

## **EXPLANATORY STATEMENT**

### **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. 1) Regulations 2024*

The *Financial Framework (Supplementary Powers) Act 1997* (the FFSP 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 FFSP 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 Principal Regulations are exempt from sunseting under section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015* (item 28A). If the Principal Regulations were subject to the sunseting regime under the *Legislation Act 2003*, this would generate uncertainty about the continuing operation of existing contracts and funding agreements between the Commonwealth and third parties (particularly those extending beyond 10 years), as well as the Commonwealth's legislative authority to continue making, varying or administering arrangements, grants and programs.

Additionally, the Principal Regulations authorise a number of activities that form part of intergovernmental schemes. It would not be appropriate for the Commonwealth to unilaterally sunset an instrument that provides authority for Commonwealth funding for activities that are underpinned by an intergovernmental arrangement. To ensure that the Principal Regulations continue to reflect government priorities and remain up to date, the Principal Regulations are subject to periodic review to identify and repeal items that are redundant or no longer required.

Section 32B of the FFSP 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. Section 32D of the FFSP Act confers powers of delegation on Ministers and the accountable authorities of non-corporate Commonwealth entities, including subsection 32B(1) of the FFSP Act. Schedule 1AA and Schedule 1AB to the Principal Regulations specify the arrangements, grants and programs.

Section 65 of the FFSP 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.

The *Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 1) Regulations 2024* (the Regulations) amend Schedule 1AB to the Principal Regulations to establish legislative authority for government spending on the Expensive Commonwealth Criminal Cases Fund (ECCCF). The ECCCF is administered by the Attorney-General's Department.

The payment to the ECCCF will expand the scope of the ECCCF and support Legal Aid Commissions to represent individuals in Community Safety Order matters. This funding will ensure that affected individuals have access to legal representation and that court proceedings can proceed expeditiously.

Funding of \$2.5 million in 2024-25 will be available to the ECCCF.

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 registration 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 regulatory impact analysis 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. 1) Regulations 2024***

**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. 1) Regulations 2024*.

**Section 2 – Commencement**

This section provides that the Regulations commence on the day after registration 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***

This instrument amends one table item in Part 4 of Schedule 1AB to establish legislative authority for government spending on an activity to be administered by the Attorney-General's Department (the department).

**Item 1 – Part 4 of Schedule 1AB (table item 494)**

**Table item 494 – Expensive Commonwealth Criminal Cases Fund**

Table item 494 in Part 4 of Schedule 1AB provides legislative authority for Government spending on the Expensive Commonwealth Criminal Cases Fund (ECCCF).

Item 1 amends table item 494 by repealing and substituting the text of the cell under the column headed “Objective(s)”. The amendment reflects the expanded scope of the ECCCF to support the Community Safety Order (CSO) scheme.

The objective of the ECCCF is to ensure Commonwealth funding is available for Legal Aid Commissions (LACs) in defending clients in serious, high cost, Commonwealth criminal matters (such as drug importation, people smuggling, terrorism, fraud and slavery) and representing clients in Commonwealth High Risk Terrorist Offender (HRTO) post-sentence matters (namely control orders, extended supervision orders and continuing detention orders).

The ECCC received total funding of \$43.7 million over four years from 2021-22 to deliver on its objective.

The *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023*, which commenced on 8 December 2023, established the CSO scheme. The CSO scheme allows the Minister for Immigration to apply to court for a Community Safety Detention Order or Community Safety Supervision Order under Division 395 of the *Criminal Code Act 1995* (Criminal Code), in relation to a non-citizen who has been convicted of a serious violent or sexual offence, has no real prospect of removal from Australia, and poses an unacceptable risk of reoffending.

The ECCCCF is limited to meeting the costs incurred by LACs in defending clients in serious, high cost, Commonwealth criminal matters (such as drug importation, people smuggling, terrorism, fraud and slavery) and representing clients in Commonwealth post-sentence matters (control orders, extended supervision orders and continuing detention orders). 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 CSO matters will ensure that individuals subject to CSO matters have access to justice, including legal counsel and representation.

Additional funding of \$2.5 million in 2024-25 is provided to expand the scope of the ECCCCF and to support LACs to represent individuals in CSO matters. This funding is intended to 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 CSO representation services.

#### Funding amount and arrangements, merits review and consultation

Funding of \$2.5 million for the program was included in the 2024-25 Budget under the measure ‘Attorney-General’s Portfolio – additional resourcing’ for a period of one year commencing in 2024-25. Details are set out in *Budget 2024-25, Budget Measures, Budget Paper No. 2* at pages 46 and 47.

