

The Senate

Community Affairs
Legislation Committee

Additional estimates 2019–20

March 2020

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MEMBERSHIP OF THE COMMITTEE

46th Parliament

Members

Senator Wendy Askew, Chair	Tasmania, LP
Senator Rachel Siewert, Deputy Chair	Western Australia, AG
Senator Malarndirri McCarthy	Northern Territory, ALP
Senator Andrew McLachlan	South Australia, LP
Senator Helen Polley	Tasmania, ALP
Senator Dean Smith	Western Australia, LP

Senators in attendance

Senators Bilyk, Chandler, Di Natale, Dodson, Farrell, Gallagher, Griff, Hughes, Keneally, Kitching, Lines, O'Neill, O'Sullivan, Patrick, Rice, Roberts, Sheldon, Marielle Smith, Steele-John, Urquhart, Waters, Watt.

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ABBREVIATIONS

AAO	Administrative Arrangements Order
CDC	Cashless Debit Card
committee	Senate Community Affairs Legislation Committee
MBS	Medical Benefits Schedule
NDIS	National Disability Insurance Scheme

Chapter 1

Overview

1.1 The Senate Community Affairs Legislation Committee (committee) examined the proposed 2019–20 additional expenditure for the Health Portfolio and the Social Services Portfolio at public hearings held on 4 and 5 March 2020.

1.2 This report does not attempt to analyse the evidence presented to the committee; however, it does outline the key issues considered by the committee during its examination of the proposed 2019–20 additional expenditure.

Referral of documents

1.3 The Senate referred the following documents to committees for examination and report:

- particulars of proposed additional expenditure in respect of the year ending on 30 June 2020 [Appropriation Bill (No. 3) 2019–2020];
- particulars of certain proposed additional expenditure in respect of the year ending on 30 June 2020 [Appropriation Bill (No. 4) 2019–2020];
- particulars of proposed additional expenditure in relation to the Parliamentary Departments in respect of the year ending on 30 June 2019 [Appropriation (Parliamentary Departments Bill (No. 2) 2019–2020]; and
- the final budget outcome 2018–19 and the advances under the annual Appropriation Acts for 2018–19.¹

1.4 The Portfolio Additional Estimates Statements for 2019–20 were tabled in the Senate on 13 February 2020.²

Portfolio oversight

1.5 The committee is responsible for examining the proposed expenditure of the department and agencies within the Health Portfolio and the Social Services Portfolio.³

1.6 The committee notes that the Administrative Arrangements Order (AAO) of 29 May 2019 saw the transfer of responsibility for whole of government service delivery from the Prime Minister and Cabinet portfolio to Services Australia, effectively transferring the Digital Transformation Agency into the committee's portfolio responsibilities.⁴

1 *Journals of the Senate*, No. 42, 13 February 2020, pp. 1283–1284.

2 *Journals of the Senate*, No. 42, 13 February 2020, p. 1284.

3 *Journals of the Senate*, No. 42, 13 February 2020, pp. 1268–1269.

4 Department of Prime Minister and Cabinet, Administrative Arrangements Order—29 May 2019, <https://www.pmc.gov.au/resource-centre/government/aao-29-may-2019> (accessed 4 February 2020).

1.7 Further to this, an AAO dated 5 December 2019 came into effect on 1 February 2020. As part of this change, Services Australia became an executive agency and, along with other agencies which were part of its portfolio, was transferred to the Social Services portfolio.

1.8 The Social Services portfolio now includes the following agencies:

- Department of Social Services (Department of State)
- Australian Institute of Family Studies
- Digital Transformation Agency
- NDIS Quality and Safeguards Commission
- Services Australia
- Australian Hearing Services
- National Disability Insurance Agency

1.9 The Health portfolio has remained unchanged.

Hearings

1.10 The Senate resolved that the committee's additional estimates 2019–20 hearings would be held on 4 and 5 March 2020.⁵

Health Portfolio

1.11 At its hearing on 4 March 2020, the committee examined the outcomes of the Health Portfolio. Evidence was provided by Senator the Hon Richard Colbeck, Minister for Youth and Sport, representing the Minister for Health, and senior officers of the Health Portfolio led by the Acting Secretary of the Department of Health, Ms Caroline Edwards.⁶

1.12 Specifically, the committee heard evidence from all outcomes of the Department of Health, as well as from the Australian Sports Anti-Doping Authority, Sport Australia, Australian Institute of Sport, Aged Care Quality and Safety Commission, Australian Digital Health Agency, Cancer Australia, and National Mental Health Commission.

