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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

**HOUSE OF REPRESENTATIVES**

**AUSTRALIAN ORGAN AND TISSUE DONATION AND  
TRANSPLANTATION AUTHORITY AMENDMENT (GOVERNANCE AND  
OTHER MEASURES) BILL 2021**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Regional Health, Regional  
Communications and Local Government, the Hon Mark Coulton MP)



# **AUSTRALIAN ORGAN AND TISSUE DONATION AND TRANSPLANTATION AUTHORITY AMENDMENT (GOVERNANCE AND OTHER MEASURES) BILL 2021**

## **OUTLINE**

### **Purpose of the Bill**

The purpose of the Australian Organ and Tissue Donation and Transplantation Authority Amendment (Governance and Other Measures) Bill 2021 (the Bill) is to transition the role of “accountable authority” under the *Public Governance, Performance and Accountability Act 2013* (PGPA ACT) of the Australian Organ and Tissue Donation and Transplantation Authority (OTA), from the Australian Organ and Tissue Donation and Transplantation Authority Board (the Board) to the Chief Executive Officer (CEO).

### **Objective of the Bill**

The Bill amends the *Australian Organ and Tissue Donation and Transplantation Authority Act 2008* (the OTA Act) to abolish the existing Board and establish an Advisory Board.

### **Overview of the Bill**

The Bill establishes an Advisory Board. The CEO will be the accountable authority of the organisation under the PGPA Act and will be directly accountable to the Commonwealth Minister for Health. The new Advisory Board will provide advice, expertise and mentorship to the CEO on organ and tissue donation and transplantation matters. The Advisory Board will have skills-based membership, harnessing expertise, experience and knowledge from a broad range of areas from within the organ and tissue sector including:

- public administration, business or management;
- hospital or health organisation leadership;
- health consumer of donation or transplantation services;
- promotion of donation and transplantation;
- community leadership and engagement;
- clinical expertise in organ and tissue donation and transplantation; and
- any other appropriate field of expertise as determined by the Minister.

The Advisory Board’s primary function will be to provide the CEO with advice in relation to organ and tissue donation and transplantation matters, and will comprise of one Chair, a Deputy Chair and between three and five members. The Bill also sets out a revised appointment process for Board members.

### **Financial Impact Statement**

The Commonwealth Government will meet any additional financial impact of this Bill within existing funding arrangements.

## **Statement of Compatibility with Human Rights**

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

### **THE AUSTRALIAN ORGAN AND TISSUE DONATION AND TRANSPLANTATION AUTHORITY AMENDMENT (GOVERNANCE) ACT 2021**

This Bill 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 Bill**

This Bill will amend the *Australian Organ and Tissue Donation and Transplantation Authority Act 2008* (OTA Act) to transition the role of the Accountable Authority under the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) from the Board to the Chief Executive Officer (CEO). This change follows recommendations made by Dr Mal Washer, Chair of the Organ and Tissue Authority Board (the Board), to Minister Coulton to enable the Board to have a more strategic and advisory focus. This amendment will repeal the existing Board and create a new Advisory Board.

#### **Human rights implications**

This Bill does not engage any of the applicable rights or freedoms.

#### **Conclusion**

This Bill is compatible with human rights as it does not raise any human rights issues.

**The Hon Mark Coulton MP Minister for Regional Health, Regional Communications and Local Government**

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**NOTES ON CLAUSES**

**Clause 1 – Short title**

Clause 1 provides that the Bill, when enacted, may be cited as the *Australian Organ and Tissue Donation and Transplantation Authority (Governance and Other Measures) Act 2021* (the Act).

**Clause 2 – Commencement**

The table in this clause sets out the commencement dates for when the provisions of the Act will commence as follows:

- Sections 1 to 3 of the Act will commence on the day the Act receives the Royal Assent.
- Schedules 1 and 2 of the Act will be enacted on a day to be fixed by proclamation, or 6 months after the Act receives the Royal Assent.

**Clause 3 – Schedule(s)**

This clause provides that each piece of legislation that is specified in a Schedule to the Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item has effect according to its terms.

