

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Finance

Financial Framework (Supplementary Powers) Act 1997

*Financial Framework (Supplementary Powers) Amendment
(Social Services Measures No. 1) Regulations 2023*

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*.

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

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.

The *Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 1) Regulations 2023* (the Regulations) amends Schedule 1AB to the Principal Regulations to establish legislative authority for government spending on the Forced Adoption Support Services—Commemoration and Capacity-Building program (the program). The program is administered by the Department of Social Services.

The program will commemorate the 10th Anniversary of the National Apology for Forced Adoptions that the then Prime Minister, the Hon Julia Gillard AC, delivered on 21 March 2013. The program would support many people impacted by the approximately 150,000 adoptions that occurred from 1951 to 1971 (birth parents and children). In addition to gender discrimination driving many unwed (often young) women of the time to feel no choice but to comply with state based adoptions, many adoptions were arranged without willing or informed consent. These adoption practices were unethical, dishonest, and in many cases illegal, and are therefore considered ‘forced’.

The 10th anniversary will be a particular date of significance for those impacted. Commemorating the anniversary on 21 March 2023 will demonstrate the Government’s resolve to uphold the commitments it has made.

Funding of up to \$300,000 in 2022-23 will be provided to support commemorative activities to raise awareness and are likely to generate momentum at state and territory level. Funding of up to \$700,000 in 2023-24 will also build the capacity through skill enhancement of the Forced Adoption Support Services providers and aged care providers to support forced adoptees and their parents.

The focus of the skills enhancement will be on training providers in trauma-informed service-delivery, so that they can better assist members of the cohort who are reaching an age where they may re-enter institutional care (with the consequent risk of re-traumatisation). Targeted care sector online training resources will be developed in a similar way to the Department of Health and Aged Care resources targeted at people entering aged care with historical experience of institutional care as children.

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 Department of Social Services.

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 (Social Services Measures No. 1) Regulations 2023*

Section 1 – Name

This section provides that the title of the Regulations is the *Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 1) Regulations 2023*.

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

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 Social Services (the department).

New **table item 598** establishes legislative authority for government spending on the Forced Adoption Support Services—Commemoration and Capacity-Building program (the program).

On 21 March 2013, the Australian Government delivered a formal apology to people affected by past forced adoption or removal policies and practices. The national apology was delivered by the then Prime Minister, the Hon Julia Gillard AC, who acknowledged that many people still experience a constant struggle, and committed to ensuring that all those affected get the help they need.

The program will commemorate the 10th anniversary of the National Apology for Forced Adoptions (the Apology) on 21 March 2023, which will demonstrate the Government's resolve to uphold the commitments it has made.

The program supports many people impacted by the approximately 150,000 adoptions that occurred from 1951 to 1971 (birth parents and children). In addition to gender discrimination driving many unwed (often young) women of the time to feel no choice but to comply with state based adoptions, many adoptions were arranged without willing or informed consent.

These adoption practices were unethical, dishonest, and in many cases illegal, and are therefore considered ‘forced’.

Funding of \$1 million over two years from 2022-23, will be provided to:

- organise national and local activities to commemorate the 10th anniversary of the Apology;
- develop and publish online resources to complement those activities, and to serve as a commemorative and educational resource; and
- develop and publish online training modules to help Forced Adoption Support Services (FASS) providers and aged care providers to address the needs of people affected by past forced adoption practices.

The department will also work with the states and territories to develop a national approach to records harmonisation.

The Government currently funds a FASS provider in each state and territory across Australia to deliver a range of services to assist and support people affected by past policies and practices of forced adoption, including trauma-informed casework, records tracing, mediation of family search and reunion, capacity-building opportunities and counselling.

In 2022-23, commemorative activities will focus on raising public awareness of the trauma and suffering experienced and de-stigmatise those people subjected to forced adoption. As part of the established model of service delivery, FASS providers must commemorate the anniversary of the Apology on 21 March each year, in an appropriate manner for the local community. For example, an event or memorial activity inviting people affected by past forced adoption to promote healing and community awareness. Locally, FASS providers are planning activities such as podcasts, posts on social media, items in newsletters, displays of books and artworks, and low-key gatherings with invited speakers.

In consultation with the Commonwealth, FASS providers indicated a preference for commemoration activities that will attract national attention in order to raise public awareness. The department is exploring ways of creating an online record of commemorative activities that will last beyond the date of the 10th Anniversary. This may include a webinar or other recordings that will be captured after 21 March 2023. The department will also provide funding to FASS providers to assist with local commemorative activities.

