



Procedural Information Bulletin

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For the sitting period 12 to 14 February 2019 and
additional estimates hearings 18 to 22 February 2019

Senators

Tasmanian Senator David Bushby resigned his place as a senator prior to the sittings and Victorian Senator the Hon. Jacinta Collins similarly resigned on 15 February. New South Wales Senator David Leyonhjelm flagged his intention to resign at the end of the February to run for the state parliament. This brings the number of Senate casual vacancies for the 45th Parliament to ten, on top of the ten senators disqualified under s.44 of the Constitution.

Legislation

With just three Senate sitting days before an April Budget, the Government demonstrated a pragmatic approach to its legislative program. Several non-contentious bills were passed without amendment, while others – dealing with superannuation, penalties in the corporate and financial sector, electoral laws and industrial chemicals – were passed with a flurry of government, opposition and crossbench amendments designed to secure Senate support.

A number of measures were removed from the [Electoral Legislation Amendment \(Modernisation and Other Measures\) Bill 2018](#), acknowledging the risk that the Australian Electoral Commission would have insufficient time to implement them prior to the next election. Among the measures passed were provisions requiring candidates to complete a qualification checklist when nominating for election. The checklists were introduced by regulation prior to by-elections for vacant House of Representatives seats in July 2018, but could be made mandatory only by a change to the Act.

Opposition amendments to a [Treasury Laws](#) bill added provisions dealing with access to justice for small business under consumer laws. The government acknowledged in the Senate that it didn't have the numbers to resist the amendments, which were carried on the voices. By the time the amendments arrived in the House the government had decided to accept them.

By contrast, the government's [Home Affairs Legislation Amendment \(Miscellaneous Measures\) Bill 2018](#) passed both Houses with amendments the government continued to oppose. On the final sitting day in 2018 the Senate had passed the bill with amendments about medical evacuations from regional processing centres (see [Bulletin 331](#)). When the Senate's message was reported in the House on 12 February, the Government challenged the constitutionality of the amendments, citing limitations upon the financial powers of the Senate (as to which, see below). The Speaker left the matter to the House, which agreed to the Senate amendments with further amendments, including one intended to address the constitutional point. The various votes on the bill were carried with opposition members and most non-aligned members in the majority over government members, 75 votes to 74.

It was widely reported that this was the first time that a government had lost a vote on government legislation in the House since 1929. The 1929 vote led Prime Minister Stanley Bruce to advise an election the following day. However, as seen on this occasion, such votes are not necessarily fatal: see *House of Representatives Practice*, 7th edition, pp. 320-323, [Withdrawal of confidence shown by defeat on other question](#).

When the bill returned to the Senate, the opposition successfully suspended standing orders to give it precedence and require consideration of a single question – That the amendments made by the House be agreed to – which was carried 36 votes to 34. Despite the government’s opposition to the bill as finally passed, the Prime Minister indicated that the normal processes for assent would be followed, and the Governor-General assented to the bill on 1 March.

Financial implications of establishing public offices

In advice tabled in the House on 12 February 2019, the Solicitor-General argued that the Senate’s medical evacuation amendments contravened section 53 of the Constitution which, in its third paragraph, prohibits the Senate amending bills “so as to increase any proposed charge or burden on the people”. Any amendment having that effect must proceed by way of a request that the House initiate the change. It was also argued that the amendments infringed section 56, which prevents the passage of a bill appropriating moneys unless the purpose of the appropriation has been recommended by the Governor-General.

The amendments in question established a health advice panel. The Solicitor-General advised that members would hold “public offices” as defined in the *Remuneration Tribunal Act 1973*, and that the obligation to remunerate them would automatically trigger expenditure under a standing appropriation in that Act.

The interpretation of section 53 is a matter for the Parliament. In a statement to the House, the Speaker reported his own advice that section 53 was engaged on this occasion, under the interpretation favoured by the House, but noted that the practice in relation to the appointment of statutory offices had at times varied.

Indeed, there are precedents stretching back over several decades of both Houses accepting that the creation of public offices triggering the same provisions of the *Remuneration Tribunal Act* may proceed by way of Senate amendments, and without the need for a message under section 56. The Solicitor-General’s advice cites one of these: Senate amendments to the Native Title Bill 1993 proposed to establish the Parliamentary Joint Committee on Native Title, requiring remuneration of its chair and deputy chair, and the payment of travel allowance. The amendments were held to be valid by the High Court [*Western Australia v Commonwealth (the Native Title Act Case) (1995) 183 CLR at 482*].