1.13 In light of the developing situation relating to coronavirus, the committee re-arranged its program in order to hear evidence on this matter from the Chief Medical Officer, Professor Brendan Murphy, at various stages throughout the day.⁷

1.14 Initially, the committee discussed the work being undertaken by the government as well as by medical professionals around the country whose focus was containment and limitation of the virus. In particular, Professor Murphy noted the

5 *Journals of the Senate*, No. 27, 14 November 2019, p. 851.

6 *Committee Hansard*, 4 March 2020, pp. 1–4.

7 See *Committee Hansard*, 4 March 2020, pp. 6–18, 41–52, 60–68.

travel bans put in place for certain countries as well as advice on self-isolation. Professor Murphy also highlighted:

We are a well prepared health system, but even the best prepared health systems can face a challenge if you have large outbreaks in various regions, and so we're looking at all of the potential contingencies. Our message at the moment though is, whilst we have had some very small evidence of community transmission in a small part of Sydney, there is no evidence of widespread community transmission in the Australian community, and we are trying to reassure people that removing all of the lavatory paper from the shelves of supermarkets probably isn't a proportionate or sensible thing to do at this time.⁸

1.15 The committee also discussed the particular threat that coronavirus would pose to aged care facilities if a widespread outbreak was to occur.⁹ Professor Murphy provided the committee with details relating to a facility in New South Wales. He explained that a staff member who works at an aged-care facility, the Dorothy Henderson Lodge at Macquarie Park, and had not travelled to any affected countries, was confirmed to have the COVID-19 disease. Using this example, Professor Murphy set out the process which follows when an individual is found to have the virus:

A New South Wales public health unit is very actively investigating all of her contacts to see if they can find out where she got it from. She's in good condition and under observation in hospital. The Northern Sydney Local Health District, in partnership with the Commonwealth Aged Care Safety and Quality Commission team, have been working since last night with the facility, which is run by BaptistCare, and they have been exemplary in their response. The worker has had contact with 11 residents while she was symptomatic—sufficient contact to regard that as materiality. Those residents, all of whom are well, are being isolated at the moment. When their relatives come to see them they'll need to wear protective equipment, and staff working in their room will wear protective equipment.¹⁰

1.16 Ms Edwards noted that the Department of Health was ensuring that quality aged care continued to be provided; and was also planning for the impacts of the spread of COVID-19.¹¹

Key issues

1.17 Further to matters relating to coronavirus, the committee discussed a wide range of topics relating to the Health portfolio, including:

- evidence provided at a public hearing of the Senate Select Committee on the Administration of Sports Grants (*Committee Hansard*, pp. 18–37);

8 *Committee Hansard*, 4 March 2020, p. 6.

9 *Committee Hansard*, 4 March 2020, pp. 41–52, 60–68.

10 *Committee Hansard*, 4 March 2020, p. 60.

11 *Committee Hansard*, 4 March 2020, p. 67.

- mental health support for people in bushfire affected regions (pp. 58–60, 68–75);
- Medical Benefits Schedule (MBS) items and telehealth items (pp. 44–45);
- doctors in rural parts of Australia (pp. 48–52);
- review of the operation of the Narcotic Regulations Act (pp. 77–79);
- Lyme-like disease (pp. 80–81);
- do-it-yourself flu test (pp. 81–84);
- funding for particular aged care facilities (pp. 85–97);
- ACAT review timeframes (pp. 52–57, 84–90);
- Royal Commission into Aged Care Quality and Safety (pp. 53–55, 65, 90–94);
- Cancer Australia (pp. 104–109, 113–114);
- Department preparedness for impact of climate change on health systems (pp. 109–112);
- national Headspace program (pp. 59, 72–73, 119–121);
- Government response to the Senate Community Affairs References Committee's report for the inquiry into support for Australia's thalidomide survivors (pp. 125–128);
- private health insurance (pp. 131–134);
- bulk billing rates (pp. 132–133);
- children in detention in the Northern Territory (pp. 133–134);
- National Partnership on Public Dental Services for Adults (pp. 136–137);
- eating disorder MBS items (pp. 137–138).

