other instruments, to specify arrangements for the purposes of the Serious Incident Response Scheme (SIRS).

The Committee's letter of 14 July 2021 has sought further advice in relation to new subsections 15NA(11) and 15NB(3) of the Quality of Care Principles (inserted by Item 1 of Part 1 of Schedule 1 to the Instrument).

New subsection 15NA(11) of the Quality of Care Principles provides that the expression 'unexplained absence of the residential care recipient from residential care services of the provider' in paragraph 54-3(2)(f) of the *Aged Care Act 1997* (Act) 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.

New subsection 15NB(3) of the Quality of Care Principles provides that, despite subsection 54-3(2) of the Act, 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.

Significant matters in delegated legislation
Parliamentary oversight

The Committee requests the Minister's advice as to:

- **Whether the modifications to the definition of 'reportable incident' in subsection 15NA(11) of the instrument can be provided for the Act, 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 the Act, rather than in delegated legislation.**

The Committee has raised concerns that new subsections 15NA(11) and 15NB(3) of the Quality of Care Principles are contained in delegated legislation. The Committee is concerned that these provisions modify the operation of the Act, and has noted that it is not clear in its view why these provisions were not included on the face of the Act.

As noted in previous correspondence to the Committee on the Instrument, unlike other expressions included in new section 15NA of the Quality of Care Principles, new subsection 15NA(11) is not inclusive, due to the specific nature of the type of incident, and the certainty required for implementation. Subsection 15NA(11) ensures clarity on the circumstances where it would be appropriate to notify the Aged Care Quality and Safety Commission (Commission) about the unexplained absence of a residential care recipient.

Through consultation on the SIRS, it was clear from the sector, including consumer advocacy groups that it was not appropriate for every single unexplained absence to be a reportable incident under the scheme. New subsection 15NA(11) limits the definition so that an incident is not reportable to the Commission where a consumer is absent, although it is not out of

character for them to be away from the service, and the provider considers that the individual has the ability to look after themselves and make their own choices.

Also noted in previous correspondence to the Committee on the Instrument, new subsection 15NB(3) of the Quality of Care Principles was included to ensure that the rights of residential care recipients are maintained, specifically their autonomy and choice. While it is not expected that situations accounted for under subsection 15NB(3) will occur frequently, it was raised as an important inclusion by stakeholders, including consumer advocates, when consulting on the arrangements under the SIRS.

Both new subsections 15NA(11) and 15NB(3) of the Quality of Care Principles have been included to ensure that the rights of residential care recipients are not limited through the implementation of the SIRS. The Government considers it necessary and appropriate to include these matters in delegated legislation to ensure the flexibility for prompt modifications, should the arrangements have any unintended consequences, that may result in paternalistic measures or other implications that may affect the health, safety, well-being, quality of life and dignity of residential care recipients.

As also noted in previous correspondence to the Committee on the Instrument, the Government also considers it necessary and appropriate for these matters to be included in delegated legislation to ensure ease of interpretation and implementation by having detailed arrangements in one place. Further, similar arrangements are present in subsections 16(2) and (4) of the *National Disability Insurance Scheme (Incident Management and Reportable Incidents) Rules 2018*, upon which the legislative design for the SIRS is based.

While the Government considers that it is appropriate that these arrangements are held in delegated legislation at this time, the legislative arrangements for the SIRS (including the structure of provisions) will be reviewed as part of the project to introduce a new Aged Care Act. In response to the final report of the Royal Commission into Aged Care Quality and Safety, the Government announced that work would commence on a new Aged Care Act that will underpin the fundamental and generational reform across aged care, with consumers at the core. The new Aged Care Act will replace the existing Act, meaning all current arrangements will be repealed, and re-drafted under the new Act's structure. The Government will have a greater understanding of the operation of the SIRS when developing the arrangements under the new Act. The Committee's views will also be taken into consideration as part of that project.

At this point in time, it is appropriate that new subsections 15NA(11) and 15NB(3) of the Quality of Care Principles are held in delegated legislation, rather than the Act. The SIRS is a new scheme, and flexibility during its early stages will ensure that the scheme's aim can be fully realised. Given that both provisions have been included to uphold the rights of residential care recipients, the ability to carefully and promptly respond to any issues or short fallings is of utmost importance to the effective operation of the scheme.