



Senator the Hon Anne Ruston

**Minister for Families and Social Services
Minister for Women's Safety
Senator for South Australia
Manager of Government Business in the Senate**

Ref: MS21-000387

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

Dear  Senator

Thank you for your letter of 17 June 2021 regarding concerns raised by the Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) about aspects of the Student Assistance Regulations 2021 (the Regulations). I am grateful for your communications with my department about this matter, and for the opportunity to personally consider and address the committee's concerns.

I would like to assure the committee that I will ask the Governor-General to amend the Regulations to take account of the committee's comments to the greatest extent possible within the scope of the regulation-making powers of the *Student Assistance Act 1973* (the Act), while maintaining consistency with other student payments administered under social security law.

In particular, I propose to replace incorporated terms with substantive definitions (except where this is not practicable), and to improve the clarity of the drafting of the instrument. I will ensure that the amendments are fully explained in the explanatory statement to the amending regulations.

Background

As the committee is aware, the ABSTUDY and Assistance for Isolated Children (AIC) schemes provide significant assistance to Aboriginal and Torres Strait Islander people and other young persons who are geographically remote and will benefit greatly from improved educational opportunities. Both schemes have been adapted over time but have also retained their character as largely administratively-based schemes that cater flexibly to the needs of the people who access this important student assistance.

The Act provides a legislative framework for aspects of the ABSTUDY and AIC schemes, for example, by providing a standing appropriation for payments, a system for payees to notify changed circumstances that may affect their payments, debt recovery and non-recovery mechanisms and merits review for certain decisions. Eligibility decisions, however, are made in accordance with policy guidelines.

Despite the hybrid framework, the schemes offer student benefits in a manner broadly consistent with other student payments available under the social security law, namely, Youth Allowance and Austudy. I consider that the ABSTUDY and AIC schemes produce optimal outcomes for participants because they are flexible without foregoing government accountability. Nonetheless, I appreciate that the committee has concerns that the Regulations raise transparency issues, which I will take action to address.

My responses to the committee's detailed comments about the Regulations are below.

Issues

Parliamentary oversight – terms incorporated by reference

Your letter identifies concerns with the incorporation of terms by reference in the Regulations. Specifically, you have identified that:

- sections 5, 6, 13, 16, 19 and 20 of the instrument incorporate terms from the ABSTUDY Policy Manual; and
- sections 5, 24, 25, 27 and 28 of the instrument incorporate terms from the AIC Guidelines.

Subsection 48(1) of the Act provides that a person who is receiving, or entitled to receive, an amount under a current special educational assistance scheme – which includes ABSTUDY and AIC – must notify the happening of prescribed event within 14 days of the happening of that event. Subsection 48(2) of the Act states that regulations for the purposes of subsection 48(1) 'may apply, adopt or incorporate any matter contained in any instrument or other writing as in force or existing from time to time'.

Subsection 48(2) of the Act was inserted by the Student Assistance Legislation Amendment Bill 2005. The Explanatory Memorandum to that Bill explained that:

Item 10 adds proposed subsection 48(2) which provides an express provision permitting the incorporation of an instrument "as in force or existing from time to time" for the purposes of section 14 of the *Legislative Instruments Act 2003*. This will eliminate the need to make new regulations under the Act whenever the guidelines for the non-statutory ABSTUDY and Assistance for Isolated Children schemes are altered.

In this light, I consider that the technique used to cross-reference definitions in the ABSTUDY Policy Manual and AIC Guidelines is authorised by the Act, and within the contemplation of the Parliament having regard to the policy basis for the Scheme.

Nevertheless, I accept the committee's concerns and will amend the Regulations to remove all incorporated definitions and replace them with substantive definitions to the fullest extent permitted by the regulation-making powers in the Act. I will explain any corresponding changes fully in the explanatory statement to the amending regulations. I will also direct my department to amend the manuals in a timely manner so that the regulations and manuals are consistent and reflect the government's policy intention.

I must, however, flag with the committee that some terms may not be able to be replaced with a wholly self-contained definition because, for example, the definition incorporates amounts calculated and indexed under the social security law. The term 'personal assets test limit' provides an example of a term which can be improved but may need to rely on a more direct cross-reference, for example, to the relevant table in *A Guide to Australian Government Payments* as in force from time-to-time or, if necessary, to the social security law.