1.18 Further information on discussions held in relation to the Health portfolio can be found in the *Committee Hansard* published on the committee's website.¹²

Social Services Portfolio

1.19 At its hearing on 5 March 2020, the committee examined the outcomes of the Social Services portfolio. Evidence was provided by Senator the Hon Anne Ruston, Minister for Families and Social Services and senior officers of the Social Services portfolio, led by the Secretary of the Department of Social Services, Ms Kathryn Campbell AO CSC.¹³

12 The *Committee Hansard* is published online at:
www.aph.gov.au/Parliamentary_Business/Senate_estimates/ca/2019-20_Additional_estimates

13 *Committee Hansard*, 5 March 2020, pp. 1–3.

1.20 The committee heard evidence from all outcomes of the Department of Social Services as well as the National Disability Insurance Agency, NDIS Quality and Safeguards Commission, Digital Transformation Agency, Australian Hearing, and Services Australia.

Key issues

1.21 The committee discussed a wide range of topics relating to the Social Services portfolio, including:

- preparedness of the Social Services portfolio to deal with a wider outbreak of coronavirus in Australia (*Committee Hansard*, pp. 5–17), including:
 - ensuring continuity of payments by Services Australia;
 - ensuring National Disability Insurance Scheme (NDIS) services;
 - emergency relief program – panic buying of food and other supplies;
 - measures for people in precarious employment, who will be in quarantine and unable to work;
- fraud investigations relating to the NDIS (pp. 17–22);
- application processes for service animals (pp. 28–30);
- work of the Disability Reform Council (pp. 30–33);
- NDIS Information, Linkages, and Capacity building grants (pp. 55–59);
- Single Touch Payroll (p. 71);
- grandparent carers eligibility and access (pp. 75–77, 80–81);
- payments for emergency circumstances and disaster recovery from bushfires – including relating to psychological effects (pp. 77–80, 118–121);
- Cashless Debit Card (CDC) (pp. 66–67, 98–114), including:
 - possibility of a CDC national rollout;
 - differences between CDC and the Basics Card;
 - merchants and products registered for CDC;
 - cost of the CDC scheme;
- National Housing and Homelessness Agreement (pp. 87–93);
- GovPass project (Digital Transformation Agency) (pp. 93–95);
- Hearing Australia (pp. 95–98), including:
 - increasing number of Australians with hearing difficulties
 - hearing services for children
 - Community Service Obligation
- Social Services and Other Legislation Amendment (Simplifying Income Reporting and Other Measures) Bill 2020 (pp. 134–135);

- Income Compliance program (Services Australia) (pp. 121–141).

Procedural matters

1.22 During the hearings, there were occasions when departmental officers declined to provide information requested by the committee. At the start of each estimates hearing, officers at the hearing are reminded by the Committee Chair of an order of the Senate of 13 May 2009 specifying the process by which a claim of public interest immunity should be raised. The Chair also specifically reminded witnesses that:

...a statement that information or a document is confidential, or consists of advice to government, is not a statement that meets the requirements of the 2009 order. Instead, witnesses are required to provide some specific indication of the harm to the public interest that could result from the disclosure of the information or document.¹⁴

1.23 The underlying principle of this provision is that the Parliament has an overarching right to obtain information, in accordance with the powers provided to the Parliament by section 49 of the Constitution. The committee recognises that it is not always in the public interest to disclose information and, if needed, established processes exist for raising and determining claims of public interest immunity.

