



EVIDENCE BASED POLICY ANALYSIS: 20 CASE STUDIES

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About Per Capita

Per Capita is an independent progressive think tank, dedicated to fighting inequality in Australia. We work to build a new vision for Australia based on fairness, shared prosperity, community and social justice.

Our research is rigorous, evidence-based and long-term in its outlook. We consider the national challenges of the next decade rather than the next election cycle. We ask original questions and offer fresh solutions, drawing on new thinking in social science, economics and public policy.

Our audience is the interested public, not just experts and policy makers. We engage all Australians who want to see rigorous thinking and evidence-based analysis applied to the issues facing our country's future.

About the authors

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Emma has a research background and policy expertise in the areas of social inclusion and economic inequality, immigration and multiculturalism, ageing and disability, media and communications and gender equality and women's rights.

She has published articles and opinion pieces on a wide range of public policy issues, and is a regular panellist on The Drum on ABC TV and appears frequently on other radio and television programs to talk about social issues and public policy. Emma holds a BA with First Class Honours from LaTrobe University and an MA with Distinction from Monash, and sits on the board of the Prader-Willi Research Foundation Australia.

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Abigail also manages Per Capita's communications, from website and social media to events and publications, focusing on outreach and engagement. Before joining Per Capita she worked as a reporter in the UK and as Communications Director for Live Below the Line, where she was nominated for a Golden Radiator Award for ethical communications.

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Introduction

Evidence-based policy

This report addresses the problem that policymaking in Australia is falling short of best practice. Policies are often built ‘on the run’ as quick reactions to the political issue of the day, designed to capture the interest of the 24-hour news cycle or motivated by short-term political advantage.¹ This can result in failed policy implementation and poor results for citizens, politicians, and society at large, especially when it undermines public confidence in policymaking.

The Institute of Public Administration Australia (IPAA) 2012 discussion paper *Public Policy Drift* argued that governments must replace “policy on the run” with a “business case approach” to address the “sense of crisis in the policymaking system”.² This approach would involve designing policies based on evidence, consultation, analysis, and debate. The paper outlined a business case approach based on Professor Kenneth Wiltshire’s *Ten Criteria for a Public Policy Business Case* and analysed 18 federal policies against that criteria, finding that only eight satisfied these standards for policymaking.

In 2018, the newDemocracy Foundation commissioned two think tanks with different ideological leanings – Per Capita and the Institute of Public Affairs (IPA) – to repeat the analysis, ranking 20 recent high profile policies (eight federal, and four from each of New South Wales, Victoria, and Queensland) against the Wiltshire criteria.

In 18 of the 20 cases, the two think tanks were able to find at least 80% agreement in scoring, revealing the importance of taking a rigorous and consultative approach to policy development and implementation at all levels of government. The project demonstrated that, while no policy analysis can be completely free of ideological perspective, there are several elements that should be common to all well-conceived and implemented policies if they are to efficiently and effectively serve the public interest.

The 2018 project received extended coverage in the media including in *The Age*, *The Australian Financial Review*, and *The Mandarin*.³

In 2019 the project was re-commissioned, and the results of the 2019 research are contained in this report. Per Capita and the Institute of Public Affairs were asked to select 20 high profile policies (eight federal and four from each of New South Wales, Victoria, and Queensland) from 2017/2018 and 2018/2019 and to rank them against the Wiltshire criteria.

Whereas in 2018 our choices ranged from unlegislated policy decisions to assented Acts, and we considered policies at all stages of development, in 2019 we aimed for more consistency and prioritised policy decisions that had passed as assented Acts. With that said, one federal and two state elections in this period made the pickings slimmer, and there are a few outliers in the table below that nonetheless merit consideration based on their high profile. We agreed on the following policies:

¹ <http://www.ipaa.org.au/documents/2012/05/public-policy-drift.pdf/>

² <http://www.ipaa.org.au/documents/2012/05/public-policy-drift.pdf/>

³ <https://www.theage.com.au/politics/federal/half-baked-opposing-think-tanks-unite-to-condemn-policy-failures-20181005-p507y9.html>, <https://www.afr.com/news/finally-something-left-and-right-can-agree-on-evidencebased-policy-20181005-h16a3l>, <https://www.themandarin.com.au/100035-in-praise-of-proper-public-policy-process-if-professional-pundits-can-agree-cant-we-all>

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Federal	New South Wales	Victoria	Queensland
National Redress Scheme for Institutional Child Sexual Abuse Act 2018	Electoral Funding Act 2018	Bail Amendment Act 2018	Termination of Pregnancy Act 2018
Promoting Sustainable Welfare Act 2018	Modern Slavery Act 2018	Residential Tenancies Amendment Act 2018	Non-consensual Sharing of Intimate Images Act 2019
Family and Domestic Violence Leave Act 2018	Children and Young Persons (Care and Protection) Amendment Act 2018	Fire Services Reform Act 2019	Human Rights Act 2019
Assistance and Access Act 2018	Crimes (Domestic and Personal Violence) Amendment Act 2018	Environment Protection Amendment Bill 2019	Final environmental approval for Adani's Carmichael mine
Sharing of Abhorrent Violent Material Act 2019			
Income Management and Cashless Welfare Act 2019			
Tax Relief So Working Australians Keep More Of Their Money Act 2019			
Commonwealth funding formula for non-government schools			

Methodology

The aim of this project was to coax more evidence-based policy decisions by all tiers of government by reviewing and rating 20 high profile government decisions against the Wiltshire business case criteria. These criteria are outlined below:

- 1) Establish Need: Identify a demonstrable need for the policy, based on hard evidence and consultation with all the stakeholders involved, particularly interest groups who will be affected. ('Hard evidence' in this context means both quantifying tangible and intangible knowledge, for instance the actual condition of a road as well as people's view of that condition so as to identify any perception gaps).
- 2) Set Objectives: Outline the public interest parameters of the proposed policy and clearly establish its objectives. For example interpreting public interest as 'the greatest good for the greatest number' or 'helping those who can't help themselves'.
- 3) Identify Options: Identify alternative approaches to the design of the policy, preferably with international comparisons where feasible. Engage in realistic costings of key alternative approaches.

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- 4) Consider Mechanisms: Consider implementation choices along a full spectrum from incentives to coercion.
- 5) Brainstorm Alternatives: Consider the pros and cons of each option and mechanism. Subject all key alternatives to a rigorous cost-benefit analysis. For major policy initiatives (over \$100 million), require a Productivity Commission analysis.
- 6) Design Pathway: Develop a complete policy design framework including principles, goals, delivery mechanisms, program or project management structure, the implementation process and phases, performance measures, ongoing evaluation mechanisms and reporting requirements, oversight and audit arrangements, and a review process ideally with a sunset clause.
- 7) Consult Further: Undertake further consultation with key affected stakeholders of the policy initiative.
- 8) Publish Proposals: Produce a Green and then a White paper for public feedback and final consultation purposes and to explain complex issues and processes.
- 9) Introduce Legislation: Develop legislation and allow for comprehensive parliamentary debate especially in committee, and also intergovernmental discussion where necessary.
- 10) Communicate Decision: Design and implement a clear, simple, and inexpensive communication strategy based on information not propaganda, regarding the new policy initiative.

Although we aimed to put ideology completely to one side, total objectivity is, of course, impossible. Broad ideas like 'the public interest' and 'key affected stakeholders' are open to interpretation. To make the assessment of the policies against the Wiltshire criteria more objective, Per Capita and the IPA were also provided with a set of guiding questions, where a 'Yes' answer would indicate the policy had met the corresponding criterion, and a 'No' answer would mean it had not. These questions are listed below:

- 1) Is there a statement of why the policy was needed based on factual evidence and stakeholder input?
- 2) Is there a statement of the policy's objectives couched in terms of the public interest?
- 3) Is there a description of the alternative policy options considered before the preferred one was adopted?
- 4) Is there a disclosure of the alternative ways considered for implementing the chosen policy?
- 5) Is there a published analysis of the pros/cons and benefits/costs of the alternative options/mechanisms considered in 3 and 4?
- 6) Is there evidence that a comprehensive project management plan was designed for the policy's rollout?
- 7) Was there further consultation with affected stakeholders after the preferred policy was announced?
- 8) Was there a) a Green paper seeking public input on possible policy options and b) a White paper explaining the final policy decision?
- 9) Was there legislation and adequate Parliamentary debate on the proposed policy initiative?
- 10) Is there an online official media release that explains the final policy in simple, clear and factual terms?

In 2018, these questions lowered the threshold for a policy to meet the criteria, meaning our ratings were likely more generous than they would have been without them. For a policy to meet criterion 2, for example, a public interest argument only had to be made, regardless of whether it was successful or if we agreed the policy's objectives were truly in the public interest. Similarly, the existence of a media release

was all that was required for a policy to meet criterion 10, rather than evidence of a successful communication strategy. For criterion 8, we agreed with the IPA that any sequence of a discussion paper followed by a policy paper would 'count' as the equivalent of a Green and White paper process.

For 2019, we have been asked to take a 'wide' rather than a 'narrow' view to answering these questions and to be more thorough in justifying how and why policies did or did not meet the criteria, rather than using the questions as a tick box exercise. With this in mind, we have explicitly and specifically addressed each criterion in turn throughout our analysis.

Disclaimer

Each case study was analysed and rated on whether it complied with good policy making **processes** as defined by the Wiltshire criteria, not on whether it achieved its intended social, economic, or environmental **outcomes**, many of which may not yet be known.

Findings

For a policy to meet the Wiltshire criteria, it needs to score more than 5 out of 10. Of the 20 policies we analysed, 10 were found to have met the Wiltshire criteria, while 10 failed. Only 3 out of 8 federal policies passed the Wiltshire test, while 3 out of 4 from QLD, 2 out of 4 from VIC, and 2 out of 4 from NSW passed. This shows that although there is high quality policymaking in Australia, especially at the state level, policymaking still often falls short of the best practice the public should expect.

The policies that passed the Wiltshire test were:

- FED: National Redress Scheme for Institutional Child Sexual Abuse Act 2018 – **9/10**
- VIC: Environment Protection Amendment Bill 2019 – **9/10**
- QLD: Termination of Pregnancy Act 2018 – **9/10**
- VIC: Residential Tenancies Amendment Act 2018 – **9/10**
- QLD: Human Rights Act 2019 – **8/10**
- NSW: Electoral Funding Act 2018 – **7/10**
- NSW: Modern Slavery Act 2018 – **6/10**
- QLD: Non-consensual Sharing of Intimate Images Act 2019 – **6/10**
- FED: Family and Domestic Violence Leave Act 2018 – **6/10**

The policies that failed the Wiltshire test were:

- FED: Income Management and Cashless Welfare Act 2019 – **5/10**
- VIC: Bail Amendment Act 2018 – **5/10**
- FED: Commonwealth funding formula for non-government schools – **5/10**
- FED: Assistance and Access Act 2018 – **4/10**
- FED: Tax Relief So Working Australians Keep More Of Their Money Act 2019 – **4/10**
- NSW: Crimes (Domestic and Personal Violence) Amendment Act 2018 – **3/10**
- VIC: Fire Services Reform Act 2019 – **3/10**
- QLD: Final environmental approval for Adani's Carmichael mine – **3/10**
- FED: Sharing of Abhorrent Violent Material Act 2019 – **2/10**
- NSW: Children and Young Persons (Care and Protection) Amendment Act 2018 – **3/10**
- FED: Promoting Sustainable Welfare Act 2018 – **2/10**

Full scores for each policy are outlined in the table overleaf.

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	Establish need	Set objectives	Identify options	Consider mechanisms	Brainstorm alternatives	Design pathway	Consult further	Publish proposals	Introduce legislation	Communicate decision	Total score
FED: National Redress Scheme for Institutional Child Sexual Abuse Act 2018	Y	Y	Y	Y	N	Y	Y	Y	Y	Y	9/10
FED: Promoting Sustainable Welfare Act 2018	N	N	N	Y	N	N	N	N	Y	N	2/10
FED: Family and Domestic Violence Leave Act 2018	Y	Y	Y	N	N	N	Y	N	Y	Y	6/10
FED: Assistance and Access Act 2018	Y	Y	N	Y	N	N	Y	N	N	N	4/10
FED: Sharing of Abhorrent Violent Material Act 2019	N	Y	N	N	N	N	N	N	N	Y	2/10
FED: Income Management and Cashless Welfare Act 2019	N	Y	N	Y	N	N	Y	N	Y	Y	5/10
FED: Tax Relief So Working	N	Y	N	N	N	Y	N	N	Y	Y	4/10

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Australians Keep More Of Their Money Act 2019											
FED: Commonwealth funding formula for non-government schools	Y	Y	Y	Y	N	N	N	Y	N	N	5/10
NSW: Electoral Funding Act 2018	Y	N	Y	Y	Y	N	Y	N	Y	Y	7/10
NSW: Modern Slavery Act 2018	Y	Y	Y	Y	N	N	N	N	Y	Y	6/10
NSW: Children and Young Persons (Care and Protection) Amendment Act 2018	N	Y	N	N	N	N	N	Y	N	Y	3/10
NSW: Crimes (Domestic and Personal Violence) Amendment Act 2018	N	Y	N	N	N	N	N	N	Y	Y	3/10
VIC: Bail Amendment Act 2018	Y	Y	N	Y	N	N	Y	N	Y	N	5/10

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VIC: Residential Tenancies Amendment Act 2018	Y	Y	Y	Y	Y	N	Y	Y	Y	Y	9/10
VIC: Fire Services Reform Act 2019	N	Y	N	N	N	N	N	N	Y	Y	3/10
VIC: Environment Protection Amendment Bill 2019	Y	Y	Y	Y	Y	N	Y	Y	Y	Y	9/10
QLD: Termination of Pregnancy Act 2018	Y	Y	Y	Y	Y	N	Y	Y	Y	Y	9/10
QLD: Non-consensual Sharing of Intimate Images Act 2019	Y	Y	N	Y	N	N	Y	N	Y	Y	6/10
QLD: Human Rights Act 2019	Y	Y	Y	Y	N	Y	Y	Y	N	Y	8/10
QLD: Final environmental approval for Adani's Carmichael mine	N	N	Y	Y	N	N	N	N	N	Y	3/10

Federal case studies

National Redress Scheme for Institutional Child Sexual Abuse Act 2018

Policy background

The Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) was announced by the then Prime Minister Julia Gillard in January 2013.⁴ One of the Royal Commission's terms of reference was an inquiry into:

*...what institutions and governments should do to address, or alleviate the impact of, past and future child sexual abuse and related matters in international contexts, including, in particular, in ensuring justice for victims through the provision of redress by institutions, processes for referral for investigation and prosecution and support services.*⁵

The Royal Commission released an issue paper and call for submissions on Redress Schemes in April 2014.⁶ After receiving hundreds of submissions and holding private sessions, public hearings, roundtables, and expert consultations, as well as conducting its own research, the Royal Commission published a consultation paper on Redress and civil litigation in January 2015.⁷ The Royal Commission released its final Redress and Civil Litigation Report in September 2015.⁸

The Royal Commission recommended a "single national redress scheme"⁹ comprising three elements:

- A direct personal response by the institution if the survivor wishes to engage with the institution
- Access to therapeutic counselling and psychological care as needed throughout a survivor's life
- Monetary payments set at a minimum payment of \$10,000, a maximum payment of \$200,000, and an average payment of \$65,000¹⁰

In November 2016, then Attorney General George Brandis and then Minister for Social Services Christian Porter announced a Commonwealth Redress Scheme for Survivors of Institutional Child Sexual Abuse.¹¹ They set up an Independent Advisory Council to advise on the scheme's implementation, and the 2017-2018 Budget included \$33.4 million to establish the scheme.¹² The government introduced the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 into the House of Representatives in October 2017, accompanied by a related Amendments Bill.¹³ Notably, the Bill capped

⁴ <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22media/pressrel/2164343%22>

⁵ <https://www.childabuseroyalcommission.gov.au/terms-reference>

⁶ <https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/Issues%20Paper%206%20-%20Redress%20schemes.pdf>

⁷ <https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/Consultation%20Paper%20-%20Redress%20and%20civil%20litigation.pdf>

⁸ https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/final_report_-_redress_and_civil_litigation.pdf

⁹ Ibid, page 9

¹⁰ Ibid, page 24

¹¹ <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22media/pressrel/4914812%22>

¹² https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22library/budget/2017_15%22, page 146

¹³ <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22legislation/Billhome/r6006%22>

monetary redress payments at \$150,000, \$50,000 less than the amount recommended by the Royal Commission. The Bills were referred to the Senate Community Affairs Legislation Committee.

The Royal Commission delivered its final report in December 2017.¹⁴ In early 2018, both the then Prime Minister Malcolm Turnbull¹⁵ and the then Attorney General Christian Porter¹⁶ indicated that the government was waiting for states to sign up to the scheme. In February 2018, a Council of Australian Governments (COAG) meeting was held at which all First Ministers committed to responding to the Royal Commission's final report and recommendations in June 2018.¹⁷ The first two states – New South Wales and Victoria – opted into the scheme in March 2018.¹⁸

As part of that agreement, the government gave states the power to set the compensation cap regardless of decisions made in the Senate, where calls had been made to increase the maximum compensation to the recommended \$200,000.¹⁹ Prior to the Senate Community Affairs Legislation Committee's report release, the new plan for the states to draft and agree on legislation superseded the Bills under consideration by that Committee. Nevertheless, at the end of March the Committee tabled its report which, as expected, contained recommendations from Labor senators that the maximum cap reflect the Royal Commission's recommendation of \$200,000.²⁰

In May 2018, COAG published the Intergovernmental Agreement on the National Redress Scheme for Institutional Child Abuse, which was intended to form the basis of the new legislation.²¹ Six days later, the National Redress Scheme for Institutional Child Sexual Abuse Bill 2018 and a related Amendments Bill were introduced into the House of Representatives.²² The House of Representatives referred the Bills to the Senate Community Affairs Legislation Committee, which reported again in June 2018.²³

The Committee recommended that both Bills be passed and noted that any significant changes would jeopardise the scheme's start date of 1 July 2018.²⁴ The Bills passed the Senate on 19 June 2018 and were assented to on 21 June 2018.

The scheme came into operation on 1 July 2018 and is intended to run for ten years. The redress comprises three elements:

- A direct personal response from the responsible institution(s), if requested by the survivor

¹⁴ <https://www.childabuseroyalcommission.gov.au/final-report>

¹⁵ <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22chamber/hansardr/31776340-cbfd-4793-af0f-753ff0be0a7d/0003%22>

¹⁶ <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22chamber/hansardr/31776340-cbfd-4793-af0f-753ff0be0a7d/0159%22>

¹⁷ https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/5780886/upload_binary/5780886.pdf;fileType=application%2Fpdf#search=%22media/pressrel/5780886%22

¹⁸ <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F5843481%22>

¹⁹ <https://www.smh.com.au/politics/federal/political-row-over-redress-scheme-for-child-sexual-abuse-20180312-p4z3yr.html>

²⁰ https://parlinfo.aph.gov.au/parlInfo/download/publications/tabledpapers/4e675856-cf14-4bb0-a5f9-c678839e3bf7/upload_pdf/community%20affairs%20-%20redress%20scheme%20for%20institutional%20child%20sexual%20abuse%20Bill%20report.pdf;fileType=application%2Fpdf#search=%22publications/tabledpapers/4e675856-cf14-4bb0-a5f9-c678839e3bf7%22, page 115

²¹ <https://www.coag.gov.au/about-coag/agreements/intergovernmental-agreement-national-redress-scheme-institutional-child-sexual>

²² https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6101

²³ https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/NationalRedressScheme/Report

²⁴ Ibid, page 46

- Access to counselling and psychological services under the scheme, or a payment to access services of up to \$5,000
- A monetary payment of up to \$150,000

To be eligible to apply for redress, applicants must:

- Have been determined by the Secretary of the Department of Social Services to have been a victim of sexual abuse where one or more institutions participating in the scheme are responsible for that abuse
- Have been a child at the time of the sexual abuse
- Have been abused prior to 1 July 2018
- Be an Australian citizen or resident
- Not be in jail or have a serious criminal conviction

These eligibility rules and other rules around access, as well as the monetary amount of redress and the limited access to counselling and psychological support, have been the focus of much of the criticism of the Act from stakeholders. In her speech to the House of Representatives in May 2018, then Shadow Minister for Families and Social Services Jenny Macklin expressed concerns about the Bill's departure from the Royal Commission's recommendations, for example by capping the maximum payment at \$150,000, allowing applicants just six months to decide whether to accept an offer of redress (the Royal Commission recommended a year), and the exclusion of former child migrants, immigration detainees, and survivors with serious criminal histories from redress.²⁵

In her Dissenting Report to the Senate Community Affairs Legislation Committee's original report on the Commonwealth Bills, Australian Greens Senator Rachel Siewert echoed these concerns, adding that the limits to accessing counselling and psychological services were unclear in the Bill and went against the Royal Commission's recommendations, that the scheme should not be limited to survivors of sexual abuse only and that survivors of other types of abuse should also be eligible, that survivors should have more than one opportunity to apply to the scheme (for example, if a particular institution was not participating in the scheme at the time of their first application), and that a process for external review of the scheme should be put in place.²⁶

²⁵ https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/8cddb385-6fa0-4f98-a538-0bc61118fa6c/0076/hansard_frag.pdf;fileType=application%2Fpdf

²⁶ https://parlinfo.aph.gov.au/parlInfo/download/publications/tables/papers/4e675856-cf14-4bb0-a5f9-c678839e3bf7/upload_pdf/community%20affairs%20-%20redress%20scheme%20for%20institutional%20child%20sexual%20abuse%20Bill%20report.pdf;fileType=application%2Fpdf#search=%22publications/tables/papers/4e675856-cf14-4bb0-a5f9-c678839e3bf7%22, page 119

Policy process

Criterion 1 - Establish Need: Identify a demonstrable need for the policy, based on hard evidence and consultation with all the stakeholders involved, particularly interest groups who will be affected.

