



SENATOR THE HON RICHARD COLBECK

Minister for Senior Australians and Aged Care Services

Minister for Sport

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

~~Dear Chair~~ *Concetta,*

Thank you for your correspondence of 13 May 2021 on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (Committee) concerning the *Aged Care Legislation Amendment (Serious Incident Response Scheme) Instrument 2021*.

In your letter you sought my advice in relation to the Committee's concerns that the instrument deals with significant matters arising from the scope of a 'reportable incident' under the Serious Incident Response Scheme. I have enclosed advice in response to the Committee's request.

Thank you for raising this matter.

Yours sincerely

Richard Colbeck

Encl (1)

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

On 13 May 2021, the Senate Standing Committee for the Scrutiny of Delegated Legislation (Committee) requested advice in relation to the *Aged Care Legislation Amendment (Serious Incident Response Scheme) Instrument 2021* (Instrument).

On 1 March 2021, the *Aged Care Legislation Amendment (Serious Incident Response Scheme and Other Measures) Act 2021* (SIRS Amendment Act) received Royal Assent. The SIRS Amendment Act amended the *Aged Care Act 1997* (Aged Care Act) and the *Aged Care Quality and Safety Commission Act 2018* (Commission Act) to introduce the Serious Incident Response Scheme (SIRS) for residential aged care (including flexible care delivered in a residential aged care setting) from 1 April 2021. The SIRS Amendment Act allowed for matters related to the SIRS to be specified in delegated legislation, and on 15 March 2021, the Instrument was registered on the Federal Register of Legislation.

From 1 April 2021, the Instrument amended the *Quality of Care Principles 2017* (Quality of Care Principles), to specify arrangements relating to an approved provider's responsibility to manage incidents and to take reasonable steps to prevent incidents, including through implementing and maintaining an incident management system, under paragraph 54-1(1)(e) of the Aged Care Act. The Instrument also amended the *Aged Care Quality and Safety Commission Rules 2018* to allow the Aged Care Quality and Safety Commissioner (Commissioner) to respond to reportable incidents and made consequential amendments to the *Accountability Principles 2014* and the *Records Principles 2014*.

Item 2 of Schedule 1 to the SIRS Amendment Act inserted section 54-3 to the Aged Care Act. Section 54-3 sets out what reportable incidents are for the purposes of the SIRS and how reportable incidents must be dealt with as part of an approved provider's responsibility to implement and maintain an incident management system under subparagraph 54-1(1)(d)(i). Subsection 54-3(2) defines a 'reportable incident' as any of the following incidents that have occurred, are alleged to have occurred, or are suspected of having occurred, in connection with the provision of residential care, or flexible care provided in a residential setting, to a residential care recipient of an approved provider:

- unreasonable use of force against the residential care recipient;
- unlawful sexual contact, or inappropriate sexual conduct, inflicted on the residential care recipient;
- psychological or emotional abuse of the residential care recipient;
- unexpected death of the residential care recipient;
- stealing from, or financial coercion of, the residential care recipient by a staff member of the provider;
- neglect of the residential care recipient;
- use of physical restraint or chemical restraint in relation to the residential care recipient (other than in circumstances set out in the Quality of Care Principles); or
- unexplained absence of the residential care recipient from the residential care services of the provider.

The Committee raised concerns that the Instrument deals with significant matters arising from defining the scope of a 'reportable incident'.

Significant matters in delegated legislation
Parliamentary oversight

The Committee requests the Minister's 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 SIRS
- whether the modification to the definition of 'reportable incident' in section 15NB of the Instrument instead be set out on the face of the Aged Care Act

The Committee raised concerns about the use of delegated legislation to define the concept of a 'reportable incident' for the purposes of the SIRS. Subsection 54-3(4) of the Aged Care Act provides that the Quality of Care Principles may define or clarify the expression 'reportable incident'. As such, item 1 of Schedule 1 to the Instrument inserted new section 15NA to the Quality of Care Principles. New section 15NA of the Quality of Care Principles further defines and provides clarity of the meaning of expressions used in paragraphs 54-3(2)(a), (b), (c), (d), (e), (f) or (h) of the Aged Care Act.

The overarching definition of reportable incident is contained in primary legislation under subsection 54-3(2) of the Aged Care Act. In most instances the definitions and clarifications of terms under section 15NA of the Quality of Care Principles are inclusive, meaning that they are not exhaustive and do not override or modify the overarching definition under subsection 54-3(2) of the Aged Care Act. The only expression that is not inclusive is 'unexplained absence of a residential care recipient from the residential care services of the provider' under new subsection 15NA(11), due to the specific nature of the type of incident, and the certainty required for implementation.

It is considered necessary and appropriate to further define and clarify the expressions used in subsection 54-3(2) of the Aged Care Act (as has been done under new section 15NA of the Quality of Care Principles) to assist the interpretation by individuals involved in meeting the requirements under the SIRS. Clarity is achieved by using concepts to assist the reader to understand what may constitute a reportable incident under the Aged Care Act. If these matters were dealt with in primary legislation it is likely that, in an attempt to capture all scenarios (acknowledging the lack of flexibility), the definitions would become highly complex and therefore difficult to interpret and implement. Given that the SIRS requires assessment of incidents by individuals with a range of backgrounds and education (such as staff members of approved providers) clarity and readability of the legislative arrangements is an important consideration for successful implementation.