The department will commence scoping work to build the capacity of the FASS providers to support the ageing cohort of forced adoptees and their birth parents. Work will also be undertaken with the Department of Health and Aged Care and FASS providers to develop online training to build the capacity of the FASS providers and aged care providers to support this cohort. Online modules will be developed to support those impacted by forced adoption and those who may be re-traumatised by entering health and aged care settings. The modules will raise awareness about the life-long trauma from forced adoptions with providers of support services and aged care who the ageing cohort impacted by forced adoptions are increasingly likely to encounter. It will increase the capacity of that workforce to respond in the most appropriate trauma-informed way, because they will be better at recognising the specific needs of the cohort impacted by past forced adoptions.

In parallel, the department will co-ordinate negotiation towards a national approach to records harmonisation and enhanced partnership across jurisdictions.

The particular focus on aged care and records harmonisation recognises:

- the trauma from past forced adoption practices and returning to institutional care (for example unwed mothers homes and/or hospitals); and
- FASS providers reporting increasing complexity around records tracing, resulting from developments such as deoxyribonucleic acid (DNA) testing and a growing interest from younger generations with adoptees in their family tree. Differing rules and regulations around privacy and access across states compound the challenges faced by children, birth parents and adoptive parents.

The department will deliver the program through a combination of grant and procurement processes in accordance with the Commonwealth resource management framework, including the *Public Governance, Performance and Accountability Act 2013* (PGPA Act), the *Commonwealth Grants Rules and Guidelines 2017* (CGRGs) and the *Commonwealth Procurement Rules* (CPRs).

Funding for FASS providers will be delivered through variations to existing grant agreements to assist with costs related to commemorative activities. The grants will be administered by the Community Grants Hub, part of the department and grants details will be available on GrantConnect (www.grants.gov.au).

Funding for commemorative activities, including linking the record of speeches delivered and recorded on the day of the 10th Anniversary with online materials and online activities through webinar will be delivered through a procurement process. This will ensure the relevant skills and expertise in communication technology are considered. Procurement will be conducted in accordance with the CPRs, including publication on the AusTender's website (www.tenders.gov.au).

The department will develop and execute a Memorandum of Understanding with the Department of Health and Aged Care to deliver the learning modules for those working in health and aged care settings. Grant agreements will be executed to formalise arrangements with providers of online training packages for support services where the work is conducted outside aged care settings.

Final decisions on expenditure activities for the program, including those associated with the commemorative event and online training to build the capacity of 'FASS providers' and aged care providers to support forced adoptees and their parents will be made by the Minister for Social Services.

Funding decisions on commemorative activities are not suitable for an independent merits review. There is a limited budget for commemorative events and the expenditure is targeted at supporting key stakeholders, such as individuals impacted by past forced adoption policies and practices. Funding to support FASS providers as well as national commemorative activities is finite.

Any variation to funding to one or more providers would be to the detriment of other providers, if challenged. The decision to provide such funding flows from a set of circumstances and leaves no room for merits review to operate. The Administrative Review Council (ARC) has recognised that it is justifiable to exclude merits review in relation to

decisions of this nature (see paragraphs 4.11 to 4.14 of the guide, *What decisions should be subject to merit review?* (the ARC guide)).

The ARC also considers that decisions to provide one-off payments to certain service providers over other service providers should be excluded from merits review, on the basis that review would promote competition amongst community groups; no effective remedy could be provided as a successful application for review would result in reductions to funding for other service providers; and there would be delays in channelling funds into service provision (see paragraphs 4.16 and 4.17 of the ARC guide). Payments to providers of services required for the commemorative events will be one-off payments and are excluded from merits review.

The review and audit process undertaken by the Australian National Audit Office also provides a mechanism to review Australian Government spending decisions and report any concerns to the Parliament. These requirements and mechanisms help to ensure the proper use of Commonwealth resources and appropriate transparency around decisions relating to making, varying or administering arrangements to spend relevant money.

Further, the right to review under section 75(v) of the Constitution and review under section 39B of the *Judiciary Act 1903* may be available. Persons affected by spending decisions would also have recourse to the Commonwealth Ombudsman where appropriate.

In the lead up to the 10th Anniversary, historic forced adoption practices have also attracted growing media attention as impacted people disclose their experiences at end of life. With those impacted moving into older age, Commonwealth investment should reflect their changing life circumstances. The program will commemorate this date of significance and augment existing services with targeted resources.

The department has commenced consultation with the FASS providers to ensure commemorative activities align with local activities. Consultation with the Department of Health and Aged Care identified the opportunity to contribute a portion of funding from the program to develop additional workforce training modules to build on existing trauma-informed online training designed for the aged care sector.