**SCHEDULE 1 – AMENDMENTS**

The Schedule amends the *Australian Organ and Tissue Donation and Transplantation ACT 2009* (the OTA Act) to provide for consequential and other amendments in view of the inclusion of provisions relating to the transition of the role of Accountable Authority under the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) to the Chief Executive Officer (CEO) and the establishment of the Australian Organ and Tissue Donation and Transplantation Authority Advisory Board (the Advisory Board).

**Item 1 – Section 3**

This item repeals the Simplified Outline of the OTA Act and replaces with a simplified outline which includes the Authority consisting of the CEO and staff of the Authority, and removes reference relating to, the Australian Organ and Tissue Donation and Transplantation Authority Board (the Board).

This item also establishes the Advisory Board. Through the establishment of the Advisory Board, expertise and support will be provided to the CEO through advice on a number of matters including organ or tissue donation and transplantation matters.

**Item 2 – Section 4**

This item provides the definition of an Advisory Board member.

**Item 3 – Section 4**

This item repeals the definition of an appointed member. This relates to the repealed Board.

**Item 4 – Section 4**

This item amends the title of the previous Board to be the new Advisory Board.

**Item 5 – Section 4**

This item repeals the definition of a Board member. This relates to the repealed Board.

**Item 6 – Section 4**

This item amends the definition of the term “Chair” to mean Chair of the new Advisory Board.

**Item 7 – Section 4**

This item repeals the definition of the COAG Health Council as this body no longer exists and the new appointment process for the Chair and members of the Advisory Board does not involve the COAG Health Council.

**Item 8 – Section 4**

This item amends the definition of the term “Deputy Chair” to mean Deputy Chair of the new Advisory Board.

**Item 9 – Section 4**

This items amends the terminology used in the definition of organ or tissue donation and transplantation to replaces the term “dead” with “deceased” to bring the terminology in line with standard and accepted nomenclature used in the organ and tissue donation and transplantation sector.

**Item 10 – Paragraph 8(3)(a)**

This item repeals reference to the Board being considered as part of the Authority.

**Item 11 – Paragraph 8(4)(a)**

This item repeals the paragraph relating to what is considered to be the listed entity under the PGPA Act and substitutes the listed entity to include the Authority (being the CEO and staff of the Authority) and the Advisory Board.

**Item 12 – Paragraph 8(4)(b)**

This item replaces “Board” with “CEO”. This item establishes the CEO as the Accountable Authority of the Authority under the PGPA Act.

**Item 13 – Subparagraphs 8(4)(c)(i) and (ii)**

This item replaces the listed officials of the Authority and the appointed Board members with the CEO and the Advisory Board members.

**Item 14 – Subparagraphs 8(4)(d)(ii) and (iii)**

This item replaces the purpose of the Authority and the functions of the Board with the functions of the CEO and the Advisory Board.

**Item 15 – Subsection 11(2)**

This item provides for the constitutional limits under which the Authority may perform its functions.

**Item 16 – Part 2A**

This item repeals the Board and its functions.

**Item 17 – Part 4 (heading)**

This item renumbers the Part as a result of the repeal of Part 2A.

**Item 18 – Section 14B**

This item repeals the previous functions of the CEO and substitutes the new functions of the CEO as the accountable authority of the Authority under the PGPA Act. Through these functions, the CEO will be responsible for determining the objectives, strategies and policies of the Authority, ensuring the proper, efficient and effective performance of the Authority, and managing the administration of the Authority.

**Item 19 – Subsection 14(1A)**

This item repeals the requirement for the Minister to consult the Chair of the Board about the appointment of the CEO. As the accountable authority of the Authority, the CEO will be appointed by the responsible Commonwealth Minister. There is no legislated requirement for the responsible Commonwealth Minister to consult when appointing the CEO under the amended legislation.

**Item 20 – Section 15**

This item revises the appointment term of the CEO from up to 4 years to up to 5 years to allow for greater continuity and time in the role.

**Item 21 – Subsection 22(1)**

This item repeals and replaces the subsection relating to the termination of the CEO to modernise nomenclature.

**Item 22 – Paragraph 22(2)(c)**

This item modernises terminology in relation to employment.