Guiding question: Is there a statement of why the policy was needed based on factual evidence and stakeholder input?

The Royal Commission, in responding to the term of reference regarding redress, established the need for a redress scheme based on hard evidence and consultation.

Criterion 2 - Set Objectives: Outline the public interest parameters of the proposed policy and clearly establish its objectives.

Guiding question: Is there a statement of the policy's objectives couched in terms of the public interest?

In announcing its intention to set up a redress scheme for survivors of institutional child sexual abuse, the government made a public interest argument that such a scheme would not only provide redress to those survivors but would contribute to preventing child sexual abuse in the future.²⁷

Criterion 3 – Identify Options: Identify alternative approaches to the design of the policy, preferably with international comparisons where feasible. Engage in realistic costings of key alternative approaches.

Guiding question: Is there a description of the alternative policy options considered before the preferred one was adopted?

Alternative approaches to the policy's design were considered at length by the Royal Commission, by the Senate Community Affairs Legislation Committee, and through the COAG process. The Royal Commission studied international comparisons of redress schemes in the United Kingdom and Canada.

Criterion 4 – Consider Mechanisms: Consider implementation choices along a full spectrum from incentives to coercion.

Guiding question: Is there a disclosure of the alternative ways considered for implementing the chosen policy?

Different implementation choices were considered. An example would be the move from a Commonwealth Scheme to a National Scheme legislated at the state level, or the decision to cap the redress monetary payment at \$150,000 rather than \$200,000 to encourage more institutions to participate.²⁸

²⁷ <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22media/pressrel/4914812%22>

²⁸ NB this is not to say that the writer agrees with these decisions; just that they are examples of different implementation options being considered.

Criterion 5 – Brainstorm Alternatives: Consider the pros and cons of each option and mechanism. Subject all key alternatives to a rigorous cost-benefit analysis.

Guiding question: Is there a published analysis of the pros/cons and benefits/costs of the alternative options/mechanisms considered in 3 and 4?

There is not a published cost-benefit analysis comparing all options considered in criteria 3 and 4, and there is no detailed consideration of the pros and cons of each option. This has resulted in ongoing debate around certain elements of the scheme and continued advocacy from stakeholders to make changes.

Criterion 6 – Design Pathway: Develop a complete policy design framework including principles, goals, delivery mechanisms, program or project management structure, the implementation process and phases, performance measures, ongoing evaluation mechanisms and reporting requirements, oversight and audit arrangements, and a review process ideally with a sunset clause.

Guiding question: Is there evidence that a comprehensive project management plan was designed for the policy's rollout?

The legislation, its explanatory memorandum, and its rules include many of the elements of a complete policy design framework. There are details on the scheme's principles, delivery mechanisms, implementation processes, and future reviews.

Criterion 7 – Consult Further: Undertake further consultation with key affected stakeholders of the policy initiative.

Guiding question: Was there further consultation with affected stakeholders after the preferred policy was announced?

Multiple rounds of consultation were held at the Royal Commission and consultation also took place as part of the Senate Community Affairs Legislation Committee's Inquiry into the Bills. The government also appointed an Independent Advisory Council which included survivor groups, legal experts, and psychological experts, to advise on the scheme's implementation.

Criterion 8 – Publish Proposals: Produce a Green and then a White paper for public feedback and final consultation purposes and to explain complex issues and processes.

Guiding question: Was there a) a Green paper seeking public input on possible policy options and b) a White paper explaining the final policy decision?

The Royal Commission produced an issues paper and a consultation paper, both of which were open for submissions.

Criterion 9 – Introduce Legislation: Develop legislation and allow for comprehensive parliamentary debate especially in committee, and also intergovernmental discussion where necessary.

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Guiding question: Was there legislation and adequate Parliamentary debate on the proposed policy initiative?

There was legislation and Parliamentary debate including referral to the Senate Community Affairs Legislation Committee, the Parliamentary Joint Committee on Human Rights, and the Senate Standing Committee for the Scrutiny of Bills.

Criterion 10 – Communicate Decision: Design and implement a clear, simple, and inexpensive communication strategy based on information not propaganda, regarding the new policy initiative.

Guiding question: Is there an online official media release that explains the final policy in simple, clear and factual terms?

The government set up a dedicated website and helpline for the National Redress Scheme.²⁹ The website explains the scheme's eligibility, application process, available support services, participating institutions, and monthly updates to the scheme.

Final scores

	Criterion	Yes/No
1	Establish Need (demonstrable, evidence-based need)	Yes
2	Set Objectives (public interest parameters)	Yes
3	Identify Options (consideration of alternatives)	Yes
4	Consider Mechanisms (implementation choices)	Yes
5	Brainstorm Alternatives (cost-benefit analysis)	No
6	Design Pathway (policy design framework)	Yes
7	Consult Further (further consultation after policy announcement)	Yes
8	Publish Proposals (produce Green then White paper, or equivalents)	Yes
9	Introduce Legislation (comprehensive parliamentary debate)	Yes
10	Communicate Decision (information not propaganda)	Yes
		9/10

²⁹ <https://www.nationalredress.gov.au/>

Promoting Sustainable Welfare Act 2018

Policy background

The measures constituting the Promoting Sustainable Welfare Act 2018 were first announced in the government's 2017-2018 Mid-Year Economic and Fiscal Outlook (MYEFO).³⁰ At that time the government proposed increasing the Newly Arrived resident's Waiting Period (NARWP) for a raft of social security payments from two years to three years.³¹ A NARWP has been in place in Australia since 1993, when the then Labor Government introduced a 26 week waiting period for migrants newly arrived to Australia to claim job search allowance, Newstart allowance, and sickness allowance.³² Under the Howard Coalition government, the NARWP was extended to two years and was also extended to cover a substantial number of other social security payments.³³ Prior to the 2017-18 MYEFO, under the NARWP a person in Australia was not eligible to receive these payments until that person had been an Australian resident and in Australia for two years; in practice, the amount of time it takes an average migrant to become an Australian resident meant that new migrants are often in Australia for many more than two years before they can access the social security system.³⁴

In February 2018, legislation that reflected the changes proposed in the 2017-18 MYEFO was introduced to Parliament in the form of the Encouraging Self-sufficiency for Newly Arrived Migrants Bill 2018.³⁵ The Bill was referred to the Senate Community Affairs Legislation Committee in March 2018. Before that Committee could table its report on the Bill, the government made a subsequent announcement in the 2018-19 Budget published in May 2018, which extended the NARWP by yet another year, to four years.³⁶

At its second reading in the House of Representatives, Labor MP Linda Burney announced that Labor had worked with the government to secure a number of amendments to the Bill, including keeping some NARWPs the same (two years for the carer payment, paid parental leave, and dad and partner pay) and reducing some others (no wait for family tax benefit B, one year for family tax benefit A), as well as guaranteeing broader exemptions (New Zealanders, orphaned visa holders, and remaining relative visa holders).³⁷ Labor claimed that these amendments spared 49,000 families, 107,000 children, and 21,000 other people from the waiting periods.³⁸ This new Bill was introduced to the Senate as the Promoting Sustainable Welfare Bill 2018, and was something of an omnibus in that it also included elements of the Payment Integrity Bill 2017, and the Maintaining Income Thresholds Bill 2018, which made changes to the targeting of family payments.³⁹

³⁰ https://archive.budget.gov.au/2017-18/myefo/MYEFO_2017-18.pdf, page 9

³¹ Bills Digest available at:

https://parlinfo.aph.gov.au/parlInfo/download/legislation/Billsdgs/5951664/upload_binary/5951664.pdf;fileType=application/pdf

³² Bills Digest, page 3

³³ Bills Digest, page 4

³⁴ Bills Digest, pages 4-5

³⁵ <https://www.legislation.gov.au/Details/C2018B00024>

³⁶ <https://archive.budget.gov.au/2018-19/bp2/bp2.pdf>, page 172

³⁷ Linda Burney MP, Second Reading Speech, House of Representatives (28 November 2018)

https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/1693529d-40ba-43e3-9ae0-8bed5691ff37/0052/hansard_frag.pdf;fileType=application%2Fpdf

³⁸ Ibid.

³⁹ https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6048

Accused by the Greens of doing a “dirty deal” with the government,⁴⁰ Labor justified its support of the Bill by asserting that the reality of the numbers meant the Bill would have passed in its original form with support from the crossbench, and it was necessary for Labor to engage with the government to mitigate the impacts of that.⁴¹ With Labor’s support the Bill passed the House of Representatives and was debated in the Senate on 29 November and 3 December 2018. In the Senate, the Greens expressed strong opposition to the Bill and to Labor’s tactics in negotiating to support the Bill, asserting that they would have had the numbers with the crossbench to block the Bill (the division proved this to be correct), accusing Labor of supporting the Bill because they expected to be in government in 2019 and therefore in command of the \$1.3 billion that the Bill was projected the save over the forward estimates, and pointing out that the Senate Community Affairs Legislation Committee had been considering a completely different Bill.⁴²

When that Committee did report, it recommended that the Bill it was considering be passed. It identified that the key concern identified in the submissions and hearings was the impact of the Bill on vulnerable migrants, for example concerns about its disproportionate impact on young people, single parents, victims of domestic and family violence and migrants with refugee-like experiences.⁴³ For example, the Ethnic Communities Council of Victoria argued that newly arrived migrants are just as vulnerable, if not more vulnerable, to changes of circumstances such as family breakdown, loss of employment, and housing insecurity.⁴⁴ The Law Council of Australia submitted that the Bill targets migrants without clear guidance as to how the measures address a substantial policy concern, or evidence to suggest that there is an over-reliance on social security by newly arrived migrants.⁴⁵

The Parliamentary Joint Committee on Human Rights also considered the Bill, arguing that extending the NARWP may further restrict access to social security and therefore be considered a retrogressive measure,⁴⁶ but ultimately concluding that the Bill appears likely to be compatible with the right to social security.⁴⁷

Of course, none of this consideration in committee really mattered as the final Bill was a very different piece of legislation. With Labor’s support, the Promoting Sustainable Welfare Bill 2018 passed both houses on 3 December 2018 and received Assent on 10 December 2018.

⁴⁰ Adam Bandt MP, Second Reading Speech, House of Representatives (28 November 2018)

https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/1693529d-40ba-43e3-9ae0-8bed5691ff37/0055/hansard_frag.pdf;fileType=application%2Fpdf

⁴¹ Senator Doug Cameron, Second Reading Speech, Senate (29 November 2018)

https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/f4b99c5d-fec0-4e18-ae29-ce35749d746e/0018/hansard_frag.pdf;fileType=application%2Fpdf

⁴² Senator Rachel Siewert, Second Reading Speech, Senate (29 November 2018)

https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/f4b99c5d-fec0-4e18-ae29-ce35749d746e/0019/hansard_frag.pdf;fileType=application%2Fpdf

⁴³ https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/self-sufficiencymigrants/Report, page 9

⁴⁴ https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/self-sufficiencymigrants/Submissions, submission 6, page 1

⁴⁵ https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/self-sufficiencymigrants/Submissions, submission 16, page 6

⁴⁶ https://www.aph.gov.au/~media/Committees/Senate/committee/humanrights_ctte/reports/2018/Report%204/Report4.pdf?la=e, page 71

⁴⁷ Ibid, page 153

Policy process

Criterion 1 - Establish Need: Identify a demonstrable need for the policy, based on hard evidence and consultation with all the stakeholders involved, particularly interest groups who will be affected.

Guiding question: Is there a statement of why the policy was needed based on factual evidence and stakeholder input?

The government did not establish why the policy was needed. The government presented no evidence that showed that newly arrived migrants were over-reliant on social security payments or that extending the NAWRP would have the effect of making newly arrived migrants more self-sufficient.

Criterion 2 - Set Objectives: Outline the public interest parameters of the proposed policy and clearly establish its objectives.

Guiding question: Is there a statement of the policy's objectives couched in terms of the public interest?

The government did not outline the public interest parameters of the proposed policy. The government stated that the Bill's aims were aligned with goals of economic management, fiscal responsibility, and controlling welfare spending.⁴⁸

Criterion 3 – Identify Options: Identify alternative approaches to the design of the policy, preferably with international comparisons where feasible. Engage in realistic costings of key alternative approaches.

Guiding question: Is there a description of the alternative policy options considered before the preferred one was adopted?

The government did not consider alternative approaches to the policy other than extending the NARWP.

Criterion 4 – Consider Mechanisms: Consider implementation choices along a full spectrum from incentives to coercion.

Guiding question: Is there a disclosure of the alternative ways considered for implementing the chosen policy?

Alternative implementation measures were considered and even introduced as legislation. The government considered extending the NARWP by three years, then by four years, and also considered a range of exemptions in their negotiations with Labor.

Criterion 5 – Brainstorm Alternatives: Consider the pros and cons of each option and mechanism. Subject all key alternatives to a rigorous cost-benefit analysis.

⁴⁸ Dan Tehan MP, Second Reading Speech, House of Representatives (15 February 2018) https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/55ca705c-f4c5-4a16-a7f5-47295e740c6e/0019/hansard_frag.pdf;fileType=application%2Fpdf

Guiding question: Is there a published analysis of the pros/cons and benefits/costs of the alternative options/mechanisms considered in 3 and 4?

While consideration of the pros and cons of each mechanism may have gone on behind closed doors, there is no published cost-benefit analysis.

Criterion 6 – Design Pathway: Develop a complete policy design framework including principles, goals, delivery mechanisms, program or project management structure, the implementation process and phases, performance measures, ongoing evaluation mechanisms and reporting requirements, oversight and audit arrangements, and a review process ideally with a sunset clause.

Guiding question: Is there evidence that a comprehensive project management plan was designed for the policy's rollout?

There is no evidence that a comprehensive project management plan was designed for the policy's rollout. There is no policy framework that includes goals, delivery mechanisms, implementation processes, performance measures, evaluation and reporting requirements, oversight arrangements, or review processes.

Criterion 7 – Consult Further: Undertake further consultation with key affected stakeholders of the policy initiative.

Guiding question: Was there further consultation with affected stakeholders after the preferred policy was announced?

Consultation took place as part of the Senate Inquiry, but the Bill that was ultimately introduced and passed was very different from the Bill that was subject to the Inquiry, and no consultation took place on the later Bill.

Criterion 8 – Publish Proposals: Produce a Green and then a White paper for public feedback and final consultation purposes and to explain complex issues and processes.

Guiding question: Was there a) a Green paper seeking public input on possible policy options and b) a White paper explaining the final policy decision?

There was no Green or White paper or any alternative.

Criterion 9 – Introduce Legislation: Develop legislation and allow for comprehensive parliamentary debate especially in committee, and also intergovernmental discussion where necessary.

Guiding question: Was there legislation and adequate Parliamentary debate on the proposed policy initiative?

EVIDENCE BASED POLICY ANALYSIS

Legislation was developed and there was significant parliamentary debate, but the confusion over which Bill was under consideration at any one time restricted this, as did the negotiations that went on behind closed doors. The final Bill that was passed was arguably not subject to consideration in committee; nevertheless, there was significant parliamentary debate about the Bill that was passed.

Criterion 10 – Communicate Decision: Design and implement a clear, simple, and inexpensive communication strategy based on information not propaganda, regarding the new policy initiative.

Guiding question: Is there an online official media release that explains the final policy in simple, clear and factual terms?

There was a media release explaining the final policy and changes but bearing in mind that these changes would affect new Australian migrants and residents, it is unclear whether there was a communication strategy to specifically target those affected by the Bill. Most of the communication appears to have been carried out by NGOs and other agencies supporting migrants.

Final scores

	Criterion	Yes/No
1	Establish Need (demonstrable, evidence-based need)	No
2	Set Objectives (public interest parameters)	No
3	Identify Options (consideration of alternatives)	No
4	Consider Mechanisms (implementation choices)	Yes
5	Brainstorm Alternatives (cost-benefit analysis)	No
6	Design Pathway (policy design framework)	No
7	Consult Further (further consultation after policy announcement)	No
8	Publish Proposals (produce Green then White paper, or equivalents)	No
9	Introduce Legislation (comprehensive parliamentary debate)	Yes
10	Communicate Decision (information not propaganda)	No
		1/10

Assistance and Access Act 2018

Policy background

The recent exponential growth in the prevalence of encrypted data and communications represents a significant challenge to law enforcement and intelligence agencies in Australia and across the world. 55% of internet communications intercepted by the Australian Security Intelligence Organisation (ASIO) were encrypted in 2017 (up from 3% four years earlier) and over 90% of data intercepted by the Australian Federal Police (AFP) is now encrypted.⁴⁹

A legislative response to that challenge was first announced by the then Prime Minister Malcolm Turnbull in July 2017 at a press conference held at AFP headquarters, where he said “new legislative priorities...will ensure that internet companies...will have the obligation to assist the police with getting access to communications and information data”.⁵⁰

After some industry consultations, the government released an Exposure Draft of the Bill in August 2018 and opened for submissions.⁵¹ Also in August 2018, the Attorneys-General and Interior Ministers of the Five Eyes nations (Australia, Canada, New Zealand, the UK, and the USA) held a joint meeting on the challenge of encryption, which resulted in an agreement and framework to discuss legislative responses with industry.⁵²

Submissions were open until 10 September 2018 – a relatively short time – but the Department of Home Affairs received almost 16,000 submissions from individuals, industry groups, civil society, and government bodies.⁵³ A few amendments were made to the Bill based on this consultation, but the Bill was introduced to the House of Representatives just 10 days later.⁵⁴ This led to concerns that the consultation process was rushed and not thorough, and that the government could not have had time to properly process all of the submissions.⁵⁵

The Assistance and Access Bill 2018 was introduced to the House of Representatives by Minister for Home Affairs Peter Dutton on 20 September 2018. The Bill contained a number of measures aimed at allowing law enforcement and intelligence agencies broader access to communications and data, both by decrypting encrypted technologies and by facilitating interception.⁵⁶ Under the legislation, industry would

⁴⁹ Bills Digest, page 9

https://parlinfo.aph.gov.au/parlInfo/download/legislation/Billsdgs/6370016/upload_binary/6370016.pdf;fileType=application/pdf

⁵⁰ https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/5400131/upload_binary/5400131.pdf;fileType=application%2Fpdf#search=%22media/pressrel/5400131%22

⁵¹ https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/6146729/upload_binary/6146729.pdf;fileType=application%2Fpdf#search=%22media/pressrel/6146729%22

⁵² Bills Digest, page 10

https://parlinfo.aph.gov.au/parlInfo/download/legislation/Billsdgs/6370016/upload_binary/6370016.pdf;fileType=application/pdf

⁵³ https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/TelcoAmendmentBill2018/Submissions, Submission 18, page 41

⁵⁴ Ibid, Attachment H

⁵⁵ See for the example, the Second Reading Speeches of Mark Dreyfus MP, Julian Hill MP, Senator Rex Patrick, and Senator Jenny McAllister, all available here:

<https://www.aph.gov.au/Parliamentary%20Business/Bills%20Legislation/Bills%20Search%20Results/Result/Second%20Reading%20Speeches?BillId=r6195&Page=1>

⁵⁶ Bills Digest, page 6

https://parlinfo.aph.gov.au/parlInfo/download/legislation/Billsdgs/6370016/upload_binary/6370016.pdf;fileType=application/pdf

be required to decrypt information for agencies upon request, or to develop and maintain a capability to decrypt such information upon request if they were not currently able to do so.⁵⁷ The Bill also provides ASIO with expanded computer access powers and gives police broader search warrant powers.⁵⁸

The Bill immediately attracted controversy as stakeholders from the Australian Human Rights Commission to technology companies to the Inspector-General of Intelligence and Security expressed concerns that the powers were subject to limited oversight, were ill-defined and broad in application, and might result in privacy invasions or the creation of backdoors in encryption technology that put national security at risk.⁵⁹ The Bill was referred to the Parliamentary Joint Committee on Intelligence and Security (PJCIS).

As the PJCIS inquiry was proceeding, a number of developments occurred. On 16 October 2018, the Parliamentary Joint Committee on Human Rights published its scrutiny of the Bill, concluding that its Statement of Compatibility with Human Rights did not address many of the ways in which the Bill may limit a number of human rights, including the right to privacy and the right to a fair trial/hearing and/or effective remedy.⁶⁰ There was no response for the government (or no response from the government has been published by the Committee thus far).⁶¹

The next day, the Standing Committee for the Scrutiny of Bills released its own scrutiny of the Bill. The report detailed several concerns about every schedule of the Bill, including the breadth and significance of powers conferred on the department with limited parliamentary scrutiny or oversight, the impact on procedural fairness, and the privacy implications for individuals.⁶² After considering the Minister's response, the Committee issued a second report arguing that these concerns had not been addressed.⁶³

Finally, on 9 November 2018, a knife attack on Bourke Street in Melbourne's CBD left one man dead and another two injured.⁶⁴ In the aftermath of that attack, Minister for Home Affairs Peter Dutton wrote to the PJCIS to ask "that the committee accelerate its consideration of this vital piece of legislation to enable its passage by the parliament before it rises for the Christmas break", arguing the need for the powers conferred by the Bill on law enforcement and intelligence agencies had become "more urgent in light of the recent fatal terrorist attack in Melbourne", and implying that there was danger of an attack over the Christmas and New Year period.⁶⁵ The Prime Minister Scott Morrison publicly urged the Committee to

⁵⁷ Explanatory Memorandum, page 3 https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6195_ems_504ca495-f6b2-46bb-a4a2-9ce169ba2616/upload_pdf/692183_Revised%20Explanatory%20Memorandum.pdf;fileType=application%2Fpdf

⁵⁸ Explanatory Memorandum, page 4 https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6195_ems_504ca495-f6b2-46bb-a4a2-9ce169ba2616/upload_pdf/692183_Revised%20Explanatory%20Memorandum.pdf;fileType=application%2Fpdf

⁵⁹ Bills Digest, pages 7-8

https://parlinfo.aph.gov.au/parlInfo/download/legislation/Billsdgs/6370016/upload_binary/6370016.pdf;fileType=application/pdf
⁶⁰ https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018/Report_11_of_2018, pages 24-71

⁶¹ https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018

⁶² https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Scrutiny_Digest/2018, Scrutiny Digest Number 12, pages 12-49

⁶³ https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Scrutiny_Digest/2018, Scrutiny Digest Number 14, pages 23-82

⁶⁴ <https://www.theage.com.au/national/victoria/two-people-stabbed-man-shot-after-car-set-alight-on-bourke-street-reports-20181109-p50f55.html>

⁶⁵ [https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024247/toc_pdf/AdvisoryReportontheTelecommunicationsandOtherLegislationAmendment\(AssistanceandAccess\)Bill2018.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024247/toc_pdf/AdvisoryReportontheTelecommunicationsandOtherLegislationAmendment(AssistanceandAccess)Bill2018.pdf;fileType=application%2Fpdf), pages 1-2

“complete their review as quickly as possible...our agencies need these powers now...I would insist on seeing them passed before the end of the next sitting fortnight.”⁶⁶

This pressure to pass the Bill before Christmas significantly truncated the amount of time the PJCIS could spend reviewing and consulting on it. However, the Committee accepted evidence from ASIO and the AFP that there was increased risk of an attack over Christmas and tabled its report on 5 December 2018. The short report listed a number of recommendations in response to concerns raised during consultation about the need for enhanced oversight, scrutiny, and authorisation provisions and processes to be included in the Bill, the broad range of offences covered by the Bill, and ill-defined key terms in the Bill.⁶⁷

Labor members of the PJCIS made it clear that they did not feel the review process was complete and that they were moving to progress the Bill despite significant ongoing concerns only because the government had agreed to continue with the PJCIS inquiry into 2019 and to undertake an independent statutory review of the legislation within 18 months.⁶⁸ The Bill was hastily amended overnight to incorporate the PJCIS’ recommendations and returned to the House of Representatives the next day, which was the final sitting day of Parliament for the year.

