

REPLACEMENT EXPLANATORY STATEMENT

This Explanatory Statement replaces the Explanatory Statement registered on 20 August 2021 for the *Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 2) Regulations 2021* [F2021L01156] to include further information in relation to the passage of the *Counter-Terrorism Legislation Amendment (High-Risk Terrorist Offenders) Bill 2021* and the delegation of decision making powers for the Expensive Commonwealth Criminal Cases Fund.

Issued by the Authority of the Minister for Finance

Financial Framework (Supplementary Powers) Act 1997

*Financial Framework (Supplementary Powers) Amendment
(Attorney-General's Portfolio Measures No. 2) 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 (Attorney-General's Portfolio Measures No. 2) Regulations 2021* (the Regulations) amend Schedule 1AB to the Principal Regulations to establish (and renew) legislative authority for government spending on the Expensive Commonwealth Criminal Cases Fund (the ECCCCF).

The ECCCCF provides funding to state and territory legal aid commissions (LACs) for costs incurred in defending clients in serious, expensive Commonwealth criminal matters (such as drug importation, people smuggling, terrorism, fraud and slavery). The ECCCCF funds matters where the actual total cost or estimated total cost of each matter is \$40,000 or more. Representation in post-sentence order matters, like Control Orders (COs), Continuing Detention Orders (CDOs) and Extended Supervision Orders (ESOs), is not presently eligible for funding through the ECCCCF because they are civil matters.

The LACs are funded for Commonwealth family, criminal and civil cases through the *National Legal Assistance Partnership 2020-25*. Expanding the ECCCCF to include the costs of defending serious, expensive post-sentence order matters will ensure that LACs do not divert or reallocate funding away from other Commonwealth service priorities, such as family law matters, to meet the costs of post-sentence order representation services.

The scope of the ECCCCF is being expanded to provide support to LACs to begin to represent convicted offenders in post-sentence order matters, such as existing COs and CDOs, as well as ESOs (which will be introduced by the *Counter-Terrorism Legislation Amendment (High-Risk Terrorist Offenders) Bill 2021*, if passed by the Parliament).

Government spending on the expanded scope of the ECCCCF relating to ESOs is dependent on the *Counter-Terrorism Legislation Amendment (High-Risk Terrorist Offenders) Bill 2021* passing through the Parliament and the legislative changes taking effect. The Government will not undertake any spending under the expanded ECCCCF on the ESO component until these legislative changes are in place.

If the *Counter-Terrorism Legislation Amendment (High-Risk Terrorist Offenders) Bill 2021* is not passed or if ESOs are not part of the bill that does pass, additional funding of \$10 million, which was provided for the expansion of the ECCCCF in 2021-22, will not be used for the proposed ESOs. This funding will continue to be available to LACs for other ECCCCF eligible matters, including other post-sentence order matters (such as COs and CDOs). Total funding of \$43.7 million over four years from 2021-22 has been allocated to the ECCCCF.

The expansion to the scope of the ECCCCF supports the operationalisation of post-sentence orders which aim to better protect Australians from the enduring risk posed by convicted terrorist offenders. In recent years, concerns have been raised by the Parliamentary Joint Committee on Intelligence and Security about the adequacy and availability of legal assistance for respondents in the CDO and the CO matters. Additional funding for the ECCCCF aims to ensure that respondents have adequate legal assistance throughout the proceedings.

Additional funding for the ECCCCF was included in the 2021-22 Budget. The Attorney-General's Department has responsibility for the ECCCCF.

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 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 (Attorney-General's Portfolio Measures No. 2) Regulations 2021*

Section 1 – Name

This section provides that the title of the Regulations is the *Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 2) 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 Attorney-General's Department (the department).

New **table item 494** establishes (and renews) legislative authority for government spending on the Expensive Commonwealth Criminal Cases Fund (the ECCCCF).

The ECCCCF provides funding to state and territory legal aid commissions (LACs) for costs incurred in defending clients in serious, expensive Commonwealth criminal matters (such as drug importation, people smuggling, terrorism, fraud and slavery). The ECCCCF funds matters where the actual total cost or estimated total cost of each matter is \$40,000 or more. Representation in post-sentence order matters, like Control Orders (COs), Continuing Detention Orders (CDOs) and Extended Supervision Orders (ESOs), is not presently eligible for funding through the ECCCCF because they are civil matters.

The LACs are funded for Commonwealth family, criminal and civil cases through the *National Legal Assistance Partnership 2020-25*. Expanding the ECCCCF to include the costs of defending serious, expensive post-sentence order matters will ensure that LACs do not divert or reallocate funding away from other Commonwealth service priorities, such as family law matters, to meet the costs of post-sentence order representation services.

The scope of the ECCCCF is being expanded to provide support to LACs to begin to represent convicted offenders in post-sentence order matters, such as existing COs and CDOs, as well as ESOs (which will be introduced by the *Counter-Terrorism Legislation Amendment (High-Risk Terrorist Offenders) Bill 2021*, if passed by the Parliament). Government spending on the expanded scope of the ECCCCF relating to ESOs is dependent on this bill passing through the Parliament and the legislative changes taking effect. The Government will not undertake any spending under the expanded ECCCCF on the ESO component until these legislative changes are in place.

