



Procedural Information Bulletin

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For the sitting period 4 to 13 February 2020

Senators and the Senate

The parliamentary sittings for the year commenced with a day set aside in each House to acknowledge the devastation and loss of life caused by the catastrophic bushfire season; expressing gratitude to those who fought fires and assisted with evacuation and relief efforts, and condolences to the families who had lost loved ones and to those who had suffered injuries or loss.

Senator Bernardi resigned his place as an independent senator for South Australia on 20 January. Section 15 of the Constitution obliged the South Australian Parliament to choose a member of the Liberal Party – the party Bernardi represented at the 2016 election – to fill the resultant vacancy. The President of the South Australian Legislative Council, the Hon. Andrew McLachlan, was the party's nominee. He resigned that office and his place on the Council and was duly chosen as a senator at a joint sitting on 6 February; taking his seat the following Monday. Senator McLachlan is the second former President of the Legislative Council to sit in the Senate. The first was the Senate's inaugural President, [Sir Richard Chaffey Baker](#).

Procedure

New debating times and a revised routine of business applied from the beginning of the 2020 sittings, for a 6-month trial: see [Bulletin 339](#). The main features include shorter time limits for general debate (20 minutes reduced to 15) and debate in committee (15 minutes reduced to 10); a more streamlined approach to considering reports and other documents on Thursday afternoon; and a new division-free period replacing the former dinner break on Monday evenings. On 10 February, by agreement, the day's 60-minute matter of public importance discussion was shifted to coincide with the division-free hour.

On 12 February, the Senate suspended pursuant to [a continuing order adopted in October 2019](#), so that senators could attend the Prime Minister's annual Closing the Gap statement. The statement was then debated during government business time on 12 and 13 February, in accordance with [a continuing order from 2017](#).

The sittings also saw the Senate suspend for a time on 10 February, so that senators could attend an address to the House of Representatives by the President of the Republic of Indonesia, Mr Joko Widodo.

Legislation

On 10 February the Senate passed a [private senator's bill on marine safety](#), after closure. Government senators did not support the bill as presented, but indicated that the Government would engage further on the matter. The bill is now on the House *Notice Paper*.

Several government bills passed during the fortnight, some with amendments. On 5 February a bill addressing [Illegal Phoenixing](#) was passed with opposition amendments requiring an independent review. The amendments were approved by the House later that day. A bill providing [exemptions from financial services and credit licensing requirements](#), among other measures, passed without amendment after the Opposition's *FinTech sandbox exemption* amendments were defeated.

Meanwhile, two attempts to defer consideration of the [Ensuring Integrity Bill No. 2](#) were defeated. The first – an Opposition motion proposed on 5 February – sought to defer the bill until legislation was passed to establish a national integrity commission and implement recommendations of royal commissions on banking and financial services, and on aged care quality and safety. The second was an attempt the following day to refer the bill to the Employment and Education Legislation Committee, via the Selection of Bills process. It was argued that the inquiry could consider the changes to the bill since its original iteration, as well as other amendments proposed but not adopted in later 2019. The amendment to initiate the reference was defeated, 33 votes to 35.

Orders for documents and explanations

The Senate again passed numerous orders requiring Ministers to table documents, or explain their failure to do so. Many of those orders arose from [Auditor-General Report No. 23 of 2019-20](#), on the awarding of funding under the Community Sport Infrastructure Program. These included orders seeking the report by the Secretary of the Department of the Prime Minister and Cabinet, Mr Phillip Gaetjens, on the application of Ministerial Standards in awarding funding under the program, and advice about the legal authority of the relevant minister to “undertake an approval role for funding decisions”. Another grants program – the Female Facilities and Water Safety program – was the subject of orders toward the end of the sitting fortnight.

In debate on the government's refusal to produce the so-called Gaetjens report, senators considered the accepted scope of claims of Cabinet confidentiality (see [Bulletin 328](#) and below). A motion moved by the Leader of the Opposition on 12 February, co-signed by all non-government parties, sought to constrain the Leader of the Government from representing the Prime Minister during question time in the Senate and appearing as his representative before Senate committees. That motion was defeated when some senators initially supporting the move indicated their discomfort with aspects of it and, in particular, with an unprecedented requirement that the Leader be prevented from occupying his seat at the Table in the Senate. Proponents described the requirement as a sanction against the “unprecedented behaviour of [the] government”, but the Leader of the Government speaking against the motion argued that it was an inappropriate procedure, open to abuse by a majority in either House. [There were also suggestions that the proposed sanctions exceeded the Senate's powers, but their connection to orders the Senate is empowered to make is clear.]

