

REPLACEMENT EXPLANATORY STATEMENT

This Explanatory Statement replaces the Explanatory Statement registered on 20 August 2021 for the *Financial Framework (Supplementary Powers) Amendment (Defence Measures No. 1) Regulations 2021* [F2021L01144] to provide further information about funding and delegation of decision making in relation to the Afghanistan Inquiry Legal Assistance Scheme.

Issued by the Authority of the Minister for Finance

Financial Framework (Supplementary Powers) Act 1997

*Financial Framework (Supplementary Powers) Amendment
(Defence Measures No. 1) Regulations 2021*

The *Financial Framework (Supplementary Powers) Act 1997* (the FF(SP) Act) confers on the Commonwealth, in certain circumstances, powers to make arrangements under which money can be spent; or to make grants of financial assistance; and to form, or otherwise be involved in, companies. The arrangements, grants, programs and companies (or classes of arrangements or grants in relation to which the powers are conferred) are specified in the *Financial Framework (Supplementary Powers) Regulations 1997* (the Principal Regulations). The powers in the FF(SP) Act to make, vary or administer arrangements or grants may be exercised on behalf of the Commonwealth by Ministers and the accountable authorities of non-corporate Commonwealth entities, as defined under section 12 of the *Public Governance, Performance and Accountability Act 2013*.

Section 65 of the FF(SP) Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Section 32B of the FF(SP) Act authorises the Commonwealth to make, vary and administer arrangements and grants specified in the Principal Regulations. Section 32B also authorises the Commonwealth to make, vary and administer arrangements for the purposes of programs specified in the Principal Regulations. Schedule 1AA and Schedule 1AB to the Principal Regulations specify the arrangements, grants and programs.

The *Financial Framework (Supplementary Powers) Amendment (Defence Measures No. 1) Regulations 2021* (the Regulations) amend Schedule 1AB to the Principal Regulations to establish legislative authority for government spending on the Afghanistan Inquiry Legal Assistance Scheme (AILAS). The AILAS will provide funding for legal assistance to current and former serving members of the Australian Defence Force (ADF) in relation to investigations or proceedings for criminal offences that arise out of the Inspector-General of the Australian Defence Force (IGADF) Afghanistan Inquiry.

On 6 November 2020, the IGADF provided the *Report of Inquiry into Questions of Unlawful Conduct Concerning the Special Operations Task Group in Afghanistan* (the report) to the Chief of the Defence Force. The report foreshadowed possible war crime charges against some Australian Army members. Some matters were referred to the Australian Federal Police to investigate further.

On 12 November 2020, the Prime Minister, the Hon Scott Morrison MP, announced the establishment of the Office of the Special Investigator (OSI) to investigate whether charges should be laid and against whom. The Commonwealth has identified that current and former members of the ADF, who will be responding to the OSI's investigation and/or who may be required to answer charges or give evidence in court if criminal proceedings are brought, find themselves in a unique position for several reasons, including:

- the Commonwealth has a duty of care to current and former serving ADF members;
- the overseas deployment context of the matters under investigation;
- the unique and complex nature of the investigation and potential proceedings;
- the additional complexity and potential expense of legal proceedings where the Commonwealth seeks to protect sensitive information under the *National Security Information (Criminal and Civil Proceedings) Act 2004*; and
- the need to ensure the proper administration of justice in accordance with the rules and norms of the Australian criminal justice system.

The AILAS aims to provide financial assistance to current and former members of the ADF to obtain legal advice and representation so they may respond appropriately to the OSI's investigation and answer charges or give evidence in court if criminal proceedings are brought.

The Department of Defence has policy responsibility for the AILAS, which will be administered by the Attorney-General's Department.

Details of the Regulations are set out at [Attachment A](#). A Statement of Compatibility with Human Rights is at [Attachment B](#).

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commence on the day after the instrument is registered on the Federal Register of Legislation.