In the House, Labor MPs clarified that they had ongoing concerns about the Bill’s risk to national security (because of the uncertainty over whether the new powers in the Bill could lead to the creation of ‘backdoors’ in encrypted systems), the risk to security cooperation with the United States (because the Bill would not fit easily with the existing framework for intelligence cooperation with the United States), and the risk to Australian business (because of the threat from Australian technology businesses to move offshore and for international technology businesses to cease operating in Australia).⁶⁹ Labor argued however that it had significantly improved the Bill and that the Opposition would be supporting its passage through the House so that agencies could have the new powers over the Christmas period.⁷⁰

As the debate continued and staffers had time to read the 50 pages of amendments that had been circulated that morning, it became apparent that the amendments did not reflect the PJCIS’ recommendations in full and did not honour the verbal agreement with the Opposition.⁷¹ Labor said it would nevertheless allow the Bill’s passage through the House and would move further amendments in the Senate.⁷² However, as time passed on the final sitting day, and as pressure from the government ramped up, with Prime Minister Scott Morrison calling then Leader of the Opposition Bill Shorten a “clear and present threat to Australia’s safety”⁷³ in the morning press conference and then Defence Minister

⁶⁶<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F6349604%22>

⁶⁷[https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024247/toc_pdf/AdvisoryReportontheTelecommunicationsandOtherLegislationAmendment\(AssistanceandAccess\)Bill2018.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024247/toc_pdf/AdvisoryReportontheTelecommunicationsandOtherLegislationAmendment(AssistanceandAccess)Bill2018.pdf;fileType=application%2Fpdf)

⁶⁸ Ibid, pages 22-23

⁶⁹ Mark Dreyfus MP, Second Reading Speech (6 December 2018)

https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/b9ad0f6d-10c4-4875-a2dd-b61196fa9329/0007/hansard_frag.pdf;fileType=application%2Fpdf

⁷⁰ Dr Mike Kelly MP, Second Reading Speech (6 December 2018)

https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/b9ad0f6d-10c4-4875-a2dd-b61196fa9329/0008/hansard_frag.pdf;fileType=application%2Fpdf

⁷¹ Hansard, House of Representatives (6 December 2018) pages 12846-7

https://parlinfo.aph.gov.au/parlInfo/download/chamber/hansardr/b9ad0f6d-10c4-4875-a2dd-b61196fa9329/toc_pdf/House%20of%20Representatives%202018%2012%2006%206842%20Official.pdf;fileType=application%2Fpdf

⁷² Ibid.

⁷³ <https://www.smh.com.au/politics/federal/portrait-of-a-dismal-day-in-parliament-as-trust-in-democracy-melts-20181207-p50ktx.html>

Christopher Pyne tweeting “Labor has chosen to allow terrorists and paedophiles to continue their evil work”,⁷⁴ Labor withdrew their amendments and passed the Bill through the Senate.⁷⁵ The Bill received Assent on 8 December 2018.

Policy process

Criterion 1 - Establish Need: Identify a demonstrable need for the policy, based on hard evidence and consultation with all the stakeholders involved, particularly interest groups who will be affected.

Guiding question: Is there a statement of why the policy was needed based on factual evidence and stakeholder input?

Although consultation on the Exposure Draft of the Bill was limited, evidence was presented from both national law enforcement and intelligence agencies and international security partners that action was needed on encryption.

Criterion 2 - Set Objectives: Outline the public interest parameters of the proposed policy and clearly establish its objectives.

Guiding question: Is there a statement of the policy’s objectives couched in terms of the public interest?

The government repeatedly made the argument that this legislation was in the public interest because the status quo meant that law enforcement and intelligence agencies were operating at a restricted level where they were not able to keep the Australian public safe.

Criterion 3 – Identify Options: Identify alternative approaches to the design of the policy, preferably with international comparisons where feasible. Engage in realistic costings of key alternative approaches.

Guiding question: Is there a description of the alternative policy options considered before the preferred one was adopted?

Although a number of international comparisons were available, and the government evoked these to justify its own legislation, there was no substantive comparison of different approaches to a legislative response to encryption.

Criterion 4 – Consider Mechanisms: Consider implementation choices along a full spectrum from incentives to coercion.

Guiding question: Is there a disclosure of the alternative ways considered for implementing the chosen policy?

⁷⁴ <https://www.smh.com.au/politics/federal/pm-escapes-threat-to-his-control-of-parliament-as-labor-backs-down-on-encryption-20181206-p50kqf.html>

⁷⁵ Hansard, Senate (6 December 2018) page 9794 https://parlinfo.aph.gov.au/parlInfo/download/chamber/hansards/eb54de0c-def5-4a0c-869c-5724f65bff20/toc_pdf/Senate_2018_12_06_6843_Official.pdf;fileType=application%2Fpdf

EVIDENCE BASED POLICY ANALYSIS

The government was willing to consider different implementation choices and made a number of amendments to narrow some applications of the new powers, to increase levels of oversight and introduce new safeguards, and to change implementation processes.

Criterion 5 – Brainstorm Alternatives: Consider the pros and cons of each option and mechanism. Subject all key alternatives to a rigorous cost-benefit analysis.

Guiding question: Is there a published analysis of the pros/cons and benefits/costs of the alternative options/mechanisms considered in 3 and 4?

Because the PJCIS review was cut short and the Committee was only able to deliver an interim report, there was neither a thorough published analysis of the available options and mechanisms nor a rigorous cost-benefit analysis.

Criterion 6 – Design Pathway: Develop a complete policy design framework including principles, goals, delivery mechanisms, program or project management structure, the implementation process and phases, performance measures, ongoing evaluation mechanisms and reporting requirements, oversight and audit arrangements, and a review process ideally with a sunset clause.

Guiding question: Is there evidence that a comprehensive project management plan was designed for the policy's rollout?

The rushed legislation did not include many of the elements of a complete policy design framework. After the legislation was passed, there was and continues to be confusion about how it is being implemented. For example, a number of international communications companies that provide encrypted messaging have said they did not intend to comply with the legislation or that the legislation did not apply to them.⁷⁶

Criterion 7 – Consult Further: Undertake further consultation with key affected stakeholders of the policy initiative.

Guiding question: Was there further consultation with affected stakeholders after the preferred policy was announced?

Further consultation was undertaken as part of the PJCIS inquiry.

Criterion 8 – Publish Proposals: Produce a Green and then a White paper for public feedback and final consultation purposes and to explain complex issues and processes.

Guiding question: Was there a) a Green paper seeking public input on possible policy options and b) a White paper explaining the final policy decision?

A draft of the legislation was briefly published and open for submissions, which could perhaps be seen as an equivalent of the Green paper process, but there was no White paper or equivalent.

⁷⁶ For example: https://www.vice.com/en_au/article/nep5vb/signal-app-australia-encryption-backdoor-Bill

EVIDENCE BASED POLICY ANALYSIS

Criterion 9 – Introduce Legislation: Develop legislation and allow for comprehensive parliamentary debate especially in committee, and also intergovernmental discussion where necessary.

Guiding question: Was there legislation and adequate Parliamentary debate on the proposed policy initiative?

Legislation was introduced and there was Parliamentary debate, but it became apparent quickly that the amount of time available for Parliamentary debate – just the last sitting day of the year – was not adequate. The committee process was also cut short.

Criterion 10 – Communicate Decision: Design and implement a clear, simple, and inexpensive communication strategy based on information not propaganda, regarding the new policy initiative.

Guiding question: Is there an online official media release that explains the final policy in simple, clear and factual terms?

There was very little communication that explained the legislation simply or explained how it would be implemented and enforced. There is still confusion in the public domain as to how and to whom the legislation applies.

Final scores

	Criterion	Yes/No
1	Establish Need (demonstrable, evidence-based need)	Yes
2	Set Objectives (public interest parameters)	Yes
3	Identify Options (consideration of alternatives)	No
4	Consider Mechanisms (implementation choices)	Yes
5	Brainstorm Alternatives (cost-benefit analysis)	No
6	Design Pathway (policy design framework)	No
7	Consult Further (further consultation after policy announcement)	Yes
8	Publish Proposals (produce Green then White paper, or equivalents)	No
9	Introduce Legislation (comprehensive parliamentary debate)	No
10	Communicate Decision (information not propaganda)	No
		4/10

Family and Domestic Violence Leave Act 2018

Policy background

The Family and Domestic Leave Bill 2018 was introduced by the government to amend the Fair Work Act to include an entitlement to five days of unpaid family and domestic violence (FDV) leave in the National Employment Standards (NES). This entitlement would cover all employees whether full time, part time, or casual, and whether covered by awards, enterprise agreements, or individual agreements. The leave would not accrue but would be available in full at the start of each 12-month period of employment.⁷⁷

FDV leave has been a contested topic in the Australian industrial relations space since around 2010, when the first FDV leave entitlements were included in enterprise agreements lodged with the Fair Work Commission (FWC).⁷⁸

In 2011, The Centre for Gender Related Violence Studies at the University of New South Wales released a report on the impact of FDV in the workplace. The report, premised on a national survey of union members, found that around 30% of respondents had experienced FDV, and half of those reported that the violence affected their ability to go to work.⁷⁹ The same year, the Australian Law Reform Commission (ALRC) released its report into Family Violence and Commonwealth Laws.⁸⁰ As part of that report the ALRC analysed FDV as it relates to employment law, the Fair Work Act, and the NES. The ALRC recommended that the government should support the inclusion of FDV clauses in enterprise agreements, that those agreements should provide access to paid FDV leave, and that the government should also consider amending the NES to include FDV leave.⁸¹

In March 2014, the FWC announced the four-yearly review of all modern awards required under the Fair Work Act and invited interested parties to identify 'common issues' with the awards. The Australian Council of Trade Unions (ACTU) filed a claim for an FDV leave clause which would entitle employees to 10 days per year of paid FDV leave.⁸² After taking evidence and accepting submissions, the FWC rejected the ACTU's claim in 2017, on the grounds that "the ACTU has not provided a satisfactory explanation as to how it arrived at ten days and the evidence does not support a finding that ten days paid leave is necessary."⁸³ However the FWC did express the preliminary view that it was necessary to make provision for unpaid FDV leave, and it initiated that process in March 2018.⁸⁴

The FWC released a draft model FDV leave clause in May 2018 and opened for submissions on the clause.⁸⁵ The final clause was released in July 2018 and from August 2018, all employees covered by the

⁷⁷ Explanatory memorandum https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6181_ems_2b2ee1ae-6c4e-4880-b0ff-95490d6fb2d8/upload_pdf/684509.pdf;fileType=application%2Fpdf

⁷⁸ Bills Digest, page 4

https://parlinfo.aph.gov.au/parlInfo/download/legislation/Billsdgs/6357903/upload_binary/6357903.pdf;fileType=application/pdf

⁷⁹ [https://www.arts.unsw.edu.au/media/FASSFile/National Domestic Violence and the Workplace Survey 2011 Full Report.pdf](https://www.arts.unsw.edu.au/media/FASSFile/National%20Domestic%20Violence%20and%20the%20Workplace%20Survey%202011%20Full%20Report.pdf)

⁸⁰ https://www.alrc.gov.au/sites/default/files/pdfs/publications/whole_alrc_117.pdf

⁸¹ Ibid pages 22-23

⁸² <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FWCFB/2017/1133.html>

⁸³ <https://www.fwc.gov.au/documents/decisionssigned/html/2017fwcfb3494.htm>, clause 65

⁸⁴ Ibid, clause 6

⁸⁵ <https://www.fwc.gov.au/documents/decisionssigned/html/2018fwcfb2440.htm>

modern awards system were entitled to five days of unpaid FDV leave.⁸⁶ However, six million employees are not covered by the modern awards system and are instead employed under an enterprise agreement or individual arrangements.⁸⁷ The Bill was introduced to extend that entitlement to all employees.

In September 2018, Kelly O'Dwyer MP introduced the Bill into the House of Representatives, from where it was referred to the Senate Education and Employment Legislation Committee.⁸⁸ The Committee found that submitters overwhelmingly supported introducing leave specifically for the purpose of dealing with FDV, including industry and employer groups.⁸⁹ Unions and groups advocating for survivors of FDV supported the Bill in principle but argued that five days unpaid leave was insufficient, and that the original ACTU proposal of 10 days paid leave was preferable.⁹⁰ The Committee pointed out that this case had been made unsuccessfully already at the FWC, which was "extremely thorough, examined a considerable volume of evidence and involved consultation with many stakeholders" but was "found to be unsubstantiated", citing Ai Group's submission which asserted that the evidence presented at the FWC showed that "employees who are experiencing family and domestic violence and take leave, on average take 2-3 days of leave."⁹¹ On the issue of paid versus unpaid leave, the Committee argued that "the FWC was not satisfied that paid leave was necessary" and that it "did not receive evidence which would challenge the basis of the FWC's decision".⁹²

The Dissenting Report authored by Labor and the Greens supported the Bill in principle but argued for the 10 days paid leave on the basis of submissions that pointed out "the five days unpaid leave proposed in this Bill...risks forcing victims to choose between their income, which is often critical to their ability to escape, and taking time off work to deal with the practicalities associated with family and domestic violence."⁹³

In November and December 2018, the debate continued in the House of Representatives. Labor supported the Bill but moved an amendment to recognise Labor's commitment to 10 days of paid leave rather than five days of unpaid leave, arguing that comparable countries like New Zealand already offer this amount, as do state governments across Australia for their public sector workers, and many companies in the private sector.⁹⁴ The amendment was negatived. The Greens then moved to amend the Bill to include 10 days of unpaid leave, to include FDV leave for supporting close relatives experiencing FDV (similar to carers leave), to remove the 'impracticality' clause in the legislation that required employees taking FDV leave to be doing so to complete tasks or errands that were impractical to

⁸⁶ Bill Digest, page 7

https://parlinfo.aph.gov.au/parlInfo/download/legislation/Billsdgs/6357903/upload_binary/6357903.pdf;fileType=application/pdf

⁸⁷ [https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024225/toc_pdf/FairWorkAmendment\(FamilyandDomesticViolenceLeave\)Bill2018\[provisions\].pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024225/toc_pdf/FairWorkAmendment(FamilyandDomesticViolenceLeave)Bill2018[provisions].pdf;fileType=application%2Fpdf), clause 1.9

⁸⁸ Kelly O'Dwyer MP, Second Reading Speech, House of Representatives (13 September 2018)

https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/b0437b01-060b-4060-bfa3-1bd778011a5e/0009/hansard_frag.pdf;fileType=application%2Fpdf

⁸⁹ [https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024225/toc_pdf/FairWorkAmendment\(FamilyandDomesticViolenceLeave\)Bill2018\[provisions\].pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024225/toc_pdf/FairWorkAmendment(FamilyandDomesticViolenceLeave)Bill2018[provisions].pdf;fileType=application%2Fpdf), page 9

⁹⁰ Ibid, page 21 onwards

⁹¹ Ibid, page 11

⁹² Ibid, page 12

⁹³ Ibid, page 21

⁹⁴ Brendan O'Connor MP, Second Reading Speech, House of Representatives (29 November 2018)

https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/c847cbd4-a9ca-41ce-93e0-8e53eac88585/0028/hansard_frag.pdf;fileType=application%2Fpdf

complete during work hours, and to extend confidentiality requirements.⁹⁵ The amendment was negated.

Labor then moved another set of amendments: to preserve five days of unpaid leave for casual employees but provide 10 days of paid leave for employees other than casuals, accruing but not accumulating.⁹⁶ The Speaker did not allow Labor to move these amendments on the grounds that they were not “within the subject of the Bill or the title of the Bill and, therefore, are out of order.”⁹⁷ The Bill passed the House of Representatives on 4 December 2018.

On 5 December 2018, the Bill was introduced to the Senate, where standing orders were rearranged to allow for debate and decision before Christmas. Labor again reiterated that they did not consider five days unpaid leave to be sufficient but that they would be supporting the Bill.⁹⁸ The Bill passed the Senate on 6 December 2018 and received Assent on 11 December 2018.

Policy process

Criterion 1 - Establish Need: Identify a demonstrable need for the policy, based on hard evidence and consultation with all the stakeholders involved, particularly interest groups who will be affected.

Guiding question: Is there a statement of why the policy was needed based on factual evidence and stakeholder input?

Need for the policy was established by an extensive process of evidence gathering and consultation at the Fair Work Commission.

Criterion 2 - Set Objectives: Outline the public interest parameters of the proposed policy and clearly establish its objectives.

Guiding question: Is there a statement of the policy’s objectives couched in terms of the public interest?

A public interest argument was made that the Bill would address “the scourge of family violence...at the heart of our communities” which “impact[s] far too many Australians”, and that it would help “protect Australian workers at their time of greatest need.”⁹⁹

⁹⁵ Hansard, House of Representatives (4 December 2018) page 12461

[https://parlinfo.aph.gov.au/parlInfo/download/chamber/hansardr/94aec17b-432c-4e5b-80ed-7c316c83ad31/toc_pdf/House%20of%20Representatives 2018 12 04 6832 Official.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/chamber/hansardr/94aec17b-432c-4e5b-80ed-7c316c83ad31/toc_pdf/House%20of%20Representatives%202018%2012%2004%206832%20Official.pdf;fileType=application%2Fpdf)

⁹⁶ Ibid, page 12466

⁹⁷ Ibid, page 12469

⁹⁸ Senator Doug Cameron, Second Reading Speech, Senate (6 December 2018)

https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/eb54de0c-def5-4a0c-869c-5724f65bff20/0037/hansard_frag.pdf;fileType=application%2Fpdf

⁹⁹ Kelly O’Dwyer MP, Second Reading Speech, House of Representatives (13 September 2018)

https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/b0437b01-060b-4060-bfa3-1bd778011a5e/0009/hansard_frag.pdf;fileType=application%2Fpdf

Criterion 3 – Identify Options: Identify alternative approaches to the design of the policy, preferably with international comparisons where feasible. Engage in realistic costings of key alternative approaches.

Guiding question: Is there a description of the alternative policy options considered before the preferred one was adopted?

Alternatives to the design of the policy – notably, the number of days of leave, and whether the leave was paid or unpaid – were considered at the FWC, in parliamentary debate, and by the Senate Education and Employment Legislation Committee. Some costings were attempted both at the FWC and at Senate Committee, with industry and employer groups making arguments based on the cost to businesses (especially small businesses) of providing FDV leave.¹⁰⁰

Criterion 4 – Consider Mechanisms: Consider implementation choices along a full spectrum from incentives to coercion.

Guiding question: Is there a disclosure of the alternative ways considered for implementing the chosen policy?

There does not appear to be a published disclosure of a range of implementation choices.

Criterion 5 – Brainstorm Alternatives: Consider the pros and cons of each option and mechanism. Subject all key alternatives to a rigorous cost-benefit analysis.

Guiding question: Is there a published analysis of the pros/cons and benefits/costs of the alternative options/mechanisms considered in 3 and 4?

Although the FWC decision and the Senate Committee's report outline that they considered the evidence for the ACTU's proposal and offer some explanation for why they rejected it, there is no rigorous cost-benefit analysis of the two options.

Criterion 6 – Design Pathway: Develop a complete policy design framework including principles, goals, delivery mechanisms, program or project management structure, the implementation process and phases, performance measures, ongoing evaluation mechanisms and reporting requirements, oversight and audit arrangements, and a review process ideally with a sunset clause.

Guiding question: Is there evidence that a comprehensive project management plan was designed for the policy's rollout?

There is no complete published policy design framework or evidence that a comprehensive project management plan was designed for the policy's rollout. The most recent published piece with details of the policy is the Bill's Explanatory Memorandum and this does not include the details of a policy design framework.

¹⁰⁰ For example,

[https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024225/toc_pdf/FairWorkAmendment\(FamilyandDomesticViolenceLeave\)Bill2018\[provisions\].pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024225/toc_pdf/FairWorkAmendment(FamilyandDomesticViolenceLeave)Bill2018[provisions].pdf;fileType=application%2Fpdf), pages 14-15

Criterion 7 – Consult Further: Undertake further consultation with key affected stakeholders of the policy initiative.