Some other procedures adopted in response to non-compliance with such orders are discussed in *Odgers' Australian Senate Practice* under the heading [Remedies against executive refusal of information](#).

Among the other orders made were an order for unanswered and overdue estimates questions, and an order seeking to remedy the late tabling of schedules of special purpose flights (11 February). This last order notes that guidelines for the use of special purpose aircraft require the Defence minister to table information about their use twice a year. This requirement itself flows from the “VIP planes affair” of the 1960s, which can be considered part of the “gradual and sporadic” resurgence in the use of orders

for documents after a half-century long decline: see Paula Waring, “[This Is a Procedure on Which We Should Not Lightly Embark](#): Orders for the Production of Documents in the Australian Senate, 1901 to 1988”, Papers on Parliament No. 58.

Cabinet documents and legal advice

The Senate occasionally orders the government to table legal advice it has obtained or a document that has been considered by Cabinet. Two enduring claims made by governments of all stripes are of a long-standing practice that such legal advice is never produced to the Senate, and that Cabinet documents are immune from production.

The Senate does not accept that there is any category of documents that is immune from production, and – while accepting that there are documents which should not, in the public interest, be disclosed – insists that it is for the Senate (and not the government) to determine where the public interest lies. A series of resolutions from 1975 emphasise this, including the [2009 order relating to public interest immunity claims made in committee](#), the principles of which also [apply to orders for information made by the Senate](#). The underlying requirement here is that any claim that it would not be in the public interest to comply in part or in full with an order for a document (or information) must be accompanied by a statement of the ground for that conclusion, specifying the harm to the public interest that could result from the production of the document to the Senate. Odgers’ describes how the Senate has dealt with claims made on the grounds of the confidentiality of legal advice (14th ed. at p. 668) and Cabinet confidentiality (at p.665).

Certainly the government can argue that Cabinet documents should not be produced, but under Senate practice it is up to the Senate to determine whether to accept that argument. The Senate has previously been persuaded to accept that argument in relation to documents which reveal Cabinet deliberations, but not necessarily in relation to documents which might be considered inputs to Cabinet processes rather than revealing those deliberations. This approach seeks to prevent government overreach in categorising administrative documents to attempt to put them beyond parliamentary scrutiny. Of course, there is nothing to prevent the Cabinet “releasing” documents in order to put them before the Parliament.

New inquiries

Early in the sitting fortnight, a new select committee was established into the administration of sports grants with a comparatively short reporting date of 24 March 2020. In addition, two new references inquiries were established: the Foreign Affairs, Defence and Trade References Committee commenced an inquiry into opportunities for strengthening Australia’s relations with France, reporting by 13 August 2020; and the Finance and Public Administration References Committee commenced an inquiry into lessons learned from the 2019-20 bushfire season to report by the last sitting day in 2021. The Joint Standing Committee on the National Disability Insurance Scheme commenced an inquiry into the workforce of the NDIS. As well as this, four bills were sent to legislation committees for inquiry and report.

Reports tabled

Unusually, only one legislative and general purpose committee was required to table a final report during the fortnight. The Community Affairs Legislation Committee tabled its report into the Australian Sports Anti-Doping Authority Amendment (Sport Integrity Australia) Bill 2019.

An interim report was tabled by the Community Affairs References Committee as part of its inquiry into Centrelink's compliance program. The report was critical of a public interest immunity claim made by the Minister for Government Services over legal advice about the compliance program. The minister claimed the legal advice was covered by legal professional privilege and so should remain confidential.

The committee noted that legal professional privilege has not been accepted in the Senate as grounds for refusing to provide information or documents, and that the Senate has rejected government claims that there is a long-standing practice of not disclosing legal advice. The committee also indicated that it was not satisfied that the minister's correspondence sufficiently explained the specific harm to the public interest that would result from provision of the advice.

The committee recommended that the Senate adopt a resolution reasserting the requirement that the legal advice and other documents be provided to the committee, which it duly did. A dissenting report by government senators accepted the Minister's claim and indicated that they did not support the recommendation.

Estimates and changes to the Administrative Arrangements Order

Changes to the Administrative Arrangements Order on 5 December 2019, which reconfigured some government departments, came into effect on 1 February 2020 with consequent implications for additional estimates hearings commencing on 2 March.

The Senate agreed on 12 February to a motion allocating the new departments and agencies to Senate committees on a, largely, business as usual basis. Unusually, this means that some departments will now report to more than one committee.

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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