Consultation

In accordance with section 17 of the *Legislation Act 2003*, consultation has taken place with the Department of Defence and the Attorney-General's Department.

A regulation impact statement is not required as the Regulations only apply to non-corporate Commonwealth entities and do not adversely affect the private sector.

Details of the *Financial Framework (Supplementary Powers) Amendment (Defence Measures No. 1) Regulations 2021*

Section 1 – Name

This section provides that the title of the Regulations is the *Financial Framework (Supplementary Powers) Amendment (Defence Measures No. 1) Regulations 2021*.

Section 2 – Commencement

This section provides that the Regulations commence on the day after the instrument is registered on the Federal Register of Legislation.

Section 3 – Authority

This section provides that the Regulations are made under the *Financial Framework (Supplementary Powers) Act 1997*.

Section 4 – Schedules

This section provides that the *Financial Framework (Supplementary Powers) Regulations 1997* are amended as set out in the Schedule to the Regulations.

Schedule 1 – Amendments

Financial Framework (Supplementary Powers) Regulations 1997

Item 1 – In the appropriate position in Part 4 of Schedule 1AB (table)

This item adds a new table item to Part 4 of Schedule 1AB to establish legislative authority for government spending on an activity administered by the Department of Defence (the department) and the Attorney-General's Department (AGD).

New **table item 505** establishes legislative authority for government spending on the Afghanistan Inquiry Legal Assistance Scheme (AILAS). The AILAS will provide funding for legal assistance to current and former serving members of the Australian Defence Force (ADF) in relation to investigations or proceedings for criminal offences that arise out of the Inspector-General of the Australian Defence Force (IGADF) Afghanistan Inquiry.

On 6 November 2020, the IGADF provided the *Report of Inquiry into Questions of Unlawful Conduct Concerning the Special Operations Task Group in Afghanistan* (the report) to the Chief of the Defence Force. The report foreshadowed possible war crime charges against some Australian Army members (available at <https://afghanistainquiry.defence.gov.au>). Some matters were referred to the Australian Federal Police to investigate further.

On 12 November 2020, the Prime Minister, the Hon Scott Morrison MP, announced the establishment of the Office of the Special Investigator (OSI) to investigate whether charges should be laid and against whom (<https://www.pm.gov.au/media/statement-igadf-inquiry>). The OSI is responsible for addressing potential criminal matters raised in the report and

investigating allegations of criminal offences under Australian laws, arising from or related to any breaches of the Laws of Armed Conflict, by members of the ADF in Afghanistan from 2005 to 2016.

The Commonwealth has identified that current and former members of the ADF, who will be responding to the OSI's investigation and/or who may be required to answer charges or give evidence in court if criminal proceedings are brought, find themselves in a unique position for several reasons, including:

- the Commonwealth has a duty of care to current and former serving ADF members;
- the overseas deployment context of the matters under investigation;
- the unique and complex nature of the investigation and potential proceedings;
- the additional complexity and potential expense of legal proceedings where the Commonwealth seeks to protect sensitive information under the *National Security Information (Criminal and Civil Proceedings) Act 2004*; and
- the need to ensure the proper administration of justice in accordance with the rules and norms of the Australian criminal justice system.

The AILAS aims to provide financial assistance to current and former members of the ADF to obtain legal advice and representation so they may respond appropriately to the OSI's investigation and answer charges or give evidence in court if criminal proceedings are brought.

Financial assistance may be provided under the AILAS for:

- the reasonable professional costs of legal representatives to act for the applicant, at a rate to be determined; and/or
- the reasonable disbursements incurred by legal representatives in the course of acting for the applicant; and/or
- the reasonable costs of travel and accommodation for an applicant to attend a place as required by a court.

Rates payable under the AILAS will be published in a discrete assessment of costs document.

The AILAS will commence on 30 September 2021 and will conclude when it becomes clear that no further applications will be received under the AILAS.