Guiding question: Was there further consultation with affected stakeholders after the preferred policy was announced?

After the initial round of consultation at the FWC, a further round of consultations was opened up at the Senate Committee level.

Criterion 8 – Publish Proposals: Produce a Green and then a White paper for public feedback and final consultation purposes and to explain complex issues and processes.

Guiding question: Was there a) a Green paper seeking public input on possible policy options and b) a White paper explaining the final policy decision?

No Green or White paper, or any equivalent, was published.

Criterion 9 – Introduce Legislation: Develop legislation and allow for comprehensive parliamentary debate especially in committee, and also intergovernmental discussion where necessary.

Guiding question: Was there legislation and adequate Parliamentary debate on the proposed policy initiative?

Legislation was developed and comprehensive parliamentary debate occurred, including in committee.

Criterion 10 – Communicate Decision: Design and implement a clear, simple, and inexpensive communication strategy based on information not propaganda, regarding the new policy initiative.

Guiding question: Is there an online official media release that explains the final policy in simple, clear and factual terms?

The Fair Work Ombudsman has a section on its website dedicated to explaining FDV leave including what it is, how to take it, and what support services are available.¹⁰¹

Final scores

¹⁰¹ <https://www.fairwork.gov.au/leave/family-and-domestic-violence-leave>

EVIDENCE BASED POLICY ANALYSIS

	Criterion	Yes/No
1	Establish Need (demonstrable, evidence-based need)	Yes
2	Set Objectives (public interest parameters)	Yes
3	Identify Options (consideration of alternatives)	Yes
4	Consider Mechanisms (implementation choices)	No
5	Brainstorm Alternatives (cost-benefit analysis)	No
6	Design Pathway (policy design framework)	No
7	Consult Further (further consultation after policy announcement)	Yes
8	Publish Proposals (produce Green then White paper, or equivalents)	No
9	Introduce Legislation (comprehensive parliamentary debate)	Yes
10	Communicate Decision (information not propaganda)	Yes
		6/10

Sharing of Abhorrent Violent Material Act 2019

Policy background

On Friday 15 March 2019, an Australian white supremacist killed 51 people in consecutive terrorist shooting attacks at two mosques in Christchurch, New Zealand. The attacker live-streamed the first 17 minutes of the attack on Facebook and it was an hour and 10 minutes before the first attempts were made to remove the video from the platform.¹⁰² Following the attack, international leaders called on Facebook and other social media platforms to take more responsibility for the footage streamed and shared on their platforms and to take action to eliminate terrorist and violent extremist content.¹⁰³ These efforts resulted in the Christchurch Call accord being signed by a number of states and technology companies in Paris on 15 May 2019, including Facebook, Google, Twitter, and YouTube.¹⁰⁴

While that process was ongoing, the Australian government took unilateral action to pass new laws relating to the “sharing of abhorrent violent material” online. With just one sitting day left in Parliament before the general election, the Criminal Code Amendment (Sharing of Abhorrent Violent Material) Bill 2019 was introduced on 3 April 2019. It passed both houses on 4 April 2019 with bipartisan support (the Greens and some crossbenchers did not support it) and was assented to on 5 April 2019.

The Act places obligations on internet service providers, content service providers, and hosting service providers to report any “abhorrent violent material” – defined as an audio or visual recording or streaming of a terrorist act, a murder, an attempted murder, torture, rape, or kidnap by the perpetrator or accomplice – to the Australian Federal Police “within a reasonable time” of becoming aware of that material’s availability on the service, and to “ensure the expeditious removal” of that material from the service.¹⁰⁵ Not doing so would be an offence carrying a fine of up to \$2.1 million or a prison sentence of up to 3 years for an individual, and fines of up to \$10.5 million or 10% of annual profit for a company.¹⁰⁶ It also awards new powers to the eSafety Commissioner to issue a written notice to providers that abhorrent violent material was available on their service and that this notice can be used in any future prosecution as proof that the service was “reckless” in allowing the material to remain on their service.

The new laws were criticised by lawyers, rights groups, and the technology industry. The Law Council issued a statement focused on the rushing of the laws through Parliament and argued that the lack of proper consultation meant the laws could have “unintended consequences” like media censorship and restricting whistle-blowers.¹⁰⁷ The Digital Industry Group Inc, which represents Facebook, Google, and Twitter in Australia, stated that they received the draft legislation just two days before it passed and expressed concern that the new laws would breach international law, as American companies are not allowed to share information with law enforcement agencies outside the United States.¹⁰⁸ The Online Hate

¹⁰² Christian Porter MP, Second Reading Speech, House of Representatives (4 April 2019)

https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/84457b57-5639-432a-b4df-68b704cb3563/0032/hansard_frag.pdf;fileType=application%2Fpdf

¹⁰³ <https://www.christchurchcall.com/call.html>

¹⁰⁴ <https://www.christchurchcall.com/supporters.html>

¹⁰⁵ <https://www.legislation.gov.au/Details/C2019A00038>

¹⁰⁶ Christian Porter MP, Second Reading Speech, House of Representatives (4 April 2019)

https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/84457b57-5639-432a-b4df-68b704cb3563/0032/hansard_frag.pdf;fileType=application%2Fpdf

¹⁰⁷ <https://www.lawcouncil.asn.au/media/media-releases/livestream-laws-could-have-serious-unintended-consequences-chilling-effect-on-business>

¹⁰⁸ <https://www.abc.net.au/news/science/2019-04-04/facebook-youtube-social-media-laws-rushed-and-flawed-critics-say/10965812>

Prevention Institute stated that the new powers awarded to the eSafety Commissioner amounted to a “presumption of guilt”.¹⁰⁹

The ALP argued that the laws were “clumsy, flawed, and rushed” and that in addition to the adverse effect on legitimate whistleblowing activity, they might:

- undermine Australia’s security cooperation with the United States by requiring US internet providers to share content data with the AFP (breaching US law)
- encourage proactive surveillance of internet users by social media platforms
- impact harshly on smaller companies that don’t have the resources or technical capabilities to comply with the regulations
- not mesh well with existing international regulatory frameworks¹¹⁰

The Greens were concerned about the Act’s potential to criminalise journalism and moved an amendment to refer the Bill to the Parliamentary Joint Committee on Intelligence and Security for proper review and consultation.¹¹¹ Greens Senator Jordon Steele-John suggested the laws could be used to take down videos of refugees being mistreated on Manus Island and other human rights abuses.¹¹² The Greens amendment was seconded by Independent MP Kerryn Phelps, who raised the issue of the “expeditious” time frame, which is not defined in the legislation, and reiterated the concerns that whistle-blowers may no longer be able to use social media.¹¹³ The amendment was negated and the Act passed.

Policy process

Criterion 1 - Establish Need: Identify a demonstrable need for the policy, based on hard evidence and consultation with all the stakeholders involved, particularly interest groups who will be affected.

Guiding question: Is there a statement of why the policy was needed based on factual evidence and stakeholder input?

The government did not present hard evidence or evidence from consultation with the stakeholders involved to identify why the policy was needed. There was no consultation at all with the technology industry, with rights groups, or with the public. The government presented no evidence to suggest that criminalising online service providers in this way would succeed in limiting the spread of messages of hate and intolerance online.

¹⁰⁹ Ibid.

¹¹⁰ Mark Dreyfus MP, Second Reading Speech, House of Representatives (4 April 2019)
https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/84457b57-5639-432a-b4df-68b704cb3563/0033/hansard_frag.pdf;fileType=application%2Fpdf

¹¹¹ Adam Bandt MP, Second Reading Speech, House of Representatives (4 April 2019)
https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/84457b57-5639-432a-b4df-68b704cb3563/0034/hansard_frag.pdf;fileType=application%2Fpdf

¹¹² <https://www.abc.net.au/news/science/2019-04-04/facebook-youtube-social-media-laws-rushed-and-flawed-critics-say/10965812>

¹¹³ Kerryn Phelps MP, Second Reading Speech, House of Representatives (4 April 2019)
https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/84457b57-5639-432a-b4df-68b704cb3563/0035/hansard_frag.pdf;fileType=application%2Fpdf

Criterion 2 - Set Objectives: Outline the public interest parameters of the proposed policy and clearly establish its objectives.

Guiding question: Is there a statement of the policy's objectives couched in terms of the public interest?

The government did make a public interest argument for this policy. The argument was that the public should be protected from the spread of "violent and extreme fanatical propaganda" online. Although the Act's dissenters disagreed with the method of doing so, they in general agreed with the government that something needed to be done to prevent the dissemination of such material on social media.

Criterion 3 – Identify Options: Identify alternative approaches to the design of the policy, preferably with international comparisons where feasible. Engage in realistic costings of key alternative approaches.

Guiding question: Is there a description of the alternative policy options considered before the preferred one was adopted?

The government did not identify alternative policy approaches. The reactive nature of the legislation and the short amount of time allowed for its consideration meant that other options were not presented. This is a shame given that there exist international comparisons that might have benefited the process; for example, in Germany, the government requires companies to remove "obviously illegal" content within 24 hours, a more precise time frame which has been described as "challenging to meet".¹¹⁴

Criterion 4 – Consider Mechanisms: Consider implementation choices along a full spectrum from incentives to coercion.

Guiding question: Is there a disclosure of the alternative ways considered for implementing the chosen policy?

The government did not consider various implementation choices. Again, this process was limited by the short time frame applied to this policymaking process. To speed up the process, the Prime Minister granted an exemption from the need to complete a Regulatory Impact Statement, so a comparison of regulatory and non-regulatory options was not carried out.¹¹⁵

Criterion 5 – Brainstorm Alternatives: Consider the pros and cons of each option and mechanism. Subject all key alternatives to a rigorous cost-benefit analysis.

Guiding question: Is there a published analysis of the pros/cons and benefits/costs of the alternative options/mechanisms considered in 3 and 4?

The government did not publish an analysis of the pros, cons, benefits, and costs of any alternative policy options or mechanisms.

¹¹⁴ <https://www.nytimes.com/2019/04/03/world/australia/social-media-law.html>

¹¹⁵ Explanatory Memorandum, page 4: https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/s1201_ems_08b22f92-a323-4512-bf31-bc55aab31a81/upload_pdf/19081em.pdf;fileType=application%2Fpdf

EVIDENCE BASED POLICY ANALYSIS

The Act's Financial Impact Statement was also limited, stating only that the laws were "unlikely to have a significant impact on consolidated revenue."¹¹⁶

Criterion 6 – Design Pathway: Develop a complete policy design framework including principles, goals, delivery mechanisms, program or project management structure, the implementation process and phases, performance measures, ongoing evaluation mechanisms and reporting requirements, oversight and audit arrangements, and a review process ideally with a sunset clause.

Guiding question: Is there evidence that a comprehensive project management plan was designed for the policy's rollout?

There is no evidence of a complete policy design framework. This legislation was drafted mere days before it was introduced into Parliament and was not accompanied by a project management plan for its rollout.

Criterion 7 – Consult Further: Undertake further consultation with key affected stakeholders of the policy initiative.

Guiding question: Was there further consultation with affected stakeholders after the preferred policy was announced?

There was no further consultation on this Act, and at time of writing there are no plans for further consultation.

Criterion 8 – Publish Proposals: Produce a Green and then a White paper for public feedback and final consultation purposes and to explain complex issues and processes.

Guiding question: Was there a) a Green paper seeking public input on possible policy options and b) a White paper explaining the final policy decision?

The government did not publish a Green paper, a White paper, or any alternative such as an issues paper or a discussion paper, to explain the policy decision.

Criterion 9 – Introduce Legislation: Develop legislation and allow for comprehensive parliamentary debate especially in committee, and also intergovernmental discussion where necessary.

Guiding question: Was there legislation and adequate Parliamentary debate on the proposed policy initiative?

The government introduced the legislation to Parliament on the last sitting day of the year, thereby not allowing for comprehensive parliamentary debate or intergovernmental discussion.

¹¹⁶ Explanatory memorandum, page 4: https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/s1201_ems_08b22f92-a323-4512-bf31-bc55aab31a81/upload_pdf/19081em.pdf;fileType=application%2Fpdf

EVIDENCE BASED POLICY ANALYSIS

Criterion 10 – Communicate Decision: Design and implement a clear, simple, and inexpensive communication strategy based on information not propaganda, regarding the new policy initiative.

Guiding question: Is there an online official media release that explains the final policy in simple, clear and factual terms?

A joint media release from Attorney-General Christian Porter and Minister for Communications and the Arts Mitch Fifield did explain the final policy in simple, clear, and factual terms.¹¹⁷

Final scores

	Criterion	Yes/No
1	Establish Need (demonstrable, evidence-based need)	No
2	Set Objectives (public interest parameters)	Yes
3	Identify Options (consideration of alternatives)	No
4	Consider Mechanisms (implementation choices)	No
5	Brainstorm Alternatives (cost-benefit analysis)	No
6	Design Pathway (policy design framework)	No
7	Consult Further (further consultation after policy announcement)	No
8	Publish Proposals (produce Green then White paper, or equivalents)	No
9	Introduce Legislation (comprehensive parliamentary debate)	No
10	Communicate Decision (information not propaganda)	Yes
		2/10

Income Management and Cashless Welfare Act 2019

¹¹⁷ <https://www.attorneygeneral.gov.au/Media/Pages/Tough-New-Laws-to-protect-Australians-from-Live-Streaming-of-Violent-Crimes.aspx>

Policy background

Income management has a controversial but accepted role in the Australian social security system. The main way in which the Department of Social Services delivers income management to social security recipients is by quarantining some percentage of their welfare payments onto a debit card that cannot be used in certain places or on certain items, for example alcohol or gambling.

There are a number of income management ‘trials’ using a cashless debit card or something similar across Australia. One example is the Cape York Welfare Reform trial (the CYWR), which has been running since 2008 and is now in its 11th year. The trial was launched in the remote Queensland communities of Aurukun, Coen, Hope Vale, and Mossman Gorge on 1 July 2008 and was due to end on 1 January 2012. Every year since then the CYWR has received funding extensions and has also expanded to include the community of Doomadgee.¹¹⁸

The CYWR runs as a partnership between the communities themselves, the federal and state governments, and the Cape York Institute. This partnership established an independent statutory authority called the Family Responsibilities Commission (FRC), which implements the scheme. Relevant state government departments notify the FRC when a community member is “not meeting pre-determined obligations”, for example not sending their children to school or breaching a social housing tenancy agreement.¹¹⁹ The matter is then referred to the Local Commissioners and the community member is invited to attend a conference where they discuss the issue with their Local Commissioners informally and confidentially. The FRC may decide based on this conference to take no action, to reprimand the community member, to encourage them to enter into a Family Responsibilities Agreement, to direct them to community support services, or to place them on a Conditional Income Management (CIM) order.¹²⁰

A CIM order is the FRC’s last resort and is issued for a defined period, usually of 12 months. Depending on individual circumstances, 60, 75, or 90% of the community member’s fortnightly welfare payments are managed by Centrelink, which uses those quarantined payments to meet the community member’s financial obligations such as rent and Bills, and puts the rest of the quarantined amount on a BasicsCard which can only be used to purchase food or other consumables. The remainder of the payment (40, 25, or 10%) is retained by the community member to spend as they please.¹²¹

The CYWR is generally seen as having a level of support within the communities in which it operates, because it was developed in partnership with them and because decisions are made by respected local elders and community leaders (who take the role of Local Commissioners) rather than by government agencies.¹²² The *Strategic Review of Cape York Income Management*, published in 2018 and assessing a decade of data, found that any successes attributed to the CYWR were driven by these unique features, with the proportion of people interacting with the FRC actually receiving a CIM order declining annually from 20.7% in 2009-10 to 7.7% in 2017-18.¹²³ While the Review found that quantitative evidence

¹¹⁸ https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/IncomeManagementCashless/Submissions, Submission 2, page 1

¹¹⁹ Ibid, page 3

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² [https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024268/toc_pdf/SocialSecurity\(Administration\)Amendment\(IncomeManagementandCashlessWelfare\)Bill2019.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024268/toc_pdf/SocialSecurity(Administration)Amendment(IncomeManagementandCashlessWelfare)Bill2019.pdf;fileType=application%2Fpdf), page 5

¹²³ <https://eprints.qut.edu.au/123533/1/final-report-strategic-review-cape-york-income-management%281%29.pdf>, page x

concerning the actual outcomes and impacts of the CYWR is “mixed”, qualitative reports of reduced harmful alcohol consumption, drugs, violence, and crime, were linked to the scheme’s flexibility to take into account individual circumstances of community members, and the option of voluntary income management.¹²⁴

The Income Management and Cashless Welfare Bill 2019 was introduced to extend funding for the CYWR for another year, to 30 June 2020, but also to extend the trials of a very different income management program: the cashless debit card trials that had been operating in the Ceduna region in South Australia and the East Kimberley region in Western Australia since 2016 and in the Goldfields region in Western Australia since 2018. The trials were due to end on 1 July 2019, but the Bill proposed extending them to 30 June 2020 to align with the end of the new trial in the Bundaberg and Hervey Bay region in Queensland.¹²⁵ Under this trial, every single person in the region who receives a working age welfare payment has 80% of that payment quarantined onto a cashless debit card which cannot be used to buy alcohol or gambling products, withdraw cash, or purchase “cash-like products” like gift cards.¹²⁶ The trials have been very controversial due to their compulsory nature, complaints from communities that they were not adequately consulted or even misled about the trials, claims that the trials are having negative effects on communities, and concerns about human rights implications.¹²⁷

Bearing in mind the significant differences between these two trials, the government’s decision to introduce their extensions in the same Bill was seen by the Opposition as an attempt to wedge them on the issue, as blocking the Bill would have meant an end to funding for the CYWR in a matter of weeks, causing significant disruption to communities that had expressed that they wanted the trial to continue.¹²⁸

Nevertheless, the Bill was introduced to the House on 13 February 2019 and referred to the Senate Community Affairs Legislation Committee. The Committee recommended the Bill be passed, but the Additional Comments made by Labor Senators and the Dissenting Report submitted by the Australian Greens highlighted the significant flaws in the evaluation that the government was using to claim that the cashless debit card trials had been a success. The Australian National Audit Office (ANAO) found that the evaluation, known as the ORIMA evaluation, had incorrectly monitored and reported the trial outcomes, while the ANU Centre for Social Research and Methods described the quality of the evaluation as “so poor that it should not be used”.¹²⁹ The Committee also heard that community leaders who had initially agreed to the trials had done so on the basis of a promise from the government that there would be a way for trial participants who were financially responsible and were not engaging in any of the behaviour targeted by the trial to come off the cashless debit card, but that the government had not delivered on

¹²⁴ Ibid, pages x-xi

¹²⁵ Explanatory Memorandum https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6289_ems_c09da960-a36b-4f91-a8d5-5aa101668e77/upload_pdf/698369.pdf;fileType=application%2Fpdf

¹²⁶ <https://www.dss.gov.au/families-and-children/programmes-services/welfare-conditionality/cashless-debit-card-overview>

¹²⁷ See ‘Addition Comments by Labor Senators’ on page 17 and ‘Dissenting Report by the Australian Greens’ on page 23, for example

[https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024268/toc_pdf/SocialSecurity\(Administration\)Amendment\(IncomeManagementandCashlessWelfare\)Bill2019.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024268/toc_pdf/SocialSecurity(Administration)Amendment(IncomeManagementandCashlessWelfare)Bill2019.pdf;fileType=application%2Fpdf)

¹²⁸ Linda Burney MP, Second Reading Speech, House of Representatives (2 April 2019)

https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/79f8c2ff-e72c-449a-b4de-7f6142267317/0272/hansard_frag.pdf;fileType=application%2Fpdf

¹²⁹ [https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024268/toc_pdf/SocialSecurity\(Administration\)Amendment\(IncomeManagementandCashlessWelfare\)Bill2019.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024268/toc_pdf/SocialSecurity(Administration)Amendment(IncomeManagementandCashlessWelfare)Bill2019.pdf;fileType=application%2Fpdf), pages 17-18

this promise.¹³⁰ The Committee heard a wealth of evidence that compulsory income management does not work, that the trials are not meeting their stated objectives, and that the evaluations claiming otherwise are flawed and discredited.¹³¹ In the final report tabled on 1 April 2019, the Greens dissented to the Committee view, while Labor recommended that the Bill be amended to introduce a way for trial participants to get off the card.

On 2 April 2019, the Parliamentary Joint Committee on Human Rights published its own scrutiny report on the Bill. The Committee restated its conclusion from previous extensions that “the measures may not be compatible with the right to social security, the rights to privacy and family, and the right to equality and non-discrimination.”¹³² The Committee also noted that the Bill’s statement of compatibility with human rights mis-represented the findings of the ORIMA evaluation as overwhelmingly positive when in reality, the data showed that a third of trial participants reported that the trial had made their lives worse.¹³³

Back in the House on 2 April 2019, the Opposition supported the Bill in order to minimise disruption to communities in the run-up to the May federal election,¹³⁴ but moved an amendment in the Senate to create an option that would allow people to come off the card if they could demonstrate “reasonable and responsible management of their family affairs”.¹³⁵ The amendments were agreed to and the Bill was returned to the House and passed on 4 April 2019. It received Assent on 5 April 2019.

Policy process

Criterion 1 - Establish Need: Identify a demonstrable need for the policy, based on hard evidence and consultation with all the stakeholders involved, particularly interest groups who will be affected.

Guiding question: Is there a statement of why the policy was needed based on factual evidence and stakeholder input?

The ORIMA evaluation was used by the government as evidence that the trial was working and should be continued. However, this evaluation has since been discredited by the ANAO and by the academic community. The Senate Committee heard that while qualitative data on the effectiveness of the trial is mixed, there is no reliable quantitative data indicating that the trial is benefiting its participants.

While the government claimed to have consulted extensively with communities impacted by the cashless debit card, a number of submitters to the Senate Inquiry argued that that consultation was inadequate, misleading, or not representative.