**Item 23 – Subsections 26(1) and (2)**

This item repeals reference to the Board and replaces with CEO to allow for the engagement of consultants.

**Item 24 – Part 4**

This item inserts a new Part into the Act that establishes the Advisory Board and sets out the functions and requirements for the Advisory Board.

Division 1 of Part 4 sets out the establishment and functions of the Advisory Board.

Section 28 establishes the Advisory Board.

Section 29 establishes the functions to be undertaken by the Advisory Board in its role to provide advice to the CEO.

The Advisory Board will have a key role in advising the CEO on:

- the objectives, strategies and policies of the OTA;
- the performance of the OTA; and
- organ or tissue donation and transplantation matters.

This section allows the Advisory Board to provide advice to the Minister about the performance of the Authority, if requested to do so by the Minister.

Division 2 of Part 4 sets out provisions relating to Members of the Advisory Board.

Section 30 sets out the membership of the Board to consist of the Chair, the Deputy Chair and at least 3, but not more than 5, other members.

Section 31 sets out matters relating to appointments to the Advisory Board: appointment process, eligibility for appointment, mix of Advisory Board members, and consultation on appointments.

Subsection 31(1) sets out that Advisory Board members are to be formally appointed by the Commonwealth Minister, on a part-time basis, by written instrument.

Subsection 31(2) sets out the eligibility requirements for Advisory Board members. For a person to be eligible as an Advisory Board member, the Minister must be satisfied that a person has experience, knowledge or expertise in relevant fields as detailed in the subsection.

Subsection 31(3) requires that an appropriate mix of expertise and knowledge/experience is represented among the Advisory Board members. The membership of the Advisory Board, with its balance of expertise, is intended to facilitate the Board in its advisory capacity, while representing the various interests of the organ and tissue sector.

The establishment of the Advisory Board does not preclude the OTA from retaining its other expert advisory committees, allowing the CEO to receive advice from a range of appropriate expert sources to assist him or her in the effective performance of his or her functions.

Subsection 31(4) sets out the consultation requirements before the Minister appoints a person as an Advisory Board member, other than the Chair. The Minister must consult with all State and Territory Health Ministers before making appointments to the Advisory Board. The Minister may also consult with any other persons they consider appropriate on the appointment of members to the Advisory Board. These consultation provisions do not apply to the Chair.

Subsection 32 provides that the term of appointment for all board members will be set out in the written instrument of appointment and must not exceed 4 years.

Subsection 33 provides for the Commonwealth Minister to appoint an acting Chair or an acting Board member to the Advisory Board if there is a vacancy, or during a period when the Chair or Board member is absent from the Board or from Australia, or is unable to perform the duties of the position for any reason.



Subsection 33(3) also provides that the Commonwealth Minister may only appoint a person to act as an Advisory Board member if the Minister is satisfied that the person is qualified under Clause 31(2).

A note in subsection 33 refers to 33AB and 33A of the *Acts Interpretation Act 1901* for rules that apply to acting appointments.

Section 34 details remuneration of Advisory Board members. Subsection 34(1) sets out that Advisory Board members are to be paid the remuneration that is determined by the Remuneration Tribunal, or if no determination is in operation, the remuneration that is prescribed by the regulations.

Subsection 34(2) sets out that an Advisory Board member is entitled to be paid the allowances that are prescribed by the regulations.

Subsection 34(3) sets out that section 32 has effect subject to the *Remuneration Tribunal Act 1973*.

Section 35 sets out provisions relating to a Leave of absence for the Chair and other Advisory Board members.

Subsection 35(1) provides that the Commonwealth Minister may grant leave of absence to the Chair of the Advisory Board, on terms and conditions that the Minister determines.

Subsection 35(2) provides that the Chair of the Advisory Board may grant leave of absence to another Board member, on terms and conditions that the Chair determines.

Subsection 35(3) provides that the Chair must notify the Commonwealth Minister if the Chair grants an Advisory Board member leave of absence for a period exceeding 3 months.

Section 36 provides that an Advisory Board member holds office on any terms and conditions, not covered by this Act, that are determined by the Commonwealth Minister.