To be eligible for financial assistance, the applicant must demonstrate the following:

- the applicant is a member or former member of the ADF; and
- the applicant has been asked to provide evidence to the OSI's Afghanistan investigation; or
- the applicant has been asked or compelled to provide evidence in criminal proceedings in relation to matters that are the subject of the OSI's Afghanistan investigation; or
- the applicant has been, or reasonably believe they will be, charged with a crime in relation to matters that are the subject of the OSI's Afghanistan investigation.

Funding for the AILAS will be allocated through a closed, non-competitive grant process in accordance with the requirements of the Commonwealth resource management framework, including the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) and the *Commonwealth Grants Rules and Guidelines 2017* (CGRGs).

The AGD will administer the AILAS on behalf of the department under the terms of a Memorandum of Understanding. The AGD will accept and assess applications from ADF members who meet the eligibility criteria as set out in the AILAS guidelines. Applications completed by individuals' legal representatives or authorised agents will also be accepted. Funding decisions will be made on an individual basis without reference to the comparative merit of any other application.

Application documentation for the AILAS, including the AILAS guidelines, will be available on GrantConnect (www.grants.gov.au) and the AGD website. Under the AILAS guidelines, only the Attorney-General or officials of AGD may decide to approve a grant as appropriate. As the Minister responsible for the delivery of programs and policies to maintain and improve Australia's law and justice framework, including the delivery of Commonwealth funded legal assistance schemes, the Attorney-General has the appropriate skills, qualifications and experience to exercise the relevant powers and functions.

Where the Attorney-General is not the decision maker in relation to a grant, the decision will be made by authorised officials of AGD at the Senior Executive Service level and Executive Level. These officials are part of an established team within AGD currently responsible for the delivery of multiple Commonwealth funded legal assistance schemes, and are appropriately qualified and experienced to make these decisions.

Funding decisions made under the AILAS are not considered appropriate for independent merits review as they involve the allocation of a finite resource, and an allocation that has already been made to another party may be affected by overturning the original allocation. The Administrative Review Council has recognised that it is justifiable to exclude merits review in relation to decisions of this nature (see paragraphs 4.11 to 4.15 of the guide, *What decisions should be subject to merit review?*).

In order to address accountability issues related to the exclusion of an external merits review, the AILAS assessment process will place great emphasis on the administrative accountability for decisions to allocate funding. This includes ensuring that the criteria for funding are made clear, and decisions are made objectively and in accordance with applicable legislative requirements under the PGPA Act.

Each application will be considered against the AILAS guidelines. In the event of a complaint in relation to the outcome of an application under the AILAS, decisions will be subject to internal merits review by a different AGD official. If the Attorney-General is the decision maker, then no internal review will be available. Judicial review of a decision under the AILAS is available under the *Judiciary Act 1903*.

The department considers that these accountability requirements will be met by means of the detailed guidelines for the AILAS administration. The scheme will be administered in a similar manner to other legal assistance schemes administered by AGD.

The department has undertaken consultation with government entities, including the Department of the Prime Minister and Cabinet and AGD to inform the development of the AILAS guidelines and scoping of the AILAS.

The department also consulted with the Afghanistan Inquiry Implementation Oversight Panel, the Australian Special Air Service Association (the Association) and legal representatives who are acting for potential applicants. The purpose of the consultations was to address concerns that had been expressed that funding decisions should be independent of the department and that the eligibility criteria should not effectively prejudice the issues that must ultimately be decided by a court. The Association and the legal representatives consulted were satisfied that the proposed arrangements address those concerns.