¹³⁰ Ibid, page 19-20

¹³¹ Ibid, page 29

¹³² https://www.aph.gov.au/~media/Committees/Senate/committee/humanrights_ctte/reports/2019/Report%202/Report%202%20of%202019.pdf?la=en, page 151

¹³³ Ibid, page 150

¹³⁴ Linda Burney MP, Second Reading Speech, House of Representatives (2 April 2019) https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/79f8c2ff-e72c-449a-b4de-7f6142267317/0272/hansard_frag.pdf;fileType=application%2Fpdf

¹³⁵ Hansard, Senate (3 April 2019) https://parlinfo.aph.gov.au/parlInfo/download/chamber/hansards/e252d273-2978-453f-86f5-ef9a8b66800f/toc_pdf/Senate_2019_04_03_7037_Official.pdf;fileType=application%2Fpdf, page 10786

Criterion 2 - Set Objectives: Outline the public interest parameters of the proposed policy and clearly establish its objectives.

Guiding question: Is there a statement of the policy's objectives couched in terms of the public interest?

The government did frame the Bill (and income management more broadly) as in the interest of the communities it will impact, by arguing that successful income management leads to a reduction of harmful alcohol and drug consumption, decreased violence, and "a general feeling of improved safety on the streets of these towns."¹³⁶

Criterion 3 – Identify Options: Identify alternative approaches to the design of the policy, preferably with international comparisons where feasible. Engage in realistic costings of key alternative approaches.

Guiding question: Is there a description of the alternative policy options considered before the preferred one was adopted?

No other options were considered by the government for supporting people on social security payments in the communities impacted by the Bill, although many submitters to the Senate Inquiry argued that the money used to implement compulsory income management would be better spent providing enhanced social support services in those communities.

Criterion 4 – Consider Mechanisms: Consider implementation choices along a full spectrum from incentives to coercion.

Guiding question: Is there a disclosure of the alternative ways considered for implementing the chosen policy?

The government was open to considering other implementation choices, as shown by their support of the Opposition's amendment to provide trial participants with a way out of the trial.

Criterion 5 – Brainstorm Alternatives: Consider the pros and cons of each option and mechanism. Subject all key alternatives to a rigorous cost-benefit analysis.

Guiding question: Is there a published analysis of the pros/cons and benefits/costs of the alternative options/mechanisms considered in 3 and 4?

There was no rigorous cost-benefit analysis or published comparison of the pros and cons of a variety of ways to support the impacted communities.

Criterion 6 – Design Pathway: Develop a complete policy design framework including principles, goals, delivery mechanisms, program or project management structure, the implementation process and phases,

¹³⁶ Paul Fletcher MP, Second Reading Speech, House of Representatives (13 February 2019)

https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/f45cf053-d00c-473b-88ab-ac7ccd4b00ec/0017/hansard_frag.pdf;fileType=application%2Fpdf

EVIDENCE BASED POLICY ANALYSIS

performance measures, ongoing evaluation mechanisms and reporting requirements, oversight and audit arrangements, and a review process ideally with a sunset clause.

Guiding question: Is there evidence that a comprehensive project management plan was designed for the policy's rollout?

There is no published complete policy design framework. The Explanatory Memorandum is short and does not outline implementation processes or evaluation mechanisms, although it does mention that a second evaluation of the program will take place and sets a sunset date.

Criterion 7 – Consult Further: Undertake further consultation with key affected stakeholders of the policy initiative.

Guiding question: Was there further consultation with affected stakeholders after the preferred policy was announced?

Further consultation was undertaken as part of the Senate Inquiry process.

Criterion 8 – Publish Proposals: Produce a Green and then a White paper for public feedback and final consultation purposes and to explain complex issues and processes.

Guiding question: Was there a) a Green paper seeking public input on possible policy options and b) a White paper explaining the final policy decision?

No Green or White paper (or equivalent) was issued for the cashless debit card trial or for any of its extensions.

Criterion 9 – Introduce Legislation: Develop legislation and allow for comprehensive parliamentary debate especially in committee, and also intergovernmental discussion where necessary.

Guiding question: Was there legislation and adequate Parliamentary debate on the proposed policy initiative?

Legislation was introduced and referred to Senate Committee but there was very little parliamentary debate as the government guillotined the discussion on the Bill. This was linked to the timing of the Bill, which was debated on the very last few days that Parliament sat before breaking for the federal election. This timing, which meant that funding for the CYWR would have ended suddenly if the Bill did not pass, did not allow for comprehensive parliamentary debate. Nevertheless, there was a thorough debate about the issues and concerns held by parliamentarians in relation to the legislation through the committee process, and the Senate amendment to reflect those concerns was passed.

Criterion 10 – Communicate Decision: Design and implement a clear, simple, and inexpensive communication strategy based on information not propaganda, regarding the new policy initiative.

EVIDENCE BASED POLICY ANALYSIS

Guiding question: Is there an online official media release that explains the final policy in simple, clear and factual terms?

There is a section of the DSS website dedicated to information about the cashless debit card including factsheets, instructions, FAQs, a free hotline and email service.¹³⁷ The cashless debit card itself also has its own website where card holders can manage their account and access support and tutorials.¹³⁸

Final scores

	Criterion	Yes/No
1	Establish Need (demonstrable, evidence-based need)	No
2	Set Objectives (public interest parameters)	Yes
3	Identify Options (consideration of alternatives)	No
4	Consider Mechanisms (implementation choices)	Yes
5	Brainstorm Alternatives (cost-benefit analysis)	No
6	Design Pathway (policy design framework)	No
7	Consult Further (further consultation after policy announcement)	Yes
8	Publish Proposals (produce Green then White paper, or equivalents)	No
9	Introduce Legislation (comprehensive parliamentary debate)	Yes
10	Communicate Decision (information not propaganda)	Yes
		5/10

¹³⁷ <https://www.dss.gov.au/families-and-children/programmes-services/welfare-conditionality/cashless-debit-card-overview>

¹³⁸ <https://cdc.indue.com.au/>

Tax Relief So Working Australians Keep More Of Their Money Act 2019

Disclaimer: Per Capita was involved in campaigning against this legislation, including undertaking advocacy efforts with the Opposition and the crossbench and launching the #StopStage3 campaign on social media. We have made every effort to keep all ideology out of this analysis.

Policy background

The measures included in the Tax Relief So Working Australians Keep More Of Their Money Bill 2019 were first introduced in the 2019-20 Budget and formed the cornerstone of the Coalition government's 2019 federal election campaign. The government had previously legislated a tranche of tax cuts in the Personal Income Tax Plan Act 2018 (the PITP), and this new Bill sought to legislate further reductions in personal income tax rates. These reductions would come into force in three stages.¹³⁹

Stage one would commence almost immediately, in the 2018-19 income year. In stage one, the Bill would increase the low and middle income tax offset (LMITO) from a minimum amount of \$200 to \$255 and a maximum amount of \$530 to \$1080. This tax offset would apply in addition to the existing low income tax offset (LITO). This would mean low and middle income earners (those earning up to \$126,000) would receive a higher tax refund in their tax returns immediately that month.

Stage two would commence in the 2022-23 income year. Under legislation already passed in the PITP, the LMITO would cease to exist, but the LITO would be increased to \$645 for individuals earning less than \$37,000. Under this new legislation, that amount would increase to \$700. In stage two, the Bill would also increase the upper threshold for the 19% marginal tax rate from \$41,000 (legislated under the PITP) to \$45,000.

Stage three would commence in the 2024-25 income year. Under the PITP, the 37% marginal tax rate had already been abolished entirely, and the new legislation would further reduce the 32.5% marginal tax rate to 30%. This would mean that all taxpayers earning between \$45,000 and \$200,000 would pay the same flat marginal tax rate of 30%. Altogether, the tax cuts were costed as removing \$158 billion from Commonwealth revenue over the period to 2029-30.¹⁴⁰

The government outlined this tax plan clearly as an election policy and, after being returned to government, made it an immediate priority, introducing it to the House on the first sitting day of Parliament, 2 July 2019. They argued that as they had campaigned on this tax plan and the Australian voters had returned them to government, they had a mandate to pass the legislation and the Parliament should support them in doing so.¹⁴¹

The government asserted that the tax plan represented a "structural reform under which 94 per cent of taxpayers would pay no more than thirty percent in income tax from July 2024. Treasurer Josh Frydenberg

¹³⁹ All information on the stages from the Bills Digest

https://parlinfo.aph.gov.au/parlInfo/download/legislation/Billsdgs/6774301/upload_binary/6774301.pdf;fileType=application/pdf

¹⁴⁰ Ibid, page 9

¹⁴¹ See, for example, Josh Frydenberg MP, Second Reading Speech, House of Representatives (2 July 2019)

https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/33c1fd11-10a4-44ad-9ff8-e52f8b1f3bd4/0066/hansard_frag.pdf;fileType=application%2Fpdf

championed this as a measure that would “incentivise and reward the efforts of workers”. Further, the government argued that stage three, which gave the most significant personal income tax to high income earners, was warranted because the \$180,000 income threshold had not been increased since 2008-09, while all income thresholds below it had been substantially increased over the same time.

The ALP’s position was that stages one and two of the Bill would support low and middle income earners and were necessary to stimulate the struggling economy, but that stage three of the Bill would overwhelmingly benefit high income earners and would pull money out of the budget that could otherwise be spent on government services.¹⁴² The ALP moved two amendments in the House. The first sought to move stage two of the Bill forward and pass it now. This amendment was negated with the Greens also voting against it, arguing that stage two of the Bill did not in fact help low and middle income earners and that there were better ways to support low income earners than tax cuts.¹⁴³ The ALP then moved a second amendment which sought to split the Bill and remove stage three from the legislation. The Greens voted with Labor on this amendment, but it was also negated.

The Bill passed the House and progressed to the Senate on 4 July 2019, where a number of further amendments were moved. The Greens moved two amendments: first, to send the legislation to the Senate Economics Legislation Committee for review and inquiry, which was negated, and secondly to double the LITO, which was also negated. Labor moved the same amendments again in the Senate but again they did not have the numbers, with key members of the crossbench voting against. The two Centre Alliance senators voted with the government following a promise by the government of action on gas prices,¹⁴⁴ and Senator Jacqui Lambie also voted with the government following a promise to discuss debt forgiveness for Tasmania.¹⁴⁵

Eventually, unable to split the package or bring stage two forward, Labor voted for the full package in the Senate, on the basis that they could not refuse tax cuts to low and middle income earners.¹⁴⁶ The Bill passed both houses on 4 July 2019 and received Assent on 5 July 2019.

Policy process

Criterion 1 - Establish Need: Identify a demonstrable need for the policy, based on hard evidence and consultation with all the stakeholders involved, particularly interest groups who will be affected.

¹⁴² Anthony Albanese MP, Second Reading Speech, House of Representatives (2 July 2019)

https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/33c1fd11-10a4-44ad-9ff8-e52f8b1f3bd4/0067/hansard_frag.pdf;fileType=application%2Fpdf

and Jim Chalmers MP, Second Reading Speech, House of Representatives (2 July 2019) https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/33c1fd11-10a4-44ad-9ff8-e52f8b1f3bd4/0069/hansard_frag.pdf;fileType=application%2Fpdf

¹⁴³ Adam Bandt MP, Second Reading Speech, House of Representatives (2 July 2019)

https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/33c1fd11-10a4-44ad-9ff8-e52f8b1f3bd4/0072/hansard_frag.pdf;fileType=application%2Fpdf

¹⁴⁴ Senator Rex Patrick, Second Reading Speech, Senate (4 July 2019)

https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/374b7d51-2533-445c-9bbd-2411c691e3bf/0261/hansard_frag.pdf;fileType=application%2Fpdf

¹⁴⁵ Senator Jacqui Lambie, Second Reading Speech (4 July 2019)

https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/374b7d51-2533-445c-9bbd-2411c691e3bf/0264/hansard_frag.pdf;fileType=application%2Fpdf

¹⁴⁶ Hansard, Senate (4 July 2019) https://parlinfo.aph.gov.au/parlInfo/download/chamber/hansards/374b7d51-2533-445c-9bbd-2411c691e3bf/toc_pdf/Senate_2019_07_04_7071_Official.pdf;fileType=application%2Fpdf, page 315

Guiding question: Is there a statement of why the policy was needed based on factual evidence and stakeholder input?

The government has not presented or published an evidence base for the need to make cuts to personal income tax rates. The government did present evidence that the economy was sluggish and that cuts to personal income tax rates could provide a much-needed stimulus to the economy, but not that tax cuts were the only or best way to provide that stimulus. There was no public consultation in advance of the government announcing its tax plan and there do not appear to be any published details about stakeholder consultation.

Criterion 2 - Set Objectives: Outline the public interest parameters of the proposed policy and clearly establish its objectives.

Guiding question: Is there a statement of the policy's objectives couched in terms of the public interest?

The government did make a public interest argument for the policy by arguing that the tax cuts would put more money in the pockets of Australian workers and would reward the efforts and encourage the aspiration of the public, allowing them to both earn more and keep more of what they earn.

Criterion 3 – Identify Options: Identify alternative approaches to the design of the policy, preferably with international comparisons where feasible. Engage in realistic costings of key alternative approaches.

Guiding question: Is there a description of the alternative policy options considered before the preferred one was adopted?

The government did not identify or describe alternative approaches to the policy's design. For example, although it was suggested that there may be other ways to stimulate the economy that the government might consider, for example increasing Newstart or restoring penalty rates, the government did not formally consider these options.

Criterion 4 – Consider Mechanisms: Consider implementation choices along a full spectrum from incentives to coercion.

Guiding question: Is there a disclosure of the alternative ways considered for implementing the chosen policy?

The government was not flexible in considering a range of implementation choices. For example, although it was argued that an alternative way to implement the chosen policy would be to bring stage two forward and pass it immediately alongside stage one, the government did not formally consider this option.

Criterion 5 – Brainstorm Alternatives: Consider the pros and cons of each option and mechanism. Subject all key alternatives to a rigorous cost-benefit analysis.

EVIDENCE BASED POLICY ANALYSIS

Guiding question: Is there a published analysis of the pros/cons and benefits/costs of the alternative options/mechanisms considered in 3 and 4?

There is no published analysis of the pros and cons of different options and mechanisms, nor is there a rigorous cost-benefit analysis.

Criterion 6 – Design Pathway: Develop a complete policy design framework including principles, goals, delivery mechanisms, program or project management structure, the implementation process and phases, performance measures, ongoing evaluation mechanisms and reporting requirements, oversight and audit arrangements, and a review process ideally with a sunset clause.

Guiding question: Is there evidence that a comprehensive project management plan was designed for the policy's rollout?

The government did outline a comprehensive and detailed plan for the rollout of the tax plan as part of its 2019 Budget. Although not all of the elements of a policy design framework listed above were included, there were certainly details about implementation and delivery.

Criterion 7 – Consult Further: Undertake further consultation with key affected stakeholders of the policy initiative.

Guiding question: Was there further consultation with affected stakeholders after the preferred policy was announced?

Although an amendment was moved to refer the legislation to the Senate Economics Legislation Committee for further consultation, this amendment was negated. There was no further consultation on the Bill.

Criterion 8 – Publish Proposals: Produce a Green and then a White paper for public feedback and final consultation purposes and to explain complex issues and processes.

Guiding question: Was there a) a Green paper seeking public input on possible policy options and b) a White paper explaining the final policy decision?

No Green paper, White paper, or equivalent documents were published in relation to the Bill.

Criterion 9 – Introduce Legislation: Develop legislation and allow for comprehensive parliamentary debate especially in committee, and also intergovernmental discussion where necessary.

Guiding question: Was there legislation and adequate Parliamentary debate on the proposed policy initiative?

EVIDENCE BASED POLICY ANALYSIS

Legislation was developed and there was Parliamentary debate, including the moving of several amendments in the Senate, although the government's need to pass the legislation in time for the tax cuts to be applied that income year meant that debate was truncated.

Criterion 10 – Communicate Decision: Design and implement a clear, simple, and inexpensive communication strategy based on information not propaganda, regarding the new policy initiative.

Guiding question: Is there an online official media release that explains the final policy in simple, clear and factual terms?

The government developed clear communications around this policy for use throughout its election campaign. There are also media releases from both before and after the legislation was passed explaining its impact on taxpayers.

Final scores

	Criterion	Yes/No
1	Establish Need (demonstrable, evidence-based need)	No
2	Set Objectives (public interest parameters)	Yes
3	Identify Options (consideration of alternatives)	No
4	Consider Mechanisms (implementation choices)	No
5	Brainstorm Alternatives (cost-benefit analysis)	No
6	Design Pathway (policy design framework)	Yes
7	Consult Further (further consultation after policy announcement)	No
8	Publish Proposals (produce Green then White paper, or equivalents)	No
9	Introduce Legislation (comprehensive parliamentary debate)	Yes
10	Communicate Decision (information not propaganda)	Yes
		4/10

Commonwealth funding formula for non-government schools

Policy background

Non-government schools in Australia are funded by a mixture of fees and contributions paid by the parents and guardians of students attending those schools, the Australian government, and state and territory governments. While state and territory governments are the majority public funder of government schools, the Commonwealth is the majority public funder of non-government schools.¹⁴⁷ Based on the recommendations of the 2011 Gonski Review of Funding for Schooling, the Commonwealth is working towards a model where it funds at least 20% of the total public funding for government schools, and at least 80% of the total public funding for non-government schools.¹⁴⁸

A base amount for each school's Commonwealth funding is set and then discounted for non-government schools using a formula that assesses the capacity for the parents and guardians of students attending those schools to contribute financially to the school.¹⁴⁹ Since 2001, this formula has been based on each school's socio-economic status score (SES score).¹⁵⁰ A school's SES score is calculated using area-based census data about the average income, education, and occupation level in the small geographical area in which families enrolled at the school live. Schools that are calculated to have well-off parents based on this measure have higher SES scores and receive less Commonwealth funding per student; schools that are calculated to have less well-off parents receive more Commonwealth funding per student. Changes to SES scores can have huge funding impacts; an SES score increase of just one point would reduce a school's Commonwealth funding by around \$300 per student per year.¹⁵¹ The 'average' SES score, for a school with a mix of students from averagely well-off neighbourhoods, was 100. A non-government school with students from highly affluent neighbourhoods would score 120-130, while a non-government school with students from relatively worse-off neighbourhoods would score around 80.¹⁵²

Originally, Catholic schools were treated differently under the first Gonski model. Catholic schools were treated as a 'system' rather than individual schools and were allocated a single, system-weighted SES score by state – so, for example, all Catholic schools in New South Wales had the same 'average' SES score of 101.¹⁵³ This advantaged high-SES Catholic schools, which received Commonwealth funding as though they were average-SES schools, and allowed Catholic primary schools in particular to keep their fees low even where their students were highly advantaged.

In 2017, then Education Minister Simon Birmingham tackled this perceived bias by removing the system-weighted average as part of a group of funding changes that preceded the second Gonski review, legislated by the Australian Education Amendment Act 2017. The Catholic education sector was "furious"¹⁵⁴ with the changes and argued that the SES score formula was both inaccurate and

¹⁴⁷ <https://www.education.gov.au/how-are-schools-funded-australia>

¹⁴⁸ <https://www.education.gov.au/what-schooling-resource-standard-and-how-does-it-work>

¹⁴⁹ Ibid.

¹⁵⁰ https://docs.education.gov.au/system/files/doc/other/national_school_resourcing_board_ses_review_final_report.pdf, page ix

¹⁵¹ <https://theconversation.com/explaining-australias-school-funding-debate-whats-at-stake-100023>

¹⁵² <https://theconversation.com/catholic-schools-arent-all-the-same-and-gonski-2-0-reflects-this-93722>

¹⁵³ Ibid.

¹⁵⁴ <https://www.smh.com.au/politics/federal/gonski-school-funding-wealthy-schools-to-have-funding-slashed-as-turnbull-government-redirects-funds-20170502-gvxnkc.html>

systematically biased against Catholic schools, because while Catholic schools may be located in affluent areas, they often serve less affluent communities in those areas than the local independent schools.¹⁵⁵

After significant lobbying from the Catholic education sector, the government asked the National School Resourcing Board (NSRB, also established by the Australian Education Amendment Act 2017) to review the SES score methodology. The NSRB released an issues paper in December 2017 and received almost 300 public submissions before tabling its final report in June 2018.¹⁵⁶ The report recommended switching from the SES score methodology to a “direct measure of parental income” that cross-references student residential addresses with de-identified tax records to calculate how affluent the school’s students are using their parents’ actual pre-tax income, rather than their area’s average income.¹⁵⁷

Months of negotiations followed,¹⁵⁸ until on 20 September 2018 the Prime Minister Scott Morrison and Minister for Education Dan Tehan announced that the Commonwealth would be transitioning to the direct income measure from 2020.¹⁵⁹ The new funding formula will increase funding to Catholic and independent schools by \$4.6 billion over a decade.¹⁶⁰ It provides nothing for public schools.

Policy process

Criterion 1 - Establish Need: Identify a demonstrable need for the policy, based on hard evidence and consultation with all the stakeholders involved, particularly interest groups who will be affected.

Guiding question: Is there a statement of why the policy was needed based on factual evidence and stakeholder input?

The NSRB review did establish a demonstrable need for a switch from the SES score methodology to a direct income measure, and did so based on evidence, commissioned research, and stakeholder consultation.

Criterion 2 - Set Objectives: Outline the public interest parameters of the proposed policy and clearly establish its objectives.

Guiding question: Is there a statement of the policy’s objectives couched in terms of the public interest?

The Prime Minister and the Minister for Education made a public interest argument for the policy by arguing that the switch to the direct income measure would give parents more affordable choices in non-government schools.