Public Interest Immunity Claim

1.24 During the hearing for examination of the Social Services portfolio on 5 March 2020, Senator the Hon Anne Ruston, Minister for Families and Social Services, made a public interest immunity claim in response to a question about the number of income compliance debts in a cohort identified by Services Australia.¹⁵

1.25 The minister provided details of the public interest immunity claim, specifically, that it pertained to 'details of the class, including the numbers of recipients in the class, identified in the current Gordon Legal proceedings— Katherine Prygodicz & Ors V Commonwealth of Australia'.¹⁶

1.26 Further, the minister provided information on the grounds of the specific harm that could occur should such information be made public:

...the specific harm to the public interest that could result from disclosure of the particulars of the class action claim is undue prejudice to the Commonwealth in relation to current litigation relating to the income compliance program. The current class action relating to the income compliance program includes a claim of unjust enrichment and a claim for damages based in negligence against the Commonwealth. The Commonwealth's ability to respond to these proceedings may be prejudiced if the applicants or their solicitors are made aware of matters covered by this public interest immunity claim. Disclosure of the details of the class

14 *Committee Hansard*, 4 March 2020, p. 5; *Committee Hansard*, 5 March 2020, p. 4.

15 *Committee Hansard*, 5 March 2020, p. 122.

16 *Committee Hansard*, 5 March 2020, p. 141.

identified by Gordon Legal could also enable a proximate quantum of the claim to become known. This could adversely affect the Commonwealth's position with respect to the resolution of the claim. The possible prejudice to the Commonwealth's ability to respond to the claims in the class action successfully exists even though parliamentary privilege would apply to evidence given by a minister or an official during an estimates hearing or in response to questions on notice.¹⁷

Questions on notice

1.27 In accordance with Standing Order 26, the committee drew the attention of the departments and their agencies to the agreed deadline of Friday, 24 April 2020 for the receipt of answers to questions taken on notice. On 24 March 2020, the committee agreed to extend the due date for answers to questions on notice to Friday, 8 May 2020, and notified the departments and agencies accordingly.

1.28 As the committee is required to report to the Senate before responses to questions are due, this report has been prepared without reference to any of these responses.

1.29 Tabled documents from the hearing, along with responses to questions on notice and additional information provided to the committee are tabled in the Senate and uploaded to the committee's website.¹⁸

Hansard transcripts

1.30 A verbatim record of the committee's hearings is made via the *Committee Hansard*, which is published on the estimates webpage.¹⁹

1.31 References in this report are to the proof *Committee Hansard*. Page numbers may vary between the proof and the final versions of the *Committee Hansard*.

Acknowledgments

1.32 The committee thanks the ministers and officers of the Health portfolio and Social Services portfolio who provided evidence and support for the committee's hearings.

Senator Wendy Askew Chair

17 *Committee Hansard*, 5 March 2020, p. 141.

18 See www.aph.gov.au/Parliamentary_Business/Senate_Estimates/ca.

19 The *Committee Hansard* is published online at:
www.aph.gov.au/Parliamentary_Business/Senate_estimates/ca/2019-20_Additional_estimates

Additional Comments from Opposition senators

1.1 The Opposition makes additional comments with respect to the public interest immunity claim made during the hearing for examination of the Social Services portfolio on 5 March 2020, by Senator the Honourable Anne Ruston, Minister for Families and Social Services, in response to questions about the number of income compliance debts in a cohort identified by Services Australia.

1.2 The circumstances of the claim are detailed in the committee report, and the report notes that the Minister provided information on the grounds of the specific harm that could occur should such information be made public:

the specific harm to the public interest that could result from disclosure of the particulars of the class action claim is undue prejudice to the Commonwealth in relation to current litigation relating to the income compliance program. The current class action relating to the income compliance program includes a claim of unjust enrichment and a claim for damages based in negligence against the Commonwealth. The Commonwealth's ability to respond to these proceedings may be prejudiced if the applicants or their solicitors are made aware of matters covered by this public interest immunity claim. Disclosure of the details of the class identified by Gordon Legal could also enable a proximate quantum of the claim to become known. This could adversely affect the Commonwealth's position with respect to the resolution of the claim. The possible prejudice to the Commonwealth's ability to respond to the claims in the class action successfully exists even though parliamentary privilege would apply to evidence given by a minister or an official during an estimates hearing or in response to questions on notice.¹