Section 37 sets out provisions around resignation of Advisory Board members.

Subsection 37(1) provides that an Advisory Board member may resign by giving the Commonwealth Minister a written resignation. Subsection 37(2) specifies that the resignation is effective from the day it is received by the Minister or on a specified later date. These provisions also apply to the Chair.

Section 38 sets out provisions for termination of appointment of Advisory Board members. Subsection 38(1) provides that the Minister may terminate the appointment of a member of the Advisory Board for misbehaviour or if the Advisory Board member is unable to perform the duties of their office because of physical or mental incapacity.

Subsection 38(2) sets out circumstances in which the Minister may terminate an Advisory Board member's appointment. These include becoming bankrupt;

compounding with his or her creditors; assigning his or her remuneration for the benefit of his or her creditors; being absent from duty (except on leave of absence) for 3 consecutive Board meetings; or failing to comply with Section 29 of the *Public Governance, Performance and Accountability Act 2013*.

Division 3 of Part 4 sets out provisions relating to meetings of the Advisory Board.

Section 39 provides that the Advisory Board must hold such meetings as are necessary for the efficient performance of its functions, and that the Chair must convene at least 4 meetings each financial year.

Section 40 provides that the Chair must preside at all meetings at which he or she is present. Subsection 40(2) sets out presiding arrangements when the Chair is not present, namely that the Deputy Chair is to preside should the Chair not be present at an Advisory Board meeting, or if the Deputy Chair is not present the other Advisory Board members present must appoint one of themselves to preside.

Section 41 provides that the Advisory Board may regulate proceedings at its meetings as it considers appropriate.

Section 42 provides that the Advisory Board must keep minutes of its meetings.

**Item 25 – Subsection 44(1)**

This item replaces the term “Board” with “CEO” to allow for the CEO in the role of accountable authority to establish expert advisory committees.

**Item 26 – Section 45**

This item replaces the term “Board” with “CEO” to allow for any expert advisory committees to advise the CEO, rather than the Board, about organ or tissue donation and transplantation matters referred to them by the CEO.

**Item 27 – Subsections 46(1) and (4) and 47(1)**

This item replaces the term “Board” with “CEO” to allow for expert advisory committees members to be appointed and terminated by the CEO, rather than the Board. Subsection 47(1) allows the CEO to give an expert advisory committee written directions about the way in which the committee is to carry out its function and the procedures to be followed in relation to meetings.

**Item 28 – Section 49**

This item replaces the term “Board” with “CEO” to allow the CEO, rather than the Board, to grant a leave of absence to an expert advisory committee member on the terms and conditions that the CEO determines.

**Item 29 – Subsections 50(1) and (2)**

This item replaces the term “Board” with “CEO” to allow an expert advisory committee member to resign his or her appointment by giving the CEO, rather than the Board, their written resignation.

**Item 30 – Section 51 (heading)**

This item replaces the term “Board” with “CEO” in the heading.

**Item 31 – Subsections 51(1) and (4)**

This item replaces the term “Board” with “CEO” to allow an expert advisory committee members to disclose interests (under section 29 of the *Public Governance, Performance and Accountability Act 2013*) to the CEO, rather than the Board.

**Item 32 – Section 53**

This item replaces the term “Board” with “CEO” to stipulates that an expert advisory committee member holds office on the terms and conditions (if any) in relation to matters not covered by this Act that are determined by the CEO, rather than the Board.

**Item 33 – Paragraph 54(1)(a)**

This item replaces the term “Board” with “Authority” to provide that a grant of financial assistance to a State can be made by the CEO, rather than the Board, on behalf of the Commonwealth.

**Item 34 – Subsection 54(3)**

This item replaces the term “Board” with “Authority” and allows for an agreement under subsection (2) to be entered into by the Authority, rather than the Board, on behalf of the Commonwealth.

**Item 35 – Paragraph 55(1)(a)**

This item replaces the term “Board” with “Authority” and provides that a grant of financial assistance to a Territory can be made by the Authority, rather than the Board, on behalf of the Commonwealth.