¹⁵⁵ <http://www.cecv.catholic.edu.au/getmedia/2f706a07-58a6-4acc-a3c6-b4ce10c5b72f/Capacity-to-contribute-and-school-SES-scores.aspx?ext=.pdf>

¹⁵⁶ <https://www.education.gov.au/review-socio-economic-status-ses-score-methodology>

¹⁵⁷ https://docs.education.gov.au/system/files/doc/other/national_school_resourcing_board_ses_review_final_report.pdf, pages x-xii

¹⁵⁸ <https://www.theguardian.com/australia-news/2018/sep/20/catholic-and-independent-schools-given-extra-46bn-in-funding-peace-deal>

¹⁵⁹ <https://www.pm.gov.au/media/press-conference-minister-education-canberra>

¹⁶⁰ <https://theconversation.com/government-unfurls-4-6-Billion-private-schools-package-calming-catholic-critics-103599>

Criterion 3 – Identify Options: Identify alternative approaches to the design of the policy, preferably with international comparisons where feasible. Engage in realistic costings of key alternative approaches.

Guiding question: Is there a description of the alternative policy options considered before the preferred one was adopted?

The NSRB review considered a number of different approaches to replacing the SES score methodology, including ways to refine the current area-based approach like using a more targeted population, using confidentialised Census data, removing the education and occupation variables, and adjusting income for family size, as well as considering school resources and wealth in the funding measure, and the potential for direct income measures.

Criterion 4 – Consider Mechanisms: Consider implementation choices along a full spectrum from incentives to coercion.

Guiding question: Is there a disclosure of the alternative ways considered for implementing the chosen policy?

The NSRB review considered a range of implementation choices, outlining options for further consultation and development work, additional data collection, and an interim arrangement to keep schools adequately funded during the transition to the new measure.

Criterion 5 – Brainstorm Alternatives: Consider the pros and cons of each option and mechanism. Subject all key alternatives to a rigorous cost-benefit analysis.

Guiding question: Is there a published analysis of the pros/cons and benefits/costs of the alternative options/mechanisms considered in 3 and 4?

The NSRB review does consider the pros and cons, and notes where certain members of the Board dissented from the majority opinion, outlining any reasons for doing so. However, there is no cost-benefit analysis of the impact of the changes on the broader education system.

Criterion 6 – Design Pathway: Develop a complete policy design framework including principles, goals, delivery mechanisms, program or project management structure, the implementation process and phases, performance measures, ongoing evaluation mechanisms and reporting requirements, oversight and audit arrangements, and a review process ideally with a sunset clause.

Guiding question: Is there evidence that a comprehensive project management plan was designed for the policy's rollout?

The government's response to the NSRB review agreed with the recommendations and subsequent announcements outlined the government's intention to implement those recommendations, but there is no published complete policy design framework. However, it is possible that this work is still ongoing as the new measure is not due to start phasing in until 2020, and there is evidence on the Department of

Education's website that a Direct income Measure Technical Working Group has been set up to "undertake further work on the implementation of the new direct income measure".¹⁶¹

Criterion 7 – Consult Further: Undertake further consultation with key affected stakeholders of the policy initiative.

Guiding question: Was there further consultation with affected stakeholders after the preferred policy was announced?

There was no further consultation undertaken in public after the NSRB published its review, although there were reports that the government continued to consult and negotiate with the Catholic education sector following the release of this review.

Criterion 8 – Publish Proposals: Produce a Green and then a White paper for public feedback and final consultation purposes and to explain complex issues and processes.

Guiding question: Was there a) a Green paper seeking public input on possible policy options and b) a White paper explaining the final policy decision?

The NSRB released an issues paper seeking public input and then a final report explaining its policy recommendations. This can be seen as an equivalent process to a Green/White paper.

Criterion 9 – Introduce Legislation: Develop legislation and allow for comprehensive parliamentary debate especially in committee, and also intergovernmental discussion where necessary.

Guiding question: Was there legislation and adequate Parliamentary debate on the proposed policy initiative?

The policy change was never legislated or debated in Parliament.

Criterion 10 – Communicate Decision: Design and implement a clear, simple, and inexpensive communication strategy based on information not propaganda, regarding the new policy initiative.

Guiding question: Is there an online official media release that explains the final policy in simple, clear and factual terms?

The Department of Education has a dedicated section on its website explaining the direct income measure, which includes fact sheets. However, the Department of Education also has numerous other sections on its website that explain previous, now outdated, schools funding measures, and as the pages aren't dated, it isn't clear when navigating the website which funding measure applies. It takes a fair amount of digging to understand what measure is actually, currently, being used to fund non-government schools in Australia.

¹⁶¹ <https://www.education.gov.au/what-direct-income-measure>

EVIDENCE BASED POLICY ANALYSIS

Final scores

	Criterion	Yes/No
1	Establish Need (demonstrable, evidence-based need)	Yes
2	Set Objectives (public interest parameters)	Yes
3	Identify Options (consideration of alternatives)	Yes
4	Consider Mechanisms (implementation choices)	Yes
5	Brainstorm Alternatives (cost-benefit analysis)	No
6	Design Pathway (policy design framework)	No
7	Consult Further (further consultation after policy announcement)	No
8	Publish Proposals (produce Green then White paper, or equivalents)	Yes
9	Introduce Legislation (comprehensive parliamentary debate)	No
10	Communicate Decision (information not propaganda)	No
		5/10

New South Wales (NSW) case studies

Electoral Funding Act 2018

Policy background

In May 2014, the NSW Department of Premier & Cabinet established a Panel of Experts – Political Donations in response to the highly publicised ICAC investigations into political corruption and prohibited donations during the 2011 NSW state election.¹⁶² The panel's *Final Report on Political Donations* – known as the Schott Report – made a total of 50 recommendations for clarifying and tightening the rules around political donations.¹⁶³ In the government's response to the report it indicated that it would support in principle 49 out of the 50 recommendations, and that it would refer the issue to the Joint Standing Committee on Electoral Matters for further review.¹⁶⁴

The Committee convened after the 2015 state election, held a public hearing, and accepted submissions before tabling its final report in June 2016.¹⁶⁵ The Committee made a series of recommendations for changes to the Expert Panel's recommendations but otherwise agreed that 44 of the Panel's 50 recommendations should be legislated. The Committee report was unanimous and there were no dissenting reports.

Following the 2015 state election, the Committee was also asked to inquire into the administration of that election. The Committee's final report was tabled in November 2016 and made a further series of recommendations for reforms to the Election Funding, Expenditure and Disclosures Act 1981.¹⁶⁶

The Bill ultimately introduced to the Legislative Assembly on 17 May 2018 combined some of the various recommendations of the three reports and was designed to fully repeal and replace the 1981 Act. Some of the Bill's key proposed reforms included:

- require more timely disclosures of political donations
 - require donations of over \$1000 made in the 6 months before a state general election (the capped period) to be disclosed within 14 days
 - require donations of over \$1000 made outside the capped period to be disclosed quarterly
- require political parties to disclose the terms and conditions of reportable loans
- increase the caps on indirect campaign contributions so they are consistent with caps that apply to other political donations
- prohibit property developers from donating
- make elected members and candidates responsible for compliance, rather than 'official agents'
- give 'associated entities' of political parties the same disclosure obligations as political parties

¹⁶² <https://www.dpc.nsw.gov.au/updates/2014/05/27/panel-of-experts-political-donations/>

¹⁶³ https://www.dpc.nsw.gov.au/assets/media-news/95/attachments/611c3861d7/Volume_1_-_Final_Report.pdf

¹⁶⁴ https://www.dpc.nsw.gov.au/assets/media-news/95/attachments/5333fdabf0/Government_response_to_Expert_Panels_final_report.pdf

¹⁶⁵ <https://www.parliament.nsw.gov.au/ladocs/inquiries/1639/Inquiry%20into%20the%20Political%20Donations%20Final%20Report%20and%20the%20Governments%20Response.pdf>

¹⁶⁶ <https://www.parliament.nsw.gov.au/ladocs/inquiries/1704/Report%20-%20Administration%20of%20the%202015%20NSW%20Election%20And%20Related%20Matters.pdf>

- reduce the current cap on electoral expenditure by third party campaigners to \$500,000, and prevent third party campaigners from 'acting in concert' i.e. working together to support a candidate and combining their expenditure caps
- increase monetary penalties for offences¹⁶⁷

During the debate in the Legislative Assembly, the Opposition came out strongly against the provisions regarding third party campaigners. NSW Labor argued that the government was not implementing the Schott Report's recommendations at all – detailing a list of differences between those recommendations and the Bill's provisions – but was only pretending to so that it could pursue "partisan advantage" by adopting the recommendations around third party campaigns.¹⁶⁸ They noted that the only three third party campaigners in the 2015 state election to spend more than the new cap of \$500,000 were unions, and argued that the new rules would impact "progressive campaigners...who are, by definition, opposed to the current Government."¹⁶⁹ Labor argued that the point of the legislation was not to reform electoral funding but to "put a muzzle on union members and working people."¹⁷⁰

The Greens supported the tighter regulations and lower spending caps, arguing they should be even tighter and lower, but expressed concerns about the 'act in concert' provisions. The Greens moved a number of amendments, many with Labor's support, including:

- to disclose donations made outside the capped period within 14 days (in line with donations made within the capped period)
- to impose more rigorous compliance standards on party agents
- to make electoral advertising definitions stricter
- to keep records of donations and declarations in perpetuity (rather than for six years)
- to lower political donation caps further
- to restrict candidates from donating to their own campaign
- to allow donations to more than three third parties
- to limit political parties' expenditure to align with the new cap on third parties
- to allow third party campaigners to act in concert
- to prohibit mining or petroleum entities from donating
- to increase the cap on third parties¹⁷¹

However, all amendments were negatived. The Bill passed the Legislative Assembly on 23 May 2018 and was introduced to the Legislative Council on the same day.

Debate in the Legislative Council continued along similar lines with Labor and the Greens raising many of the same arguments. In direct contradiction to the Greens amendments earlier that day, the Shooters, Fishers and Farmers Party moved amendments to loosen the new rules on disclosing donations: from quarterly to half-yearly outside the capped period, and from 14 days to 21 days during the capped period. These amendments were agreed to.¹⁷²

¹⁶⁷ <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1323879322-101944'>

¹⁶⁸ Legislative Assembly Hansard (23 May 2018) page 1

<https://api.parliament.nsw.gov.au/api/hansard/search/daily/pdf/HANSARD-1323879322-102217>

¹⁶⁹ Ibid, page 4

¹⁷⁰ Ibid, page 8

¹⁷¹ Ibid, pages 66-76

¹⁷² Legislative Council Hansard (23 May 2018) pages 94, 96

EVIDENCE BASED POLICY ANALYSIS

Labor moved amendments to tighten the definition of 'electoral expenditure' (agreed to), limit the role of the Electoral Commission (agreed to), clarify duties of party officers (agreed to), condition the investigative powers exercised by the regulatory authority (agreed to), and allow third party campaigners to act in concert (negated by one vote). The Greens moved many of the same amendments they had moved in the lower house, and again all were negated. The Bill passed the Legislative Council with amendments in the early hours of 24 May 2018. It received assent on 30 May 2018.

Policy process

Criterion 1 - Establish Need: Identify a demonstrable need for the policy, based on hard evidence and consultation with all the stakeholders involved, particularly interest groups who will be affected.

Guiding question: Is there a statement of why the policy was needed based on factual evidence and stakeholder input?

The Schott review established a demonstrable need for reforming electoral funding arrangements.

Criterion 2 - Set Objectives: Outline the public interest parameters of the proposed policy and clearly establish its objectives.

Guiding question: Is there a statement of the policy's objectives couched in terms of the public interest?

The objectives outlined were around increasing the integrity, transparency, and accountability of political donations in New South Wales, but the public interest parameters were not made clear. A public interest argument was not specifically made for these changes.

Criterion 3 – Identify Options: Identify alternative approaches to the design of the policy, preferably with international comparisons where feasible. Engage in realistic costings of key alternative approaches.

Guiding question: Is there a description of the alternative policy options considered before the preferred one was adopted?

The Schott review and the subsequent Committee reviews identified alternative approaches to electoral funding reform, in particular where the later Committee reviews suggested alternative approaches that differed slightly or completely from those recommended in the Schott review.

Criterion 4 – Consider Mechanisms: Consider implementation choices along a full spectrum from incentives to coercion.

Guiding question: Is there a disclosure of the alternative ways considered for implementing the chosen policy?

A range of implementation choices were considered, during the review processes and also in parliamentary debate, where a number of amendments designed to change implementation were considered and passed.

Criterion 5 – Brainstorm Alternatives: Consider the pros and cons of each option and mechanism. Subject all key alternatives to a rigorous cost-benefit analysis.

Guiding question: Is there a published analysis of the pros/cons and benefits/costs of the alternative options/mechanisms considered in 3 and 4?

The Schott review did conduct rigorous analysis of the pros and cons of different options and mechanisms.

Criterion 6 – Design Pathway: Develop a complete policy design framework including principles, goals, delivery mechanisms, program or project management structure, the implementation process and phases, performance measures, ongoing evaluation mechanisms and reporting requirements, oversight and audit arrangements, and a review process ideally with a sunset clause.

Guiding question: Is there evidence that a comprehensive project management plan was designed for the policy's rollout?

There does not appear to be public evidence a comprehensive policy design framework or project management plan for the policy's rollout.

Criterion 7 – Consult Further: Undertake further consultation with key affected stakeholders of the policy initiative.

Guiding question: Was there further consultation with affected stakeholders after the preferred policy was announced?

During debate, the government promised that certain elements of the Bill would be referred again to the Joint Standing Committee on Electoral Matters for further review and consultation.

Criterion 8 – Publish Proposals: Produce a Green and then a White paper for public feedback and final consultation purposes and to explain complex issues and processes.

Guiding question: Was there a) a Green paper seeking public input on possible policy options and b) a White paper explaining the final policy decision?

Although multiple reviews of electoral funding laws were carried out and they were all open for public submission, there was no issues paper and consultation paper (or Green/White paper) process as such.

Criterion 9 – Introduce Legislation: Develop legislation and allow for comprehensive parliamentary debate especially in committee, and also intergovernmental discussion where necessary.

Guiding question: Was there legislation and adequate Parliamentary debate on the proposed policy initiative?

EVIDENCE BASED POLICY ANALYSIS

Legislation was introduced and there was extensive parliamentary debate, with amendments being considered into the early hours of the morning and all parties intent on debating the legislation thoroughly.

Criterion 10 – Communicate Decision: Design and implement a clear, simple, and inexpensive communication strategy based on information not propaganda, regarding the new policy initiative.

Guiding question: Is there an online official media release that explains the final policy in simple, clear and factual terms?

There has been a good communications campaign around these changes, including a section of the NSW Electoral Commission's website which outlines the new Act and provides direction as to the new rules and responsibilities under the Act.¹⁷³

Final scores

	Criterion	Yes/No
1	Establish Need (demonstrable, evidence-based need)	Yes
2	Set Objectives (public interest parameters)	No
3	Identify Options (consideration of alternatives)	Yes
4	Consider Mechanisms (implementation choices)	Yes
5	Brainstorm Alternatives (cost-benefit analysis)	Yes
6	Design Pathway (policy design framework)	No
7	Consult Further (further consultation after policy announcement)	Yes
8	Publish Proposals (produce Green then White paper, or equivalents)	No
9	Introduce Legislation (comprehensive parliamentary debate)	Yes
10	Communicate Decision (information not propaganda)	Yes
		7/10

¹⁷³ <https://www.elections.nsw.gov.au/Funding-and-disclosure>

Modern Slavery Act 2018

Policy background

The term 'modern slavery' has been used increasingly in recent decades to refer to a range of exploitative practices including human trafficking, slavery, forced labour, child labour, trafficking in organs, and slavery-like practices.¹⁷⁴ In many countries, the various criminal offences falling under this definition are addressed by a number of different pieces of legislation and tackled by a number of different government agencies and non-governmental organisations. Recognising this fact in their own context, the United Kingdom introduced a Modern Slavery Act in 2015.¹⁷⁵ This legislation is widely seen as world-leading.

In Australia, the Joint Committee on Law Enforcement initiated an inquiry into human trafficking in December 2015.¹⁷⁶ This inquiry lapsed at the end of the 44th Parliament but was re-initiated with the 45th Parliament in October 2016. It accepted submissions until January 2017, held hearings throughout May 2017, and tabled its final report in July 2017.¹⁷⁷

As that process was ongoing at the federal level, and in response to a perceived lack of action federally, NSW Legislative Council member Paul Green MP, representing the Christian Democratic Party, moved a motion in November 2016 to establish a Legislative Council Select Committee on human trafficking in NSW.¹⁷⁸ That motion was agreed to and the Committee accepted submissions until February 2017 and held hearings from March to August 2017. In April 2017, Paul Green MP took a Commonwealth Parliamentary Association study tour to the USA and Canada to investigate how governments, churches, NGOs, and other groups address and tackle human trafficking in that context.¹⁷⁹ The Committee tabled its final report in October 2017.¹⁸⁰

A third inquiry also took place in 2017, at the federal level. In February 2017 the Attorney-General asked the Standing Committee on Foreign Affairs, Defence and Trade to inquire into establishing a Modern Slavery Act in Australia, with reference to the United Kingdom's Modern Slavery Act.¹⁸¹ That inquiry also opened for submissions and held public hearings through to October 2017. After an interim report in August 2017 dealing specifically with modern slavery and global supply chains,¹⁸² the inquiry tabled its final report in December 2017.¹⁸³

¹⁷⁴ See for example

https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024102/toc_pdf/HiddeninPlainSight.pdf;fileType=application%2Fpdf, page 29

¹⁷⁵ For a broader discussion of this see <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/RP14-37#fullreport>

¹⁷⁶ https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Law_Enforcement/Humantrafficking45

¹⁷⁷ https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Law_Enforcement/Humantrafficking45/Report

¹⁷⁸ <https://www.parliament.nsw.gov.au/lcdocs/committees/250/Resolution%20-%20Human%20trafficking.pdf>

¹⁷⁹ Legislative Council Hansard (8 March 2018) available at

<https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1820781676-75577'>

¹⁸⁰ <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2421/Final%20report.pdf>

¹⁸¹ https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/ModernSlavery

¹⁸² https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/ModernSlavery/Interim_Report

¹⁸³ https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024102/toc_pdf/HiddeninPlainSight.pdf;fileType=application%2Fpdf

Back in NSW, a cross-parliamentary working group that had arisen out of the Select Committee's inquiry drafted a Modern Slavery Bill for NSW that incorporated a mix of recommendations from both the NSW and federal inquiries. That Bill was introduced as a private member's Bill in the Legislative Council in March 2018.¹⁸⁴

The Bill contained a number of provisions to do with combatting modern slavery, including providing assistance and support for victims of modern slavery, establishing an Anti-Slavery Commissioner, providing education and training about modern slavery, and legislating mandatory reporting of risks of modern slavery occurring in corporate supply chains.¹⁸⁵

At the second reading debate in May 2018, the Christian Democratic Party introduced a number of amendments in response to consultations with other parties and concerns raised during the debate by Labor and Greens members.¹⁸⁶ Amendments to include government agencies, to introduce a Modern Slavery Committee to oversee the Anti-Slavery Commissioner as an independent statutory commissioner, to allow the Commissioner to conduct their own inquiries, and to include organ trafficking in the legislation, were all agreed to without government support. An amendment to align the legislation with existing child protection legislation was agreed to with government support.

In response, the government said it would introduce amendments in the Legislative Assembly – where it had a majority – to improve the “workability” of the Bill, which the government was concerned might ultimately clash with the Commonwealth Modern Slavery Act that was under development at the federal level.¹⁸⁷ These were foreshadowed to be appointing the Commissioner to sit within government as a public servant, not an independent statutory officer, to implement ‘codes of practice’ for small and medium sized business rather than imposing mandatory reporting regulations on their supply chains, to exclude government agencies from the legislation, and to remove the Bill's provision requiring a modern slavery course in the school curriculum.¹⁸⁸ Despite this threat, the Bill passed in the Legislative Council and went to the Legislative Assembly.

At the debate stage in the Legislative Assembly, and following extensive consultation with Paul Green MP, the government moved a set of amendments which were considerably watered down from those they had outlined in the Legislative Council.¹⁸⁹ The amendments were:

- appointing the Commissioner under the Government Sector Employment Act
- giving the Modern Slavery Committee broad remit to inquire and report
- ensuring that supply chain reporting obligations do not overlap with future Commonwealth regulations
- imposing a requirement on government agencies to take reasonable steps regarding their procurement lines
- removing the provision requiring a modern slavery course in the school curriculum
- exempting small businesses (fewer than 20 employees) for the first 18 months

¹⁸⁴ <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1820781676-75577'>

¹⁸⁵ <https://www.parliament.nsw.gov.au/Bill/files/3488/First%20Print.pdf>

¹⁸⁶ Legislative Council Hansard (3 May 2018) available at

<https://api.parliament.nsw.gov.au/api/hansard/search/daily/pdf/HANSARD-1820781676-76209>, pages 45-56

¹⁸⁷ Ibid, page 12

¹⁸⁸ Ibid, pages 12-13

¹⁸⁹ Legislative Assembly Hansard (6 June 2018) available at

<https://api.parliament.nsw.gov.au/api/hansard/search/daily/pdf/HANSARD-1323879322-102560>, page 79

All amendments were agreed to.

The Greens moved an amendment, based on consultation with Scarlet Alliance and other advocates for sex workers' rights, to specify that the Bill does not include any conduct engaged in by sex workers on a consensual basis.¹⁹⁰ There was a division and the Greens amendment was negated.

The Bill passed the Legislative Assembly with amendments on 6 June 2018 and was returned to the Legislative Council. The Council accepted the amendments on 21 June 2018 and the Act received Assent on 27 June 2018.