The expansion to the scope of the ECCCCF supports the operationalisation of post-sentence orders which aim to better protect Australians from the enduring risk posed by convicted terrorist offenders. In recent years, concerns have been raised by the Parliamentary Joint Committee on Intelligence and Security about the adequacy and availability of legal assistance for respondents in the CDO and the CO matters. Additional funding for the ECCCCF aims to ensure that respondents have adequate legal assistance throughout the proceedings.

Table item 494 is necessary to give effect to the Government's policy agenda for managing high-risk terrorist offenders and to ensure the respondents have adequate legal assistance throughout the proceedings. Funding for LACs through the ECCCCF will ensure that complex and contested High-Risk Terrorist Offender applications proceed efficiently and are not delayed, suspended or adjourned due to inadequate legal representation. Failure to ensure the defendants have legal representation could risk delays or stays in proceedings.

Funding to represent convicted offenders in post-sentence order matters will be provided to LACS in 2021-22 through a grant process. The ECCCCF funding will be available for post-sentence order matters initiated in 2021-22, with all LACs invited to apply through a new grant round. The grants will be delivered under grant opportunity guidelines, which will be approved by the Attorney-General.

Funding will be provided to LACs via a grant selection process, in accordance with the *Public Governance, Performance and Accountability Act 2013* and the *Commonwealth Grants Rules and Guidelines 2017*. The department is considering the type of grant opportunity most appropriate for this funding arrangement.

Information on the grant opportunity, including the grant opportunity guidelines, will be made available on the GrantConnect website (www.grants.gov.au), and the grants will be administered by the Department of Social Services' Community Grants Hub. Final decisions about Commonwealth expenditure and the selection of successful grant applicants will be made by the Secretary of the department or the relevant delegate of the Secretary of the department, in accordance with the department's *Financial Framework (Supplementary Powers) Financial Delegation 2017*.

The relevant decision maker will be determined based on the monetary amount of the grant in question, as set out in the *Expensive Commonwealth Criminal Cases Fund 2021-22 Guidelines*. The guidelines provide that:

- If a grant application is below \$5 million, the First Assistant Secretary, Legal Services Policy Division in the department will make the final decision about the grant application;

- If a grant application exceeds \$5 million and is less than \$10 million, the Deputy Secretary, Legal Services and Families Group in the department will make the final decision about that application; and
- If a grant application exceeds \$10 million, the Secretary of the department will make the final decision about that application.

Funding decisions made in connection with payments under the ECCCCF are not considered appropriate for independent merits review as such decisions are automatic or mandatory in nature. The decision to make a payment by a departmental official will be very limited and procedural (confined to verifying the case meets strict criteria, for example funding spent and case type). The Administrative Review Council has recognised that it is justifiable to exclude merits review in relation to decisions of this nature (see paragraphs 3.8 to 3.11 of the guide, *What decisions should be subject to merit review?*).

The LACs were formally informed of the decision to expand the ECCCCF to include representation for post-sentence order matters after the release of the 2021-22 Budget. The department subsequently sent letters to LACs, providing additional detail about the Government's intention to expand the scope of the ECCCCF. The LACs were broadly supportive of the ECCCCF expansion.

Funding for this item of \$43.7 million over four years from 2021-22 will come from Program 1.4: Justice Services, which is part of Outcome 1. Details are set out in the *Portfolio Budget Statements 2021-22, Budget Related Paper No. 1.2, Attorney-General's Portfolio* at page 25. This includes additional funding of \$10 million in 2021-22 in the 2021-22 Budget.

Noting that it is not a comprehensive statement of relevant constitutional considerations, the objective of the item references the following powers of the Constitution:

- the executive power and the express incidental power (sections 61 and 51(xxxix));
- the defence power (section 51(vi)); and
- the referral of power from the States (section 51(xxxvii)).

Executive power and express incidental power

The express incidental power in section 51(xxxix) of the Constitution empowers the Parliament to make laws with respect to matters incidental to the execution of any power vested in the Parliament, the executive or the Courts by the Constitution. Together with the executive power in section 61 of the Constitution, the express incidental power extends to a range of matters including the execution and maintenance of the Constitution and the laws of the Commonwealth.

Legal assistance services for representation in post-sentence order matters will support the proper execution of the regimes for the relevant post-sentence orders contained in the *Criminal Code Act 1995*.

Defence power and referral of powers

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

Section 51(xxxvii) empowers the Parliament to make laws with respect to ‘matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States’.

The ECCCCF will support funding for legal assistance in post-sentence order matters relating to the relevant regimes contained in the *Criminal Code Act 1995*.

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 (Attorney-General's Portfolio Measures No. 2) 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*.

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Human rights implications

This disallowable legislative instrument engages the following right:

- the right to be equal before the courts and tribunals – 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 to respect and to ensure to 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 states, in part:

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

[...]

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it'; [...]

This disallowable legislative instrument will promote these entitlements by ensuring that those subject to post-sentence orders receive legal counsel if they do not have sufficient means to pay for it, by providing defence in the form of legal assistance. This disallowable legislative instrument promotes the right to be tried without delay, by reducing the risk that a lack of representation and means to acquire it will cause trials to be stayed.

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**