**Item 36 – Subsection 55(3)**

This item replaces the term “Board” with “Authority” and allows for an agreement under subsection (2) to be entered into by the Authority, rather than the Board, on behalf of the Commonwealth.

**Item 37 – Subsection 56(1)(a)**

This item replaces the term “Board” with “Authority” to allow a grant to be made to a person other than a State or Territory by the Authority, rather than the Board.

**Item 38 – after Subsection 56(2)**

This item inserts subsection 56(2A) to require that any constitutional corporation granted financial assistance must comply with the necessary terms and conditions.

**Item 39 – Subsection 56(3)**

This item replaces the term “Board” with “Authority” to allow the Authority, rather than the Board, to enter into agreements under subsection 56(2) on behalf of the Commonwealth.

**Item 40 – before Subsection 58(1)**

This item inserts subsection 58(1A) to provide that the Authority must not publish or disseminate information that may identify donors or recipients.

**Item 41 – Subsection 58(2)**

This item replaces references to “Subsection (1)” with “Subsections (1A) and (1)” in relation to criteria that does not apply in the publication or dissemination of information.

**Item 42 – Subsection 59(2)**

This item updates the terminology to replace “dead” with “deceased” to bring the terminology in line with standard and accepted nomenclature used in the organ and tissue donation and transplantation sector.

**SCHEDULE 2 – Application, transitional and saving provisions****Item 1 - Definitions**

This item sets out the definitions for schedule 2 for “commencement time”, “OTA Act” and “reporting period”.

**Item 2 – Functions of the CEO**

This item stipulates that the CEO assumes the functions outlined in section 14B of the OTA Act, once amended, regardless of whether the appointment occurred before or after the commencement of this Act. That is, if the CEO is appointed prior to the enactment of this Bill, once the legislation commences the CEO automatically assumes the functions outlined in section 14B of the amended Act.

**Item 3 – Board members**

This item allows for Board members who have been appointed under section 31 of the OTA Act, immediately before the commencement of this Act, to continue the existing appointment under the amended legislation on the same terms and conditions. The item does not prevent those terms and conditions being varied after the commencement time.

**Item 4 – Consultants**

This item allows for the continued engagement of consultants who were engaged by the Board under section 26 of the OTA Act, provided their engagement was in effect immediately before commencement of this Act. This item further provides for the preservation of the same terms and conditions relating to the person’s engagement applicable immediately before commencement of this Act. This item does not prevent those terms and conditions being varied after the commencement time.

**Item 5 – Expert advisory committee**

This item allows for the continuation of expert advisory committees, established under section 44 of the OTA Act, to continue after commencement of this Act. This item also provides for the expert advisory committee to be dealt with as if established by the CEO under this Act, after commencement of this Act.

**Item 6 – Expert advisory committee members**

This item allows for the continuation of expert advisory committee member appointments, appointed by the Board under section 46 of the OTA Act, after commencement of this Act. This item also allows for the appointment of an expert advisory committee member to be taken to have been appointed by the CEO, and to be appointed for the balance of their appointment that remained before the

commencement of this Act on the same terms and conditions. This item does not prevent those terms and conditions being varied after the commencement time.

**Item 7 – Agreements regarding grants of financial assistance**

This item allows for grants that have been made by the Board under the OTA Act, but where agreements have not been signed, to be entered in to by the Authority once the amended legislation commences.

**Item 8 – Compliance with terms and conditions of grants of financial assistance**

This item stipulates that a constitutional corporation must comply with the terms and conditions set out in an agreement that was entered in to after the commencement of this Act.

**Item 9 – Protection of patient confidentiality**

This item ensures the protection of patient confidentiality for information that was obtained before, or after, the commencement of this Act.

**Item 10 – Annual report etc**

This item allows for the CEO to be the accountable authority for the purposes of sections 39, 42 and 46 of the PGPA Act from 1 July 2021, and each later reporting period.

**Item 11 – Transitional rules**

This item allows for the Minister to, by legislative instrument, make additional rules prescribing matters that are of a transitional nature, that are not already covered by Schedule 2, which are not excluded in 40(2).