An Interim Anti-Slavery Commissioner was appointed in December 2018 and tasked with bringing the Act into effect. The Act was due to come into force on 1 July 2019, but the NSW government delayed it, claiming that as expected there were a number of clashes with the Commonwealth Modern Slavery Act, passed in November 2018.¹⁹¹ For example, the Commonwealth Act only applied to businesses with a turnover of \$100 million, whereas the stricter NSW Act applied to businesses with \$50 million in turnover. On the basis of these inconsistencies, and in the face of disappointment from Paul Green MP (who no longer sits on the Legislative Council) and outrage from NSW Labor, the government returned the legislation to committee.¹⁹² The Legislative Council Standing Committee on Social Issues is leading an ongoing inquiry into the legislation, which is currently open for submission.¹⁹³

Policy process

Criterion 1 - Establish Need: Identify a demonstrable need for the policy, based on hard evidence and consultation with all the stakeholders involved, particularly interest groups who will be affected.

Guiding question: Is there a statement of why the policy was needed based on factual evidence and stakeholder input?

Three separate inquiries, at both state and federal level, established a demonstrable need for the policy based on hard evidence and extensive consultation with stakeholders.

Criterion 2 - Set Objectives: Outline the public interest parameters of the proposed policy and clearly establish its objectives.

Guiding question: Is there a statement of the policy's objectives couched in terms of the public interest?

A public interest argument for the policy was very strongly made in almost all speeches and announcements to do with the policy. This argument was based on data showing that more than 4,000 people in Australia are victims of some form of slavery, and a number of case studies exposed in the media and testified to at the inquiries showing modern slavery was an issue in New South Wales. In particular, the public interest argument was made around the specific issue of child sex trafficking, both in

¹⁹⁰ Ibid, page 88

¹⁹¹ <https://www.smh.com.au/politics/nsw/outrage-as-nsw-government-delays-state-s-modern-slavery-act-20190628-p522eo.html>

¹⁹² Ibid.

¹⁹³ <https://www.nsw.gov.au/improving-nsw/projects-and-initiatives/modern-slavery/>

person and online, and the need to protect children in Australia and in our region from this type of modern slavery.

Criterion 3 – Identify Options: Identify alternative approaches to the design of the policy, preferably with international comparisons where feasible. Engage in realistic costings of key alternative approaches.

Guiding question: Is there a description of the alternative policy options considered before the preferred one was adopted?

All three of the inquiries – and in particular, the NSW inquiry and the second federal inquiry – identified a number of approaches towards implementing a Modern Slavery Act in NSW or in Australia. The NSW inquiry assessed a number of different elements that could be included in a Modern Slavery Act and a number of different measures to address those issues. The NSW Committee also engaged in international comparisons, drawing from the example of the Modern Slavery Act in the UK, visiting the USA and Canada, and including United Nations resolutions in its comparison.

Criterion 4 – Consider Mechanisms: Consider implementation choices along a full spectrum from incentives to coercion.

Guiding question: Is there a disclosure of the alternative ways considered for implementing the chosen policy?

At Committee stage and in Parliamentary debate, implementation choices were thoroughly considered and debated. For example, the exact status and responsibilities of the Anti-slavery Commissioner developed over the course of the debate, as did the extent to which government agencies would be covered by the legislation, as well as a whole host of other legislative details.

Criterion 5 – Brainstorm Alternatives: Consider the pros and cons of each option and mechanism. Subject all key alternatives to a rigorous cost-benefit analysis.

Guiding question: Is there a published analysis of the pros/cons and benefits/costs of the alternative options/mechanisms considered in 3 and 4?

The pros and cons of different options and mechanisms were considered at Committee level and during Parliamentary debate, but as they developed during discussions and consultations between parties, there is no single published cost-benefit analysis comparing all the different approaches that were proposed.

Criterion 6 – Design Pathway: Develop a complete policy design framework including principles, goals, delivery mechanisms, program or project management structure, the implementation process and phases, performance measures, ongoing evaluation mechanisms and reporting requirements, oversight and audit arrangements, and a review process ideally with a sunset clause.

Guiding question: Is there evidence that a comprehensive project management plan was designed for the policy's rollout?

EVIDENCE BASED POLICY ANALYSIS

While the Committee report detailed a number of elements of the design pathway of the original Bill that was proposed, the Act passed with a number of amendments and is therefore fairly substantially different from the original Bill. A key issue raised by the government during debate – that the Bill had the potential to clash with a future Commonwealth Modern Slavery Act – was therefore never specifically planned for, allowing the government to delay the legislation and send it back to committee.

Criterion 7 – Consult Further: Undertake further consultation with key affected stakeholders of the policy initiative.

Guiding question: Was there further consultation with affected stakeholders after the preferred policy was announced?

Further consultation is currently taking place as part of the new Legislative Council Standing Committee on Social Issues inquiry into the legislation. However, as this consultation did not occur before the legislation was introduced, this does not meet the standard set by the Wilshire criteria.

Criterion 8 – Publish Proposals: Produce a Green and then a White paper for public feedback and final consultation purposes and to explain complex issues and processes.

Guiding question: Was there a) a Green paper seeking public input on possible policy options and b) a White paper explaining the final policy decision?

The NSW inquiry did not publish an initial Green paper or an issues paper, although it did publish a final report. As part of the current Committee inquiry, stakeholders have been invited to provide feedback on the draft Regulation, which could be seen as the equivalent of an issues paper. However, neither of these processes meets the criteria for a proper Green and White paper process.

Criterion 9 – Introduce Legislation: Develop legislation and allow for comprehensive parliamentary debate especially in committee, and also intergovernmental discussion where necessary.

Guiding question: Was there legislation and adequate Parliamentary debate on the proposed policy initiative?

Legislation was developed, introduced, and debated comprehensively at both parliamentary and committee level. There has also been intergovernmental discussion between state and federal governments.

Criterion 10 – Communicate Decision: Design and implement a clear, simple, and inexpensive communication strategy based on information not propaganda, regarding the new policy initiative.

Guiding question: Is there an online official media release that explains the final policy in simple, clear and factual terms?

As the policy has not yet been finalised, there is not a thorough set of communications explaining the ultimate implications of the legislation. However, the NSW government has an area of its website

EVIDENCE BASED POLICY ANALYSIS

dedicated to the progress of this legislation, which does clearly outline the current rules and the changes brought in by the Commonwealth Modern Slavery Act, and also offers options for contacting the team with questions.¹⁹⁴

Final scores

	Criterion	Yes/No
1	Establish Need (demonstrable, evidence-based need)	Yes
2	Set Objectives (public interest parameters)	Yes
3	Identify Options (consideration of alternatives)	Yes
4	Consider Mechanisms (implementation choices)	Yes
5	Brainstorm Alternatives (cost-benefit analysis)	No
6	Design Pathway (policy design framework)	No
7	Consult Further (further consultation after policy announcement)	No
8	Publish Proposals (produce Green then White paper, or equivalents)	No
9	Introduce Legislation (comprehensive parliamentary debate)	Yes
10	Communicate Decision (information not propaganda)	Yes
		6/10

¹⁹⁴ <https://www.nsw.gov.au/improving-nsw/projects-and-initiatives/modern-slavery/>

Children and Young Persons (Care and Protection) Amendment Act 2018

Policy background

The number of children and young people in out-of-home care in New South Wales doubled between 2005 and 2015, despite increased government expenditure in the child and family services system over the same time period.¹⁹⁵ In response the NSW government commissioned an independent review of the state's out-of-home care system in November 2015.¹⁹⁶ The report from that review, carried out by David Tune and known as 'the Tune report', was allegedly delivered to government at some point in 2016 but was not released publicly.

In August 2016, the government approved a suite of reforms in response to the Tune report, known as *Their Futures Matter*. The government invested \$190 million over four years in the strategy, which self-describes as a "cross-government reform delivering whole-of-system changes to better support vulnerable children and families".¹⁹⁷

In October 2017, the Family and Community Services department (FACS) released an issue paper called *Shaping a Better Child Protection System* that sought public and stakeholder submissions on some proposed legislative changes to the child protection system.¹⁹⁸ The paper considered amendments to the Care Act and the Adoption Act that would assign response time-frames to child protection services, encourage the user of shorter-term court orders to promote permanency planning, introduce Alternative Dispute Resolution (ADR) processes before reaching the Children's Court, and streamline adoption processes.¹⁹⁹

Although FACS received over 100 submissions, none of these were ever made publicly available. Many of the organisations that had submitted or were consulted as part of the *Shaping a Better Child Protection System* process later said they were led to expect that there would be a draft exposure Bill or some kind of more details consultation on the legislation,²⁰⁰ but FACS did not remark on the proposed changes for a year.

After a significant pressure campaign from the Opposition, the media, and the public, as well as one of the government's own ministers Matthew Mason-Cox MP, who repeatedly crossed the floor to demand the public release of the report,²⁰¹ the Tune report was published in June 2018, between 18 months and two years after it was first seen by government.²⁰² The report was highly critical of NSW's child protection system, describing it as "ineffective and unsustainable...failing to improve long-term outcomes for children...particularly poor for Aboriginal children, young people and families."²⁰³

¹⁹⁵ <https://www.acwa.asn.au/wp-content/uploads/2018/06/TUNE-REPORT-indepth-review-out-of-home-care-in-nsw.pdf>, page 3

¹⁹⁶ <https://www.theirfuturesmatter.nsw.gov.au/about-their-futures-matter/independent-review-of-out-of-home-care-in-nsw>

¹⁹⁷ <https://www.theirfuturesmatter.nsw.gov.au/about-their-futures-matter/reform-overview>

¹⁹⁸ <https://www.facs.nsw.gov.au/download?file=441495>

¹⁹⁹ <https://www.facs.nsw.gov.au/about/reforms/children-families/better-child-protection>

²⁰⁰ See for example, Legislative Council Hansard (14 November 2018), page 8

<https://api.parliament.nsw.gov.au/api/hansard/search/daily/pdf/HANSARD-1820781676-78092> and Legislative Assembly Hansard (15 November 2018), page 2 <https://api.parliament.nsw.gov.au/api/hansard/search/daily/pdf/HANSARD-1323879322-104807>

²⁰¹ <https://www.theguardian.com/australia-news/2018/jun/12/crisis-driven-nsw-child-protection-system-is-failing-study-says>

²⁰² <https://www.abc.net.au/news/2018-06-12/secret-report-shows-out-of-home-care-fails-to-help-nsw-children/9857966>

²⁰³ <https://www.acwa.asn.au/wp-content/uploads/2018/06/TUNE-REPORT-indepth-review-out-of-home-care-in-nsw.pdf>, page 3

After a year of silence and in a move that “stunned” the sector,²⁰⁴ the government released a brief report on the outcomes of the *Shaping a Better Child Protection System* consultations in October 2018 and immediately afterwards introduced the Care and Protection Amendment Bill to the Legislative Council.²⁰⁵

The Bill included a raft of amendments to the Care Act and Adoption Act, and its key features were:

- to mandate that FACS offer ADR processes to families prior to Children’s Court
- to allow the Children’s Court to, with the consent of a child’s parents, make guardianship orders for that child as an alternative to foster or out-of-home care, without the requirement of a legal finding that the child is in need of care or protection or a legal finding that there is no realistic possibility of restoration of the child to their parents
- to limit the period for which an order can allocate parental responsibility to the Minister to 24 months, obliging the Court to consider whether restoration is realistic within 24 months
- to amend the provision regarding parents’ right to apply to vary or rescind a care order (section 90) to allow the Children’s Court to dismiss an application “if satisfied that it is frivolous, vexatious, [or] an abuse of process”
- to allow the Supreme Court to make an adoption order without parental consent if the application is made by the child’s current carers or guardians²⁰⁶

The legislation was immediately controversial. Between the Bill’s surprise introduction on 24 October 2018 and its debate in the Legislative Council on 14 November 2018, a letter signed by 61 organisations (mainly community legal centres and Aboriginal and Torres Strait Islander community-controlled organisations) and more than 700 individuals was sent to NSW Premier Gladys Berejiklian urging her to turn “away from the path of forced adoptions”, put the reforms on hold and “engage in genuine dialogue with all stakeholders”.²⁰⁷ A letter from the Law Society asked the government to refer the Bill to an inquiry for proper consultation citing deep concerns about the lack of opportunity for public scrutiny, explicitly opposed the 24-month time limit on family restoration, urged the government to exclude Aboriginal and Torres Strait Islander children from many of the clauses, and opposed the plan to impose additional barriers on parents applying to vary or dispense with orders.²⁰⁸ A joint statement from NGOs including Save the Children, Community Legal Centres NSW, the Aboriginal Legal Service and others focused on the lack of transparency and consultation on the legislation, and expressed deep concerns for Aboriginal and Torres Strait Islander communities in particular, calling on the Legislative Council to send the Bill to committee.²⁰⁹ There was also a rally protesting the legislation outside Parliament House on the day of the debate.²¹⁰

In debate, the Opposition and the Greens outlined a number of objections to the Bill. Their main points were:²¹¹

²⁰⁴ Joint statement issued by NGOs including Save the Children, Community Legal Centres NSW, the Aboriginal Legal Service and others, read into Legislative Council Hansard (14 November 2018) page 21

<https://api.parliament.nsw.gov.au/api/hansard/search/daily/pdf/HANSARD-1820781676-78092>

²⁰⁵ <https://www.facs.nsw.gov.au/download?file=633577>

²⁰⁶ <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1820781676-77862'>

²⁰⁷ Legislative Council Hansard (14 November 2018), page 20

<https://api.parliament.nsw.gov.au/api/hansard/search/daily/pdf/HANSARD-1820781676-78092>

²⁰⁸ Ibid, page 20-21

²⁰⁹ Ibid, page 21

²¹⁰ Ibid, page 45

²¹¹ This summarises Second Reading Speeches made by Opposition and Greens members in the Legislative Council, which are available in full in the Hansard <https://api.parliament.nsw.gov.au/api/hansard/search/daily/pdf/HANSARD-1820781676-78092>

- 24 months was an “arbitrary time limit” for families to work towards restoration, without imposing “corresponding obligations on the department to provide intensive, holistic support to families to achieve restoration within that time frame”, and would mean families would start to lose their children because of the length of time waiting for services, for example public housing or rehabilitation
- allowing the Children’s Court to make a guardianship order when there is no finding that the child is at risk of harm diminished the rights of parents to object to adoptions, and although the order would require parental consent and parents would have access to free legal advice, these stipulations did not go far enough to ensure accountability
- allowing the Supreme Court to dispense with parental consent where an adoption order is sought by the child’s current guardian created a “fast-tracked pathway to adoption” without an adequate regulatory framework
- the amendment to section 90 had little community support according to the Department’s own report on its consultations and would diminish the rights of parents to object to permanent separations from their children
- the Bill did not properly detail the ADR process and made no provision for independent legal advice or representation, meaning parents wouldn’t have the means or support to properly engage with the ADR process
- the Bill would disproportionately impact Aboriginal and Torres Strait Islander families and might constitute another ‘stolen generation’
- the Bill should be referred to committee for proper consultation and scrutiny

Many of these concerns were echoed in the Legislative Review Committee’s Digest of the Bill, elaborating that the mandated time-frame was arbitrary, reduced the Court’s discretion, had potential for inconsistent application, and may not be in the best interests of the child, while removing parental consent for adoption by guardians may limit the rights of the parents.²¹²

The response from the government argued that hyperbole and inaccuracies had been spread about what the legislation actually does. They focused on children and young people who had been in out-of-home care for many years rotating through multiple placements and argued that the legislation would give them stability, complemented by the early intervention and systemic changes that the government was funding in response to the Tune report.²¹³

Labor and the Greens moved more than 20 amendments reflecting their concerns, key among which were:

- sending the Bill to the Standing Committee on Social Issues
- removing the 24-month time limit
- removing the part of the Bill dealing with guardianship orders
- opposing changes to section 90
- including legal and advice and representation for families in ADR processes

All amendments were negatived and the Bill passed the Legislative Council. The Bill was introduced to the Legislative Assembly on 15 November 2018 and debated from 20-22 November 2018, the last few sitting days of Parliament before Christmas and before the state election. In the Legislative Assembly, Labor and

²¹² <https://www.parliament.nsw.gov.au/ladocs/digests/631/Digest%2064%20-%2013%20November%202018.pdf>, pages iv-v

²¹³ Legislative Council Hansard (14 November 2018), pages 49-52

<https://api.parliament.nsw.gov.au/api/hansard/search/daily/pdf/HANSARD-1820781676-78092>

Greens members cooperate to filibuster right through until late on the final sitting night, with then Shadow Minister for Family and Community Services Tania Milhailuk MP giving a speech that lasted more than six hours.²¹⁴

In her response, then Minister for Family and Community Services, Pru Goward MP, emphasised that her role was to focus on the safety of the child, not the rights of the parents, and reiterated that the claims from those opposed to the Bill were lies and hyperbole designed to attract media attention and whip the sector up to protest.²¹⁵ While opposing the calls for a committee review, she promised more consultation through the ministerial advisory group and community panels.

Labor and the Greens moved all the same amendments they had moved in the Legislative Council but again they were all negatived. The Bill passed the Legislative Assembly on 22 November 2018 and received assent on 28 November 2018.

Policy process

Criterion 1 - Establish Need: Identify a demonstrable need for the policy, based on hard evidence and consultation with all the stakeholders involved, particularly interest groups who will be affected.

Guiding question: Is there a statement of why the policy was needed based on factual evidence and stakeholder input?

The government did not identify a demonstrable need for the policy. The steps they had taken to establish the need – the Tune report and the *Shaping a Better Child Protection System* process – did not show that the policies comprising this legislation were necessary. In fact, the Tune report made very different and sometimes directly contradictory recommendations, while many of the organisations consulted as part of *Shaping a Better Child Protection System* said they raised concerns about the proposals that were ignored.

Criterion 2 - Set Objectives: Outline the public interest parameters of the proposed policy and clearly establish its objectives.

Guiding question: Is there a statement of the policy's objectives couched in terms of the public interest?

The government did make a strong public interest argument for its policy, based on information about the number of children and young people in long-term out-of-home care who were rotating through placements and deserved stability and permanency in their care arrangements.

Criterion 3 – Identify Options: Identify alternative approaches to the design of the policy, preferably with international comparisons where feasible. Engage in realistic costings of key alternative approaches.

²¹⁴ Legislative Assembly Hansard (20 November 2018), page 42 onwards

<https://api.parliament.nsw.gov.au/api/hansard/search/daily/pdf/HANSARD-1323879322-104926>

²¹⁵ Legislative Assembly Hansard (22 November 2018), pages 3-9

<https://api.parliament.nsw.gov.au/api/hansard/search/daily/pdf/HANSARD-1323879322-105069>

Guiding question: Is there a description of the alternative policy options considered before the preferred one was adopted?

If alternative approaches to the policy design were considered, they were never made public. The various policy options proposed by the Tune report did not appear to filter through to the eventual proposed legislation and the submissions to the consultation process were not published so it is unclear the extent to which they informed the legislation.

Criterion 4 – Consider Mechanisms: Consider implementation choices along a full spectrum from incentives to coercion.

Guiding question: Is there a disclosure of the alternative ways considered for implementing the chosen policy?

The government refused to consider any alternative options for implementation, voting down more than 20 amendments in succession, ignoring appeals from the sector, and refusing to refer the legislation to committee for inquiry, even when the option of a short inquiry that would still allow the government to pass the legislation before Christmas was proposed.²¹⁶

Criterion 5 – Brainstorm Alternatives: Consider the pros and cons of each option and mechanism. Subject all key alternatives to a rigorous cost-benefit analysis.

Guiding question: Is there a published analysis of the pros/cons and benefits/costs of the alternative options/mechanisms considered in 3 and 4?

The government did not conduct rigorous analysis of the costs and benefits or pros and cons of alternative policy options or implementation mechanisms.

Criterion 6 – Design Pathway: Develop a complete policy design framework including principles, goals, delivery mechanisms, program or project management structure, the implementation process and phases, performance measures, ongoing evaluation mechanisms and reporting requirements, oversight and audit arrangements, and a review process ideally with a sunset clause.

Guiding question: Is there evidence that a comprehensive project management plan was designed for the policy's rollout?

While there does appear to be a policy design framework for the suite of reforms to the sector known as *Their Futures Matter*, which has its own website dedicated to laying out the structure and implementation of the reforms, as well as ongoing consultation opportunities and updated reports, hardly any of that plan appears to deal with this particular piece of legislation. As *Their Futures Matter* was developed as a response to the Tune report and the Care and Protection Amendment Act was developed in response to *Shaping a Better Child Protection System*, it is unclear exactly how these two sets of policies fit together.

²¹⁶ Legislative Assembly Hansard (22 November 2018), page 91

<https://api.parliament.nsw.gov.au/api/hansard/search/daily/pdf/HANSARD-1323879322-105069>

Criterion 7 – Consult Further: Undertake further consultation with key affected stakeholders of the policy initiative.

Guiding question: Was there further consultation with affected stakeholders after the preferred policy was announced?

At the time the legislation was passed, the Minister promised further consultation through a ministerial advisory group, but that Minister was replaced following the election and there does not appear to be a dedicated ministerial advisory group on this issue, or at least one is not listed on the FACS website.²¹⁷

Criterion 8 – Publish Proposals: Produce a Green and then a White paper for public feedback and final consultation purposes and to explain complex issues and processes.

Guiding question: Was there a) a Green paper seeking public input on possible policy options and b) a White paper explaining the final policy decision?

An issues paper and then a consultation paper were both produced as part of the *Shaping a Better Child Protection System* process, which could be seen as the equivalent of a Green and White paper process.

Criterion 9 – Introduce Legislation: Develop legislation and allow for comprehensive parliamentary debate especially in committee, and also intergovernmental discussion where necessary.

Guiding question: Was there legislation and adequate Parliamentary debate on the proposed policy initiative?

Legislation was introduced but, at the very end of Parliament, there was inadequate time for comprehensive debate and no question of considering the Bill at the committee level.

Criterion 10 – Communicate Decision: Design and implement a clear, simple, and inexpensive communication strategy based on information not propaganda, regarding the new policy initiative.

Guiding question: Is there an online official media release that explains the final policy in simple, clear and factual terms?

While a clear communications strategy exists for the *Their Futures Matter* project, which has a dedicated website, there is no page on the website that explains these particular legislative changes. However, there was a media release from the Premier announcing the changes to the Act.