General comments

1.3 The 'cohort' referred to in the 5 March hearing is potentially the subject of a class action led by Gordon Legal. According to Gordon Legal, the class action, which will be considered by the Federal Court with over 10,000 applicants, 'argues that the Commonwealth Government has taken money from Centrelink recipients unjustly. The Court is asked to determine whether the more than 570,000 debts raised issued by Centrelink after 1 July 2015 lawfully entitle it to recover the amounts claimed. The Court has also been asked to determine whether the so-called collection fees levied by Centrelink should be refunded and whether those who have repaid all or part of those amounts should be paid interest. Finally, the Court has been asked to determine whether the persons affected are entitled to compensation for any distress or inconvenience caused'.

1.4 In its defence to the class action the Commonwealth Government has acknowledged that there was no legal basis in the social security law for debts to be

1 *Committee Hansard*, 5 March 2020, p. 141.

raised using income averaging alone. In relation to the negligence claim, it has submitted that it does not owe social security recipients a duty of care.

1.5 The class action follows a judgement by the Federal Court in *Amato v The Commonwealth* which confirmed that the compliance program was unlawful. The Commonwealth Government consented to orders that found: the issuing of a compliance debt by 'averaging' of Australian Taxation Office data, addition of a 10 per cent penalty fee based on the information at hand, and garnishee of a tax refund under the circumstances – were unlawful. The Government agreed to pay the plaintiff \$92 in interest on the amount that was unlawfully taken.

1.6 The *Amato* case tested claims by legal experts that there was no basis for the use of income averaging in the Social Security Law. The relevant provisions, 1222A(a) and s 1223 of the *Social Security Act 1991* do not provide a basis for income averaging to be used as evidence upon which to raise a debt, and Centrelink is obliged to establish that there is a difference between the amount paid and the amount to which a person was entitled. In 2017 alone there were at least five judgements by members of the Administrative Appeals Tribunal's Social Security Division recommending that debts using income averaging were not lawfully raised. How these judgements were received and whether or not legal advice was provided to the Commonwealth at any point in the compliance program's development and implementation was of interest to Opposition senators during the 5 March 2020 estimates hearing.

1.7 The social detriment of the compliance program and the use of income averaging in the process to raise compliance debt have also been well established. In the April 2017 report *Centrelink's automated debt raising and recovery system*, the Commonwealth Ombudsman acknowledged that many of the debts were false or greatly inflated. The application of income averaging in debts against individuals with insecure, 'lumpy' or variable income has been recorded as particularly problematic. The harms associated with raising false or inaccurate debts against current or former social security recipients have been outlined in many of the submissions made by advocacy organisations and social security rights groups to the Community Affairs References Committee's Inquiry into *Centrelink's Compliance program*.

Substance of the claim

1.8 The Minister has identified prejudice to the Commonwealth's position in legal proceedings as the possible harm. *Odgers' Australian Senate Practice* (Odgers) lists grounds for public interest immunity claims that have attracted some measure of acceptance in the Senate, subject to the circumstances of particular cases, the inclusion of an explanation of the harm to be caused, and without acceptance of distorted or exaggerated versions of the grounds. Prejudice to legal proceedings is one such ground.

1.9 Odgers goes on to articulate 'that there are two ways in which the production of information to the Senate or a committee could cause prejudice to legal

proceedings' (page 662). The first of these is 'a reasonable apprehension that disclosure of some information could prejudice a trial which is in the offing by influencing magistrates, jurors or witnesses in their evidence or decision-making' (page 662). This does not appear to be a relevant aspect in this instance.

1.10 Odgers states 'The second way in which the production of information to the Senate or a committee could cause prejudice to legal proceedings is that it could create material which, by reason that it is unexaminable in court proceedings because of parliamentary privilege, could create difficulties in pending court proceedings' (page 663). Given the statement of the minister that 'The possible prejudice to the Commonwealth's ability to respond to the claims in the class action successfully exists even though parliamentary privilege would apply to evidence given by a minister or an official during an estimates hearing or in response to questions on notice', this ground also does not appear to be applicable in this instance.