Clarity of drafting and legal certainty

Your letter identifies concerns about a lack of clarity with respect to phrases used in the Regulations that 'appear to have a subjective character' and the absence of guidance in the explanatory material. You have asked whether the instrument can be amended to prescribe the events in more certain terms, so that a person who is subject to the requirements can clearly understand when they are required to report under the Act.

The committee has identified the following prescribed events as being of concern:

- paragraphs 14(1)(c), 16(1)(d) and 16(1)(e) of the Regulations, which prescribe as an event the situation where a person '*becomes aware*' that something is '*likely to occur*';
- subsection 19(3), 19(4) and 27(3) which prescribe events where a person *becomes aware* something is *reasonably likely* to occur (including to the extent that subsections 19(3) and (4) are affected by subsection 19(5) which applies a standard that the person *ought reasonably know*);
- paragraph 26(a) which prescribes an event when certain payments become *receivable* in respect of the student, which does not address the fact of the student *becoming aware* of the fact.

As a preliminary point, I note that several of my portfolio laws create offences in circumstances where a person fails or refuses to notify in accordance with statutory obligations. There are significant parallels between these laws, which are aimed at ensuring that people who access benefits in the different schemes can rely on consistent reporting requirements. For example, it is not uncommon for students who are parents to access family assistance payments or for young people on Youth Allowance (other) to move onto ABSTUDY. For this reason, the Regulations adopt similar requirements to inform the Secretary when the claimant '*becomes aware*' of a matter that is '*likely to occur*'.

Consistency is vital as it helps to avoid overpayments of student benefits, which can have deleterious impacts on students and their families. I note that potential inconsistencies identified by the committee reflect policy choices to recreate aspects of the sunsetted Student Assistance Regulations 2003, but can be readily revised in line with the committee's preferences.

I will now address the committee's concerns under the events as grouped in your letter.

'Becoming aware' - paragraphs 14(1)(c), 16(1)(d) and 16(1)(e)

Paragraphs 14(1)(c), 16(1)(d) and 16(1)(e) prescribe events to trigger payee notification in essentially the following circumstances:

- an independent ABSTUDY student *becoming aware* that a dependent child is *likely to* travel outside Australia for any period;
- for ABSTUDY remote area allowance recipients—the payee *becoming aware* that the student is *likely to* be absent from their permanent home for a period of more than 8 weeks; and
- the ABSTUDY payee *becoming aware* that the student *is likely to* be outside Australia for any period.

Each of the above events is relevant to a person's rate of ABSTUDY payment and should remain as a notifiable event even if in a modified form.

I agree that the phrases 'becoming aware' and 'is likely to' apply a subjective standard that depends on the person's knowledge and capacity to understand the information in their possession. These matters will vary from person to person and in different circumstances.

The phrases are deliberately pre-emptive as early reporting of income-related events will minimise the scope for overpayment. The events apply the same standard as for reporting of these matters under the social security law. As a result, I have preferred these events to be prescribed in this form and accepting that a court is likely to resolve uncertainty in the claimant's favour having regard to the circumstances.

In light of the Committee's concerns, I will omit any references to 'is likely to' and replace them with the word 'will'.

I would also be happy to provide further detail in a explanatory statement to the Regulations.

'Becoming aware' and 'reasonably likely' to occur – subsections 19(3)-(5) and 27(3)

These paragraphs prescribe events to trigger payee notification in the following circumstances:

- for a dependent student aged 18 years and over—the ABSTUDY student *becomes aware* that it is *reasonably likely* that parental income for the year has exceeded or will exceed the estimated or stated amount by at least 25 per cent;
- for the parent of a dependent ABSTUDY student aged under 18 years—that parent *becomes aware* that it is *reasonably likely* that their or their partner's income has exceeded or will exceed the estimated or stated amount about by at least 25 per cent;
- for both of the above circumstances, a person is be taken to be aware of something if he or she 'ought reasonably know of it'; and
- for the parent of an AIC student—that parent *becoming aware* that it is *reasonably likely* that their or their partner's income has exceeded or will exceed the estimated or stated amount about by at least 25 per cent.