Similarly, to further ensure ease of interpretation and implementation, having detailed arrangements in one place also adds to the rationale as to why it is necessary and appropriate to include clarified terms in delegated legislation. As noted in the Instrument's explanatory statement, the legislative design of the SIRS is similar to the incident management and disclosure protection scheme under the *National Disability Insurance Scheme (Incident Management and Reportable Incidents) Rules 2018* (NDIS Incident Rules). Feedback from stakeholders affected the NDIS Incident Rules, indicated that keeping all operational arrangements in one place was beneficial and assisted with layman interpretation. This feedback informed the design of the legislative structure for the SIRS, by including all operational detail (including process, procedures and clarity of terms) in new Part 4B of the Quality of Care Principles.

The Committee may notice that the NDIS Incident Rules do not further define or clarify the expressions used to define a 'reportable incident' under subsection 73Z(4) of the *National Disability Insurance Scheme Act 2013*, and that this is instead done through guidance material. The approach taken under the new section 15NA of the Quality of Care Principles, was based on support and feedback from key stakeholders that having clarification in delegated legislation, as opposed to policy, would be beneficial to the implementation of the SIRS by ensuring more definitive clarity of the expressions.

Lastly, as noted in the Instrument's explanatory statement, it is considered necessary and appropriate to include matters under new section 15NA of the Quality of Care Principles in delegated legislation to allow for flexibility. The SIRS is new, and by including these matters in delegated legislation the Government is able to be responsive to unforeseen risks and to provide clarity should confusion arise. Allowing prompt responses to unforeseen circumstances, is particularly of importance in this context, where clarification may address abuse and neglect of older Australians receiving residential aged care.

The Committee's concerns regarding the use of delegated legislation to define the concept of a 'reportable incident' for the purposes of the SIRS also extends to new section 15NB of the Quality of Care Principles. Despite the definition of reportable incident under subsection 54-3(2) of the Aged Care Act, paragraph 54-3(5)(b) of the Aged Care Act provides that the Quality of Care Principles may specify when an incident is not a reportable incident. As such, item 1 of Schedule 1 to the Instrument inserted new section 15NB of the Quality of Care Principles. New section 15NB specifies limited circumstances where an incident covered by subsection 54-3(2) of the Aged Care Act is not a reportable incident; including:

- use of physical restraint or chemical restraint in a transition care program in a residential care setting, if that use is in circumstances consistent with sections 15F and 15G of the Quality of Care Principles (assuming that those circumstances applied to that care); or
- if the incident results from the residential care recipient deciding to refuse to receive care or services offered by the approved provider.

The Committee also queries whether the modifications to the definition of 'reportable incident' in section 15NB of the Quality of Care Principles should instead be set out on the face of the Aged Care Act. The Committee also noted that 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 Government does not consider that it is necessary to set the modifications to the definition of 'reportable incident' in primary legislation. Similar to new section 15NA of the Quality of Care Principles, the inclusion of these arrangements in delegated legislation is considered necessary and appropriate to ensure ease of interpretation and implementation by having detailed arrangements in one place. Further, as noted above, the legislative design of the SIRS is modelled on the NDIS Incident Rules, and similar modifications to the term 'reportable incident' are present in subsections 16(2) to (4) of the NDIS Incident Rules. It is therefore considered reasonable to include these matters in delegated legislation to be consistent with comparable arrangements under the National Disability Insurance Scheme.

Modifications made by the instrument support the operation of the primary legislation by allowing for unintended consequences of a broad definition to be addressed. Key stakeholders were consulted on the exceptions in new section 15NB of the Quality of Care Principles, and were very supportive of the inclusion of these modifications. Particularly the inclusion of subsection 15NB(3), which was included to ensure that the rights of residential care recipients are maintained, specifically their autonomy and choice.

The inclusion of the power to modify the definition of reportable incident under subsection 54-3(5) of the Aged Care Act (relied upon to include section 15NB in the Quality of Care Principles) is intended to support the effective operation of the SIRS, by allowing the definition of reportable incident to be tailored to the operation of the scheme by providing flexibility to address unintended consequences that may arise with respect to a particular incident. These powers are necessary to allow for responsiveness to unforeseen risks, concerns and omissions in order for the SIRS to achieve its aim of protecting the health, safety, well-being and dignity of older Australians receiving residential aged care. Contrary to the Committee's assumptions it is possible that the powers under subsection 54-3(5) will be used to make further modifications to the definition of reportable incident in delegated legislation. Relevantly, subsection 15NB(2) will be revised in response to sections 15F and 15G of the Quality of Care Principles sunseting from 1 July 2021. This subsection will be adapted or repealed to align with new arrangements for restrictive practices commencing 1 July 2021. While any further modifications will be considered very carefully based on individual circumstances, it is possible that further exclusions will be included in new section 15NB of the Quality of Care Principles, or existing arrangements will be changed over time.

It is appropriate that these aspects be held in delegated legislation to allow for modifications and clarification of the definition of 'reportable incident'. The Department of Health and the Aged Care Quality and Safety Commission will monitor the operation of the Instrument, including whether the provisions remain necessary and appropriate and respond as needed.