1.11 The Government's claim appears to be grounded not in prejudice to legal proceedings, but in prejudice to the Commonwealth's position in those proceedings. This is different, and not a validly accepted ground for a public interest immunity claim. As the former Clerk of the Senate, Harry Evans, said in a letter that was incorporated into the Hansard record of evidence to the Senate Economics Legislation Committee on 2 June 1998, 'It is inherent in any free constitution, however, that governments will have the additional 'disadvantage' of accountability to the legislature and the public'. At the very least, the Government should provide a more detailed statement of the grounds for the conclusion that it would not be in the public interest to disclose the information or document to the committee and the harm to the public interest that could result from the disclosure of the information or document.

Process

1.12 The 2005 guidance prepared by the former Clerk of the Senate, Harry Evans, states:

If at the end of this process the committee is left with a public interest immunity claim maintained by a minister on a sufficiently articulated ground, the committee should report the facts to the Senate in such terms as the committee considers appropriate. It is suggested that this be done even if all members of the committee conclude that the claim was validly raised. The basis of this is that the Senate should be aware of claims which have been made. Also, the committee itself cannot apply any remedy to a claim which is maintained to this extent; only the Senate can apply any remedy, and it is open to any senator to initiate further consideration of the matter by the Senate.

1.13 This needs to be read in conjunction with the subsequent 2009 Cormann Order relating to public interest immunity claims, which indicates in paragraph (5) that:

If, after considering a statement by a minister provided under paragraph (3), the committee concludes that the statement does not sufficiently justify the

withholding of the information or document from the committee, the committee shall report the matter to the Senate.²

1.14 It is the view of Opposition senators that the statement by the Minister did not sufficiently justify the withholding of the information from the committee. However, despite the decision of a majority of the committee to the contrary, in keeping with the terms of the Cormann Order and the guidance from the former clerk, the Opposition believes it would have been reasonable in this instance for the Committee to resolve to refer the matter to the Senate for determination.

Conclusion

1.15 Opposition senators are of the view that committee should have resolved to refer the public interest immunity claim to the Senate for determination, in accordance with the Cormann Order. Opposition senators will further explore the merits of this public interest immunity claim in the Senate at an appropriate time. In the meantime, Opposition senators urge the Government to reconsider its claim and release the material requested. To do so would be in the public interest.

Senator McCarthy
Senator for the Northern Territory

Senator Polley
Senator for Tasmania

Senator O'Neill
Senator for New South Wales

2 The Senate, *Standing Orders and other orders of the Senate*, January 2020, Procedural Orders of Continuing Effect, 10–Public interest immunity claims, p. 132.

APPENDIX 1

Tabled documents

Health portfolio hearing, 4 March 2020

- Ms Caroline Edwards, Acting Secretary, Department of Health—Documents prepared in response to correspondence from Senator McCarthy dated 20 February 2020
- Senator Claire Chandler—Article: Women's Sport: Tamsyn Lewis questions whether transgender athletes should compete in women's sports, dated 1 March 2020
- Senator the Honourable Richard Colbeck, Minister for Youth and Sport—Copy of a Facebook post by Devonport Football Club
- Mr Michael Lye, Deputy Secretary, Ageing and Aged Care Group, Department of Health—Mr Michael Lye, Deputy Secretary, Ageing and Aged Care Group
- Mr Michael Lye, Deputy Secretary, Ageing and Aged Care Group, Department of Health—Invitation list for the Aged Care COVID-19 Preparedness Forum, Friday 6 March 2020, dated 4 March 2020
- Ms Caroline Edwards, Acting Secretary, Department of Health—Medical Research Future Fund: Grant Opportunities 2019-20; All MRFF Funding Agreements as at 31 January 2020

Social Services portfolio hearing, 5 March 2020

- Senator Helen Polley—Extract from Grant Connect: Grant Award View—GA58348
- Senator the Honourable Anne Ruston, Minister for Families and Social Services—Homelessness data tables, dated March 2020
- Senator Catryna Bilyk—Commonwealth Standard Agreements – Casey North Community Information and Support Service Inc., Grant Agreement 4-A48K6RA and Grant Agreement 4-9ZYC8GZ