The estimated cost of the AILAS is confidential and will not be made public. This is because the cost estimate is highly speculative as the department has no oversight over how many criminal investigations are being/will be conducted, nor their prospects of proceeding to criminal trial. Disclosure would raise legal and policy sensitivity issues for the following reasons:

- disclosing the estimated cost of the AILAS may give rise to the perception that the Commonwealth anticipates a known volume of prosecutions, or that information pertaining to ongoing criminal investigations and prosecutions and their likely outcome is known to the department. This is inconsistent with the independent nature of the relevant criminal procedures; and
- the future costs associated with the AILAS are subject to many independent and variable factors, which are not possible to pre-empt at this time. War crimes prosecutions have never been undertaken in Australia, and it is not known how many cases would proceed to trial. It is also difficult to quantify how long each trial would take, and the legal work undertaken by legal representatives in these cases is likely to be complex.

The relevant Commonwealth expenditure will be undertaken in accordance with the PGPA Act and the CGRGs. For the purposes of transparency and effective parliamentary oversight of executive expenditure, the expenditure on the AILAS will be reported aggregately in AGD's annual report. Further, each grant of financial assistance will be reported on GrantConnect, noting this will not include the details of the individual grantee in order to ensure compliance with the Australian Privacy Principles.

Noting that it is not a comprehensive statement of relevant constitutional considerations, the objective of the item references the defence power (section 51(vi)) of the Constitution.

Defence power

Section 51(vi) of the Constitution provides the Parliament with the power to make laws with respect to 'the naval and military defence' of the Commonwealth and States, and 'the control of the forces to execute and maintain the laws of the Commonwealth'.

The AILAS is established for the provision of benefits in the form of financial assistance to ADF members, during or after service, for the supply of legal services in relation to criminal investigations or proceedings related to events and conduct that occurred in the course of their ADF service.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Financial Framework (Supplementary Powers) Amendment (Defence Measures No. 1) Regulations 2021

This disallowable legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the legislative instrument

Section 32B of the *Financial Framework (Supplementary Powers) Act 1997* (the FF(SP) Act) authorises the Commonwealth to make, vary and administer arrangements and grants specified in the *Financial Framework (Supplementary Powers) Regulations 1997* (the FF(SP) Regulations) and to make, vary and administer arrangements and grants for the purposes of programs specified in the Regulations. Schedule 1AA and Schedule 1AB to the FF(SP) Regulations specify the arrangements, grants and programs. The powers in the FF(SP) Act to make, vary or administer arrangements or grants may be exercised on behalf of the Commonwealth by Ministers and the accountable authorities of non-corporate Commonwealth entities, as defined under section 12 of the *Public Governance, Performance and Accountability Act 2013*.

The *Financial Framework (Supplementary Powers) Amendment (Defence Measures No. 1) Regulations 2021* amend Schedule 1AB to the FF(SP) Regulations to establish legislative authority for government spending on the Afghanistan Inquiry Legal Assistance Scheme (AILAS). The AILAS will provide funding for legal assistance to current and former serving members of the Australian Defence Force (ADF) in relation to investigations or proceedings for criminal offences that arise out of the Inspector-General of the Australian Defence Force (IGADF) Afghanistan Inquiry.

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- the need to ensure the proper administration of justice in accordance with the rules and norms of the Australian criminal justice system.

The AILAS aims to provide financial assistance to current and former members of the ADF to obtain legal advice and representation so they may respond appropriately to the OSI's investigation and answer charges or give evidence in court if criminal proceedings are brought.

The Department of Defence has policy responsibility for the AILAS, which will be administered by the Attorney-General's Department.

Human rights implications

This disallowable legislative instrument engages the following right:

- the right to the presumption of innocence, and to a fair and public hearing – Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR), read with Article 2.

Article 2 of the ICCPR requires each State Party undertake to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognised in the ICCPR without distinction of any kind.

Article 14 of the ICCPR provides, among other things, that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

This disallowable legislative instrument promotes the right to the presumption of innocence, and to a fair and public hearing by providing access to timely and qualified legal representation under the AILAS.

Conclusion

This disallowable legislative instrument is compatible with human rights because it promotes the protection of human rights.

**Senator the Hon Simon Birmingham
Minister for Finance**