Additionally, as work progresses on a national approach to records harmonisation, the department will seek state co-investment and partnership, and will meet those needs from within existing resources.

Funding of \$1 million over two years from 2022-23 for the program will come from Program 2.1: Families and Communities, which is a component of Outcome 2. Details will be included in the 2023-24 Budget and Portfolio Budget Statements 2023-24, Social Services Portfolio.

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 communications power (section 51(v));
- the social welfare power (section 51(xxiiiA));
- the express incidental power and the executive power (sections 51(xxxix) and 61), including the nationhood aspect; and
- the territories power (section 122).

Communications power

Section 51(v) of the Constitution empowers the Parliament to make laws with respect to ‘postal, telegraphic, telephonic and other like services’.

The program includes the development of online training modules for providers of support services. The commemoration event for the 10th anniversary of the Apology will be accompanied by online resources.

Social welfare power

The social welfare power in section 51(xxiiiA) of the Constitution empowers the Parliament to make laws ‘with respect to the provision of, amongst other things, the provision of medical services’.

The program will fund capacity building of support services and aged care to address the needs of people affected by past forced adoption practices.

Executive power and express incidental power, including the nationhood aspect

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. Section 61 of the Constitution supports activities that are peculiarly adapted to the government of a nation and cannot be carried out for the benefit of the nation otherwise than by the Commonwealth.

The commemorative event being held for the 10th anniversary of the Apology will be an event of special national significance.

Territories power

Section 122 of the Constitution empowers the Parliament to ‘make laws for the government of any territory’.

The program will fund activities to commemorate the 10th anniversary of the Apology, which will be held in the Australian Capital Territory.

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 (Social Services Measures

No. 1) Regulations 2023

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 (Social Services Measures No. 1) Regulations 2023* amend Schedule 1AB to the Principal Regulations to establish legislative authority for government spending on the Forced Adoption Support Services—Commemoration and Capacity-Building program (the program). The program is administered by the Department of Social Services.

The program will commemorate the 10th Anniversary of the National Apology for Forced Adoptions (the Apology) that the then Prime Minister, the Hon Julia Gillard AC, delivered on 21 March 2013. The program would support many people impacted by the approximately 150,000 adoptions that occurred from 1951 to 1971 (birth parents and children). In addition to gender discrimination driving many unwed (often young) women of the time to feel no choice but to comply with state based adoptions, many adoptions were arranged without willing or informed consent. These adoption practices were unethical, dishonest, and in many cases illegal, and are therefore considered ‘forced’.

The 10th anniversary will be a particular date of significance for those impacted. Commemorating the anniversary on 21 March 2023 will demonstrate the Government’s resolve to uphold the commitments it has made.

Funding of \$1 million to 30 June 2024 will be provided to:

- organise national and local activities to commemorate the 10th anniversary of the Apology;
- develop and publish online resources to complement those activities, and to serve as a commemorative and educational resource; and

- develop and publish online training modules to help Forced Adoption Support Services (FASS) providers and aged care providers to address the needs of people affected by past forced adoption practices.

The department will also work with the states and territories to develop a national approach to records harmonisation.

Human rights implications

This disallowable legislative instrument engages the following human rights:

- the right to widest possible protection and assistance – Article 10 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), read with Article 2;
- the right to health – Article 12 of the ICESCR; and
- the right to take part in cultural life – Article 15 of the ICESCR.

Right to widest possible protection and assistance

Article 2 of the ICESCR requires that each State Party to the Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the Covenant by all appropriate means, including particularly the adoption of legislative measures.

Article 10 of the ICESCR recognises that the widest possible protection should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.

Assistance provided by FASS and aged care providers attempts to address trauma experienced by forced adoptees and birth parents as a result of interference with their families at a time when they were being established.

Right to health

Article 12 of the ICESCR provides that the States Parties recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

Building the capacity of FASS and aged care workers will increase their ability to assist adoptees and birth parents with the particular types of mental health issues they may experience as a result of forced adoptions.

Right to take part in cultural life

Article 15 of the *International Covenant on Economic, Social and Cultural Rights* refers to the right of all persons to take part in cultural life and requires Australia to take steps to achieve the full realisation of this right, including steps necessary for the conservation, development and the diffusion of culture.

Funding the commemoration of the 10th anniversary of the Apology and building the capacity of 'FASS providers' and aged care providers to support forced adoptees and their birth parents will allow for recognition of the enduring impacts of forced adoption on birth parents and adoptees and provide education on the impacts of such practices.

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