The above events relate to means testing arrangements, which are common to most student payments including under the social security law. The phrase 'reasonably likely' was used to apply an objective standard to the requirement to report prospective income, while subsection 19(5) was intended to follow paragraph 6(2)(b) of the sunsetted regulations.

The income of the student or the applicant's partner or their parent(s) is relevant to the calculation of ABSTUDY benefits, noting that the members of the student cohort are often in a position of dependency. Again, the events are expressed in pre-emptive terms to avoid overpayment and possible debt recovery action.

In my view, the requirement to report these events should be retained in this form with the exception of section 19(5), which I am prepared to repeal due to its deeming effect.

However, I accept that the word 'reasonably' creates an inconsistency with matters in the social security law and paragraphs 14(1)(c), 16(1)(d) and 16(1)(e) of the Regulations. If retention of this word is not acceptable to the committee, I would be prepared to remove the word 'reasonably' (as it is unnecessary) or, more reluctantly, remove the phrase 'it is reasonably likely that' from each of the events.

I would also be happy to provide further explanation in the explanatory statement to the amending Regulations.

Payments becoming 'receivable' – paragraph 26(a)

This event relates to the reporting of income received from specified Australian Government sources such as scholarships, social security or veterans' income support payments or ABSTUDY or AIC Scheme payments. You have noted that the explanatory statement to the Regulations does not address the implications of the specified payments being receivable by a student who is not aware of the fact (of those payments being made).

For the AIC Scheme, payments can only be claimed by, or at the instance of, parents of dependent students. The large majority of these students are under the age of 18 years. AIC payments are only paid for primary, secondary or ungraded-level students who are under 19 years of age on 1 January of the year of study. However, this may be extended by one year if the student's progress through school has been delayed by special circumstances such as illness or English language difficulties.

I accept that paragraph 26(a) of the Regulations does not incorporate an awareness component as has been included for other prescribed events discussed above. I accept that the events should be consistent in this regard. I am therefore prepared to seek amendment to paragraph 26(a) to include an awareness component, and ensure that the effect of this amendment is explained in the explanatory statement to the amending Regulations.

Summary and contact details

In summary, I reiterate that the Australian Government is highly committed to improving the circumstances of Australia's first peoples and geographically isolated students, including by promoting access to important educational opportunities and providing appropriate financial support.

In this light, I am prepared to take action as soon as practicable, and no later than the end of the 2021 calendar year, to:

- seek amendments to the Regulations to:
 - remove incorporated terms from the Regulations and replace them with substantive definitions to the extent this is possible under the relevant regulation-making powers in the Act;
 - remove references to ‘is likely to’ from paragraphs 14(1)(c), 16(1)(d) and 16(1)(e) of the Regulations and replace these phrases with ‘will’;
 - remove references to ‘that it is reasonably likely that’ from subsection 19(3), 19(4) and 27(3);
 - repeal subsection 19(5) which recreated paragraph 6(2)(a) of the sunsetted regulations dealing with deemed knowledge; and
 - insert an ‘awareness’ component into paragraph 26(a) of the Regulations; and
- ensure that the explanatory statement to the amending Regulations provides more detailed information:
 - explaining that the Regulations implement, as far as possible, reporting requirements in similar terms to those that apply to other Centrelink administered payments, including Austudy, Youth Allowance and Family Assistance payments; and
 - providing examples of circumstances in which a person may be asked to report various matters in the provisions identified by the committee as requiring additional explanation.

I will also ensure that the explanatory statement is consistent with the committee’s *Guidelines* published on its webpages and that the ABSTUDY Policy Manual and AIC Guidelines will be updated in a timely way.

To assist the committee’s consideration of the Regulations, I note that I am already making arrangements to repeal Part 3 of the instrument to reflect the passage of new measures dealing with tax file numbers in the *Social Services and Other Legislation Amendment (Student Assistance and Other Measures) Act 2021*, as part of this exercise.

I appreciate that the committee would like to finalise these matters before the disallowance period for the Regulations ends. If there are any further issues arising from my correspondence, I would be happy for the committee to make contact with my office or the Chief Counsel of my department, Ms Bronwyn Worswick, who is available on (02) 6146 1939.

For completeness, I acknowledge that the committee will publish my response to the committee's letter on its website in the interests of transparency.

Yours sincerely

Anne Ruston

6/7/2021