Similar amendments were made and accepted in the Australian Securities Commission Bill 1988 (establishing the Parliamentary Joint Committee on Corporations and Securities and increasing the number of members appointed to the Corporations and Securities Panel) and the Tourism Australia Bill 2004 (increasing the number of “other members” of the Board of Directors). Likewise, numerous bills have established statutory offices coming within the definition of “public office” in the *Remuneration Tribunal Act*, without the requirement for a message under section 56.

In practice, the remuneration for such offices is frequently funded through annual departmental appropriations or cost-recovery arrangements, or offset in other ways. However, the Solicitor-General noted his instructions that the Government – unsurprisingly – had no intention of otherwise funding

the expenditure required under the “medevac” amendments. In the end, the House did not adopt the interpretation proposed in the advice, but amended the Senate’s amendments to remove the financial aspect.

Committee activity

The sitting week saw roughly the same number of inquiries (14) finished as new ones commenced.

The enormous breadth of inquiries undertaken by Senate references committees was revealed by the reports tabled. These included: a report by the Environment and Communications References Committee on the April 2018 grant of \$440 million to the Great Barrier Reef Foundation; the Community Affairs References Committee tabled a substantive interim report on support for Australia’s thalidomide victims; the Education and Employment References Committee tabled its report on the mental health of first responders, emergency workers and volunteers; the report on the practice of dowry and dowry abuse in Australia from the Legal and Constitutional Affairs References Committee was also tabled; as was the report on the appropriateness and effectiveness of the objectives, design, implementation and evaluation of Jobactive from the Education and Employment References Committee.

Degrees of independence

The issue of the independence of statutory officers from direction by the executive arose in the estimates hearings of the Education and Employment Legislation Committee. The catalyst was an apparent intervention by the minister at the table in relation to a question taken on notice by the Commissioner of the Registered Organisations Commission.

Statutory agencies are established with varying degrees of independence from the executive government. Some, such as the ROC, may be directed by the relevant minister in relation to their functions, but only by way of disallowable legislative instrument. Others, such as the Australian Human Rights Commission, are independent of ministerial direction. For such agencies, it may be helpful for an independent statutory officer to be joined at the table by the responsible minister as a variety of views may assist the committee, but the statutory officer should be allowed to give evidence freely and without interruption or hindrance. The Senate recognises this in its 2009 resolution on public interest immunity claims (see paragraph (8)).

Odgers notes that, while “statutory authorities may not be subject to direction or control by the executive government in their day-to-day operations, they are accountable to the Senate for their expenditure of public funds, and have no discretion to withhold from the Senate information concerning their activities” [14th ed. at p 569].

Questions to ministers

Estimates provides, among other things, an opportunity for senators to ask for explanations from ministers in the Senate about matters relevant to their portfolio responsibilities.

Questions were asked in different estimates committees about an apparent discrepancy between evidence provided by Minister Cash and that provided by the Australian Federal Police in relation to an AFP search of the Australian Workers’ Union offices in 2017.

Similarly, questions were asked in the Finance and Public Administration Legislation Committee of Minister Cormann, and then in the Foreign Affairs, Defence and Trade Legislation Committee (FADT) as senators sought more information about matters relating to the Helloworld travel company. An example of the way committees receive and use information while conducting their hearings came during the FADT lunch suspension when senators and the secretariat received an email, the first sentence of which included ‘...I’ve been advised by a friend that my name was mentioned in the Senate’s Estimate Committee today.’ The email and other attached documents were tabled, published on the committee’s website, and used as the basis for further questioning in the committee that day.

Other matters traversed

Other significant matters traversed during the week of hearings included questioning of Department of Home Affairs officials in relation to the awarding of a \$423 million contract to Paladin to provide services to refugees on Manus Island. In addition, the following matters were discussed:

- Australian Institute of Marine Science’s Long-term Monitoring Program on the condition of the Great Barrier Reef
- Caretaker conventions and processes in an election period
- The role of the Australian Federal Police and the Department of Home Affairs in the detention in Thailand of Mr Hakeem al-Araibi
- Incentives for the uptake of electric vehicles
- Mental health funding for Primary Health Networks
- ASIC’s response to the final report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry
- Funding for apprenticeships and traineeships
- Export of weapon systems to Saudi Arabia.

RELATED RESOURCES

[Dynamic Red](#) – updated continuously during the sitting day, the Dynamic Red displays the results of proceedings as they happen.

[Senate Daily Summary](#) – a convenient summary of each day’s proceedings in the Senate, with links to source documents.

Like this bulletin, these documents can be found on the Senate website: www.aph.gov.au/senate

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