Funding for this item will come from Program 1.4: Justice Services, which is part of Outcome 1. Details are set out in the *Portfolio Budget Statements 2024-25, Budget Related Paper No. 1.2, Attorney-General’s Portfolio* at page 22.

Funding will be provided to LACs via a closed non-competitive grant process, in accordance with the Commonwealth resource management framework, including the *Public Governance, Performance and Accountability Act 2013* and the *Commonwealth Grants Rules and Guidelines 2017* (CGRGs), where a total of eight organisations will be invited to apply.

The grants will be delivered under grant opportunity guidelines, which will be approved by the Attorney-General. CSO funding provided to LACs will also be informed by CSO caseload estimations and jurisdictional information provided by the Department of Home Affairs. LACs are well established, highly skilled and experienced in the representation of defendants in Commonwealth matters. LACs are also statutory bodies established pursuant to legislation in the relevant state or territory and therefore have robust accountability mechanisms in place to manage the funding. Targeting the grant opportunity to LACs achieves value for money for the ECCCCF by leveraging their experience and is consistent

with the Australian Government's decision to fund LACs for CSO matters in each affected state and territory.

LACs will be asked to address two criteria: how funding being sought relates to program outcomes; and approach to use and management of funding to deliver services. Applications will be assessed based on the eligibility and assessment criteria set out in the grant opportunity guidelines in accordance with the CGRGs. LACs will use the additional funding to meet the costs of defending clients in Commonwealth Community Safety Orders. A matter may include multiple co-accuseds.

The final decisions about expenditure and the selection of successful grants applicants will be made by the relevant and appropriately qualified delegate as a delegate of the Secretary of the department in accordance with their financial delegations under the department's *Financial Framework (Supplementary Powers) Financial Delegation 2017*.

The appropriate decision maker will be determined based on the monetary amount of the relevant grant, which will also be set out in the grant opportunity guidelines:

- if the grant application is \$2.5 million and below, the Assistant Secretary, Legal Assistance Branch in the department will make the final decision about the grant application;
- if the grant application exceeds \$2.5 million and is up to \$5.0 million, the First Assistant Secretary, First Nations and Justice Policy in the department will make the final decision about the grant application;
- if a grant application exceeds \$5.0 million and is up to \$10.0 million, the Deputy Secretary, Justice and Communities Group in the department will make the final decision about that application; or
- if a grant application exceeds \$10.0 million, the Secretary of the department will make the final decision about that application.

Information on the grant, including the grant opportunity guidelines, will be made available on the GrantsConnect website ([help.grants.gov.au](http://help.grants.gov.au)). The grant will be administered by the Community Grants Hub, which is part of the Department of Social Services.

Independent merits review is not considered suitable for decisions made in connection with payments under the ECCCCF as these decisions relate to an allocation of finite resources from which all potential claims under the ECCCCF may not be met. Allowing independent merits review would only promote competition among LACs for Commonwealth funding. Additionally, independent merits review would create delays in a departmental official's decision on providing Commonwealth funds to LACs which could result in a court's decision to issue cost orders or a stay in proceedings.

It would also mean that payments made by the Commonwealth to other LACs would be affected if there is an overturning of an original decision for one LAC. This could result in LACs no longer considering grants of legal aid for CSO matters. Additionally, CSO funding for the ECCCCF is based on budgetary decisions of a policy nature, rather than decisions immediately affecting any particular person's interests. Decisions of this nature are subject to parliamentary scrutiny.

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, 4.17 and 4.18 of the guide: *What decisions should be subject to merit review?*).

The Department of Home Affairs, in leading the whole-of-government long term policy response to the decision in *NZYQ v. Minister for Immigration, Citizenship and Multicultural Affairs*, conducted consultations with relevant Commonwealth agencies, including the department in relation to the CSO scheme framework. Risks and sensitivities associated with implementation of the scheme were considered and consulted through this process.

Initial consultation has taken place with National Legal Aid (NLA), the peak body of LACs, to determine whether their current internal guidelines and policies would ordinarily support individuals that are subject to CSOs. NLA confirmed that as CSOs are a new matter type, LACs do not have relevant guidelines/policies in place to assess and consider grants of legal aid effectively. NLA also stated that expanding the ECCCCF would be considered the most effective and expeditious way to address this new class of matters comprehensively and consistently. The department will continue to correspond with LACs to provide information on the expanded ECCCCF to include CSOs and subsequent procedures for the relevant grant round.

#### Statement of relevant constitutional considerations

Noting that this is not a comprehensive statement of relevant constitutional considerations, the objective of the item references the aliens power (section 51(xix)) of the Constitution.

#### *Aliens power*

Section 51(xix) of the Constitution empowers the Parliament to make laws with respect to ‘naturalization and aliens’.

The ECCCCF involves the provision of funding to state and territory legal aid commissions to provide legal assistance to serious offenders who are non-citizens in court proceedings in which a community safety order has been sought under Part 9.10 of 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. 1) Regulations 2024***

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 FFSP Act) authorises the Commonwealth to make, vary and administer arrangements and grants specified in the *Financial Framework (Supplementary Powers) Regulations 1997* (the Principal 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 Principal Regulations specify the arrangements, grants and programs. The powers in the FFSP 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 (Attorney-General's Portfolio Measures No. 1) Regulations 2024* amend table item 494 in Part 4 of Schedule 1AB to the Principal Regulations to establish legislative authority for government spending on the Expensive Commonwealth Criminal Cases Fund (ECCCF). The ECCCF is administered by the Attorney-General's Department.

The Government introduced the *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Bill 2023* to Parliament in response to the High Court's decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*. The Act, which commenced on 8 December 2023, established the Community Safety Order (CSO) scheme. The CSO scheme allows the Minister for Immigration to apply to a court for a community safety detention or supervision order in relation to a non-citizen who has been convicted of a serious violent or sexual offence, has no real prospect of removal from Australia, and poses an unacceptable risk of reoffending.

Currently, the ECCCF is limited to meeting the costs incurred by Legal Aid Commissions (LACs) in defending clients in serious, high cost, Commonwealth criminal matters (such as drug importation, people smuggling, terrorism, fraud and slavery) and representing clients in Commonwealth post-sentence matters (control orders, extended supervision orders and continuing detention orders).

The Government has agreed to provide the ECCCF with additional funding of \$2.5 million in 2024-25 to expand the scope of the ECCCF to include the CSO scheme and to support LACs

to represent individuals in CSO matters. The amendment to table item 494 is necessary to give effect to the Government's policy agenda and to reduce the risk that the Commonwealth is ordered to pay costs for the defendant in the prosecution of these matters. This funding is intended to ensure that affected individuals have access to legal representation and that court proceedings can proceed expeditiously.

### **Human rights implications**

This disallowable legislative instrument engages the following rights:

- the right to a fair trial and fair hearings – Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR), read with Article 2; and
- the right to be equal before the courts and tribunals – Article 14 of the ICCPR.

Article 2(1) of the ICCPR provides that each State Party to the ICCPR undertakes 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, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 2(2) provides that where not already provided for by existing legislative or other measures, each State Party to the ICCPR undertakes to take the necessary steps, in accordance with its constitutional processes, to adopt such laws or other measures as may be necessary to give effect to the rights recognised.

#### *Right to a fair trial and fair hearings*

Article 14(1) of the ICCPR provides that:

‘All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.’

This disallowable legislative instrument promotes Article 14(1) by ensuring individuals who are subject to a Community Safety Order proceeding have sufficient access to legal representation, even if they do not have the means to fund it themselves. The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way. Allowing the ECCCCF to fund CSO proceedings guarantees that LACs have the appropriate funds to support people who need legal aid. As such, providing funding for the ECCCCF for CSO matters ensures ‘equality of arms’ is met, which requires that all parties to a proceeding must have a reasonable opportunity of presenting their case under conditions that do not disadvantage them as against other parties to the proceedings. This ensures people who are subject to a CSO proceeding maintain the right to a fair trial and fair hearings.



Right to be equal before the courts and tribunals

Article 14(3) of the ICCPR relevantly provides that:

‘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 promotes the entitlements outlined in Article 14(3) by ensuring that individuals subject to CSOs receive legal counsel and legal representation - even if they do not have sufficient means to pay for it - by providing legal assistance. Under Article 14, States are encouraged to provide legal aid to those who do not have sufficient means to pay for legal counsel or representation. Ensuring that there is funding to provide legal aid for individuals who are subject to a CSO proceeding supports the right to be equal before courts and tribunals. The disallowable legislative instrument also 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 indefinitely.

**Conclusion**

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

**Senator the Hon Katy Gallagher  
Minister for Finance**