It is worth noting that during the debate and controversy over the legislation, the government regularly stated that the reforms were being mischaracterised by the Opposition, by the media, and by the protestors. Despite this, there was little attempt to conduct a communications campaign to clarify these misperceptions.

²¹⁷ <https://www.facs.nsw.gov.au/inclusion/advisory-councils>

EVIDENCE BASED POLICY ANALYSIS

Final scores

	Criterion	Yes/No
1	Establish Need (demonstrable, evidence-based need)	No
2	Set Objectives (public interest parameters)	Yes
3	Identify Options (consideration of alternatives)	No
4	Consider Mechanisms (implementation choices)	No
5	Brainstorm Alternatives (cost-benefit analysis)	No
6	Design Pathway (policy design framework)	No
7	Consult Further (further consultation after policy announcement)	No
8	Publish Proposals (produce Green then White paper, or equivalents)	Yes
9	Introduce Legislation (comprehensive parliamentary debate)	No
10	Communicate Decision (information not propaganda)	Yes
		3/10

Crimes (Domestic and Personal Violence) Amendment Act 2018

Policy background

In January 2018, 14-year-old Amy ‘Dolly’ Everett died by suicide after being cyberbullied by other students at the boarding school she attended.²¹⁸ Following her death, her parents Tick and Kate launched a social media campaign around the hashtag #DoltForDolly to raise awareness about the impacts of cyberbullying.²¹⁹

Support and donations poured in and Tick and Kate set up a foundation called Dolly’s Dream with the goal of advocating to reduce the incidence of cyberbullying and other cyber risks.²²⁰ The foundation lobbied the NSW government to introduce laws imposing tough penalties on cyber bullies.²²¹

At the same time, the state government’s Joint Committee on Children and Young People was in the midst of undertaking an inquiry into youth suicide in NSW. The inquiry had been referred to the committee in June 2017 and opened for submissions until August 2017, after which public hearings were conducted from November 2017 to April 2018.

On 17 October 2018, the Domestic and Personal Violence Amendment Bill was introduced to the Legislative Assembly. The Bill amended the definition of the crime of intimidation to make it clear that cyberbullying is a form of intimidation and extended the definition of the crime of stalking to include stalking via the internet or other technologically assisted means.²²²

The legislation would ensure that a person who uses modern technology to stalk or intimidate another person could be prosecuted for stalking or intimidation, which is punishable by up to five years’ imprisonment, and that apprehended domestic violence orders or apprehended personal violence orders could be put in place for the protection of cyberbullying and cyberstalking victims.²²³

The Opposition pointed out that the Bills could have been presented as standalone Bills but were being rushed through Parliament as cognate Bills so they could be debated before Parliament rose for Christmas, but did not oppose the actual Bills.²²⁴ With regard to the Domestic and Personal Violence Amendment Bill specifically, Labor welcomed the “substantive change to the law.”²²⁵ The Bill passed the Legislative Assembly quickly on 23 October 2018.

²¹⁸ <https://www.abc.net.au/news/2018-01-10/dolly-everett-nt-suicide-cyber-bullying-campaign-launched/9317056>

²¹⁹ <https://twitter.com/hashtag/doitfordolly?lang=en>

²²⁰ <https://dollysdream.org.au/about>

²²¹ <https://dollysdream.org.au/wp-content/uploads/2019/03/AMF-Dollys-Dream-Infographic.pdf>

²²² Explanatory note, [https://www.parliament.nsw.gov.au/Bill/files/3563/XN%20Crimes%20\(Domestic%20and%20Personal%20Violence\)%20Amendment%20Bill.pdf](https://www.parliament.nsw.gov.au/Bill/files/3563/XN%20Crimes%20(Domestic%20and%20Personal%20Violence)%20Amendment%20Bill.pdf)

²²³ Legislative Assembly Hansard (17 October 2018) pages 4-5

<https://api.parliament.nsw.gov.au/api/hansard/search/daily/pdf/HANSARD-1323879322-104140>

²²⁴ Legislative Assembly Hansard (23 October 2018) pages 64-65

<https://api.parliament.nsw.gov.au/api/hansard/search/daily/pdf/HANSARD-1323879322-104309>

²²⁵ Ibid, page 66

Two days later, the final report of the Joint Committee on Children and Young People's inquiry, titled *Prevention of Youth Suicide in New South Wales*, was tabled.²²⁶ The Committee heard that there is "no established link between bullying on social media and youth suicide as yet" but that that may be because the research has not yet caught up with the speed at which social media is developing.²²⁷ The Committee recommended that the NSW government support further research on the relationship between social media and youth suicide, but was cautious in pointing out that the role of cyberbullying is complex and poorly understood.²²⁸

Although the Committee did not explicitly recommend criminalising cyberbullying, the Committee's Chair Paul Green MP of the Christian Democratic Party discussed the report during the Legislative Council debate on the Bills on 21 November 2018 and cited it as a reason for supporting the Bill.²²⁹ Labor and the Greens also expressed their support for the Bill at this stage. No amendments were proposed, and the Bill passed the Legislative Council, receiving assent on 28 November 2018.

Policy process

Criterion 1 - Establish Need: Identify a demonstrable need for the policy, based on hard evidence and consultation with all the stakeholders involved, particularly interest groups who will be affected.

Guiding question: Is there a statement of why the policy was needed based on factual evidence and stakeholder input?

The government did not establish a demonstrable need for this specific policy by linking it to hard evidence or consultation efforts that were related to this legislation.

Criterion 2 - Set Objectives: Outline the public interest parameters of the proposed policy and clearly establish its objectives.

Guiding question: Is there a statement of the policy's objectives couched in terms of the public interest?

There was a statement of the policy's objectives couched in the terms of the public interest, specifically around protecting people who are victims of stalking or intimidation online, from young people dealing with cyberbullying to women dealing with family and domestic violence.

Criterion 3 – Identify Options: Identify alternative approaches to the design of the policy, preferably with international comparisons where feasible. Engage in realistic costings of key alternative approaches.

Guiding question: Is there a description of the alternative policy options considered before the preferred one was adopted?

²²⁶ <https://www.parliament.nsw.gov.au/ladocs/inquiries/2447/Report%20-%20Prevention%20of%20Youth%20Suicide%20in%20New%20South%20Wales.pdf>

²²⁷ Ibid, pages 69-70

²²⁸ Ibid, page 71

²²⁹ Legislative Council Hansard (21 November 2018) pages 97-98

<https://api.parliament.nsw.gov.au/api/hansard/search/daily/pdf/HANSARD-1820781676-78308>

There was no published description of alternative policy options considered before this policy proposal was adopted. The Joint Committee on Children and Young People's report on preventing youth suicide took a brief look at cyberbullying but did not comment specifically on the legislation to criminalise stalking or intimidation online.

Criterion 4 – Consider Mechanisms: Consider implementation choices along a full spectrum from incentives to coercion.

Guiding question: Is there a disclosure of the alternative ways considered for implementing the chosen policy?

There is no published disclosure of alternative ways considered for implementing this particular policy.

Criterion 5 – Brainstorm Alternatives: Consider the pros and cons of each option and mechanism. Subject all key alternatives to a rigorous cost-benefit analysis.

Guiding question: Is there a published analysis of the pros/cons and benefits/costs of the alternative options/mechanisms considered in 3 and 4?

There is no published analysis of the pros and cons or benefits and costs of alternative options for the policy or different mechanisms to implement it.

Criterion 6 – Design Pathway: Develop a complete policy design framework including principles, goals, delivery mechanisms, program or project management structure, the implementation process and phases, performance measures, ongoing evaluation mechanisms and reporting requirements, oversight and audit arrangements, and a review process ideally with a sunset clause.

Guiding question: Is there evidence that a comprehensive project management plan was designed for the policy's rollout?

There does not appear to be a complete policy design framework or comprehensive project management plan for the policy or its rollout.

Criterion 7 – Consult Further: Undertake further consultation with key affected stakeholders of the policy initiative.

Guiding question: Was there further consultation with affected stakeholders after the preferred policy was announced?

There do not appear to be plans for further consultation with affected stakeholders.

Criterion 8 – Publish Proposals: Produce a Green and then a White paper for public feedback and final consultation purposes and to explain complex issues and processes.

EVIDENCE BASED POLICY ANALYSIS

Guiding question: Was there a) a Green paper seeking public input on possible policy options and b) a White paper explaining the final policy decision?

No Green paper, White paper, or equivalent was published with regard to this legislation.

Criterion 9 – Introduce Legislation: Develop legislation and allow for comprehensive parliamentary debate especially in committee, and also intergovernmental discussion where necessary.

Guiding question: Was there legislation and adequate Parliamentary debate on the proposed policy initiative?

Legislation was developed and debated comprehensively in Parliament. While the point was raised that this legislation was introduced in cognate which limited the time available to debate it, as all parties in both houses seemed to support the legislation there was no need for extra time to debate.

Criterion 10 – Communicate Decision: Design and implement a clear, simple, and inexpensive communication strategy based on information not propaganda, regarding the new policy initiative.

Guiding question: Is there an online official media release that explains the final policy in simple, clear and factual terms?

There was an official media release announcing the changes and making it clear what actions would fall under the new criminal definitions and that a maximum five-year prison term would apply for these offences.²³⁰

Final scores

	Criterion	Yes/No
1	Establish Need (demonstrable, evidence-based need)	No
2	Set Objectives (public interest parameters)	Yes
3	Identify Options (consideration of alternatives)	No
4	Consider Mechanisms (implementation choices)	No
5	Brainstorm Alternatives (cost-benefit analysis)	No
6	Design Pathway (policy design framework)	No
7	Consult Further (further consultation after policy announcement)	No

²³⁰ <https://www.nsw.gov.au/your-government/the-premier/media-releases-from-the-premier/tougher-laws-to-combat-online-abuse/>

EVIDENCE BASED POLICY ANALYSIS

8	Publish Proposals (produce Green then White paper, or equivalents)	No
9	Introduce Legislation (comprehensive parliamentary debate)	Yes
10	Communicate Decision (information not propaganda)	Yes
		3/10

Victoria case studies

Bail Amendment (Stage Two) Act 2018

Policy background

On 20 January 2017, James Gargasoulas drove a car down the footpath of Melbourne's busy Bourke Street Mall, driving into pedestrians and killing six people. In the aftermath of the event it was revealed that Gargasoulas was known to police and had been sought by them on repeated occasions for violent incidents involving his family and pregnant girlfriend over the previous months. In particular, there was public outcry over the fact that Gargasoulas had been arrested just six days prior to the Bourke Street attack, but was granted bail by a volunteer bail justice, against strong police advice. Victoria is the only state in Australia that uses volunteer bail justices with no legal qualifications to make bail decisions.²³¹

Following this incident, the Victorian government asked former Supreme Court Judge and Director of Public Prosecutions, the Hon. Paul Coghlan, QC, to review Victoria's bail system as a matter of urgency.²³² Mr Coghlan's advice, known as 'the Coghlan review', was returned in the form of two reports. The first, dealing with legislative reform of the bail system, was delivered on 3 April 2017,²³³ and the second, addressing broader systemic issues relevant to the bail system, was delivered on 1 May 2017.²³⁴ The Coghlan review made a total of 37 recommendations. The government's response to the first part of the Coghlan review indicated that it would support or support in principle all of the recommended legislative reforms.²³⁵

In June 2017, six months after the Bourke Street attack, the government passed the Bail Amendment (Stage One) Act 2017. This Act addressed a number of recommendations from the Coghlan review that could be implemented immediately, including:

- adding a 'purposes section' and 'guiding principles' to the Bail Act to remind bail decision-makers of important considerations relevant to bail, in particular balancing the presumption of innocence and the protection of the community
- clarifying the tests for granting bail, including by:
 - creating lists of offences where the presumption of bail is reversed, requiring the accused to prove 'exceptional circumstances' for bail to be granted for offences in schedule 1 and 'show compelling reason' for bail to be granted for offences in schedule 2
 - introducing new offences to both schedules to expand the categories of offences where the presumption of bail is reversed
 - applying these 'reverse onus' tests to circumstances where the accused has committed further offences while on bail
- mandating that bail for persons charged with schedule 1 offences (the most serious offences) will now only be able to be granted by a court, not by police or by a bail justice

²³¹ <https://www.abc.net.au/news/2019-06-10/bourke-street-attack-making-of-killer-james-gargasoulas/11133576>

²³² Explanatory Memorandum, page 1

[http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/PubPDocs_Arch.nsf/5da7442d8f61e92bca256de50013d008/CA257CCA00177A46CA2581F40078FDD3/\\$FILE/581455exi1.pdf](http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/PubPDocs_Arch.nsf/5da7442d8f61e92bca256de50013d008/CA257CCA00177A46CA2581F40078FDD3/$FILE/581455exi1.pdf)

²³³ <https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/9814/9419/7926/Coghlan-report-1.pdf>

²³⁴ <https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/4414/9419/8013/Coghlan-report-2.pdf>

²³⁵ <https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/7914/9419/8133/Bail-review-govt-response.pdf>

- changing the language of the Bail Act to make it clear to all bail decision-makers that community safety must be taken into account when imposing bail conditions
- implementing recommendation 80 of the Royal Commission into Family Violence, which ensures that bail decision-makers consider risks of family violence when making bail decisions²³⁶

At this time, the government also foreshadowed that a second tranche of amendments to the Bail Act would be forthcoming later in the year to implement the remaining reforms of the Coghlan review as well as some of the broader, systemic changes from Coghlan's second report.²³⁷

This second tranche was introduced to the Legislative Assembly in December 2017 as the Bail Amendment (Stage Two) Bill 2017. The amendments included:

- reformulating and clarifying how tests for bail should be applied, including by emphasising that the 'unacceptable risk' test should come first, i.e. that the accused person's potential risk to community safety should be considered over their potential of being a 'flight risk'
- introducing a police remand system, enabling police to remand an adult accused until a court is available for up to 48 hours, without the accused being able to make a further application to a bail justice
- requiring a person accused of serious offences who is already on two undertakings of bail to be brought before a court in relation to any bail decision, and not granted bail by police or a bail justice
- providing an express power for a court to bail or remand a person appearing on summons
- excepting children, Aboriginal people, and vulnerable adults from these amendments²³⁸

The Bill was debated in the Legislative Assembly from 6 to 8 February 2018. The Opposition supported the Bill but argued that the reforms did not go far enough to tighten the bail system and that Labor was taking a "piecemeal" or incremental approach rather than rewriting the entire Bail Act, which they promised to do if elected.²³⁹ The Greens also supported the Bill but raised some concerns at the other end of the spectrum: that Labor was not doing enough to remove small and minor offences from the bail system, thereby making it likely that remand centres would become overcrowded.²⁴⁰ It is worth noting that the Coghlan review specified that changes to tighten bail at the top end of the offences spectrum should only be implemented once reforms were made to remove lower level offenders from the remand and bail systems.²⁴¹ Despite these concerns, the Bill passed the Legislative Assembly and was then debated in the Legislative Council in February 2018.

²³⁶ http://hansard.parliament.vic.gov.au/search/?LDMS=Y&IW_FIELD_ADVANCE_PHRASE=be+now+read+a+second+time&IW_FIELD_IN_SpeechTitle=Bail+Amendment+Stage+One+Bill+2017&IW_FIELD_IN_HOUSENAME=ASSEMBLY&IW_FIELD_IN_ACTIVITYTYPE=Second+reading&IW_FIELD_IN_SittingYear=2017&IW_DATABASE=*

²³⁷ Ibid.

²³⁸ http://hansard.parliament.vic.gov.au/search/?LDMS=Y&IW_DATABASE=*&IW_FIELD_ADVANCE_PHRASE=be+now+read+a+second+time&IW_FIELD_IN_SpeechTitle=Bail+Amendment+Stage+Two+Bill+2017&IW_FIELD_IN_HOUSENAME=ASSEMBLY&IW_FIELD_IN_ACTIVITYTYPE=Second+reading&IW_FIELD_IN_SittingYear=2017&IW_FIELD_IN_SittingMonth=December&IW_FIELD_IN_SittingDay=13

²³⁹ Legislative Assembly Hansard (6 February 2018), page 55 https://www.parliament.vic.gov.au/images/stories/daily-hansard/Assembly_2018/Assembly_Daily_Extract_Tuesday_6_February_2018_from_Book_1.pdf

²⁴⁰ Legislative Assembly Hansard (7 February 2018), page 112 https://www.parliament.vic.gov.au/images/stories/daily-hansard/Assembly_2018/Assembly_Daily_Extract_Wednesday_7_February_2018_from_Book_1.pdf

²⁴¹ <https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/9814/9419/7926/Coghlan-report-1.pdf>, pages 10-

The debate in the Legislative Council was extensive, especially in committee where the Council went through the Bill clause by clause. The Opposition raised similar concerns about the government not taking a wholesale approach and argued that the Bail Act needed a “clean rewrite”.²⁴² Ministers sought clarity about the definition of ‘vulnerable adult’, about how ‘exceptional circumstances’ might be weighted and prioritised, and about how police officers should exercise and implement the exemptions for Aboriginal people and vulnerable adults. The Opposition moved an amendment to bring the commencement dates of both the Stage One Bill (due to commence on 1 July 2017) and the Stage Two Bill (due to commence on 1 October 2017) to 30 March 2017.²⁴³ The amendment was negated, but only by one vote.

The Greens also raised similar concerns as they did in the Assembly around the need to remove minor offences from the bail system to unplug the bottleneck and reduce overcrowding in remand centres and prisons. Their argument was that the Coghlan advice had been to remove minor offences *before* tightening bail laws, but the government was doing the latter without the former.²⁴⁴ They also expressed concerns about the police using the Law Enforcement Assistance Program (described by Coghlan as in need of review) to determine whether an accused was a ‘vulnerable adult’ and opposed altogether the clause instating a police remand system.²⁴⁵

After thorough debate, all clauses of the Bill passed on 22 February 2018. The Bill received assent on 27 February 2018.

Policy process

Criterion 1 - Establish Need: Identify a demonstrable need for the policy, based on hard evidence and consultation with all the stakeholders involved, particularly interest groups who will be affected.

Guiding question: Is there a statement of why the policy was needed based on factual evidence and stakeholder input?

It could be argued that the Coghlan review provided the evidence based of a demonstrable need for the policy, although the policy did not include all of Coghlan’s recommendations and excluded some. The Coghlan review did open for public submission and also conducted consultation sessions with stakeholder groups.

Criterion 2 - Set Objectives: Outline the public interest parameters of the proposed policy and clearly establish its objectives.

Guiding question: Is there a statement of the policy’s objectives couched in terms of the public interest?

In the aftermath of the Bourke Street attack, the public interest argument was repeatedly made that reforms to the bail system were necessary to keep the public safe and stop such an attack happening again.

²⁴² Legislative Council Hansard (22 February 2018), page 512 https://www.parliament.vic.gov.au/images/stories/daily-hansard/Council_2018/Council_Daily_Extract_Thursday_22_February_2018_from_Book_2.pdf

²⁴³ Ibid, page 551

²⁴⁴ Ibid, page 518

²⁴⁵ Ibid, pages 560-561

Criterion 3 – Identify Options: Identify alternative approaches to the design of the policy, preferably with international comparisons where feasible. Engage in realistic costings of key alternative approaches.

Guiding question: Is there a description of the alternative policy options considered before the preferred one was adopted?

The government accepted the recommendations of the Coghlan review. It does not appear to have identified or costed alternative approaches.

Criterion 4 – Consider Mechanisms: Consider implementation choices along a full spectrum from incentives to coercion.

Guiding question: Is there a disclosure of the alternative ways considered for implementing the chosen policy?

The government did consider implementation choices that differed from those outlined in the Coghlan review. For example, the legislated police remand reform allowed police to keep accused in remand for 48 hours, rather than overnight as the Coghlan review had recommended. The government also decided to proceed with reforms in a different order from that recommended by Coghlan, tightening the top end of the bail system before loosening the bottom end.

Criterion 5 – Brainstorm Alternatives: Consider the pros and cons of each option and mechanism. Subject all key alternatives to a rigorous cost-benefit analysis.

Guiding question: Is there a published analysis of the pros/cons and benefits/costs of the alternative options/mechanisms considered in 3 and 4?

There is no published analysis of the pros/cons or benefits/costs of different policy options or implementation mechanisms.

Criterion 6 – Design Pathway: Develop a complete policy design framework including principles, goals, delivery mechanisms, program or project management structure, the implementation process and phases, performance measures, ongoing evaluation mechanisms and reporting requirements, oversight and audit arrangements, and a review process ideally with a sunset clause.

Guiding question: Is there evidence that a comprehensive project management plan was designed for the policy's rollout?

There does not appear to be a published policy design framework or project management plan. This became clear during the parliamentary debate where there were some questions about the commencement dates of both Stage One and Stage Two of the Bail Amendment Act. Some members of the Opposition were seeking clarity as to the commencement timeline, and the government explained that they had received advice about time required to train police and legal practitioners in the new rules, indicating that some work had been done on the policy's rollout, but offering no further detail than that.

Criterion 7 – Consult Further: Undertake further consultation with key affected stakeholders of the policy initiative.

Guiding question: Was there further consultation with affected stakeholders after the preferred policy was announced?

During debate the government indicated that it would continue to consult with police and legal practitioners on the implementation of the policy changes.

Criterion 8 – Publish Proposals: Produce a Green and then a White paper for public feedback and final consultation purposes and to explain complex issues and processes.

Guiding question: Was there a) a Green paper seeking public input on possible policy options and b) a White paper explaining the final policy decision?

Although the Coghlan review opened for public submissions, there was not a Green and White paper process as such. The public was invited to respond to a series of questions, rather than an issues paper.

Criterion 9 – Introduce Legislation: Develop legislation and allow for comprehensive parliamentary debate especially in committee, and also intergovernmental discussion where necessary.

Guiding question: Was there legislation and adequate Parliamentary debate on the proposed policy initiative?

There was legislation and extensive parliamentary debate, with the Legislative Council debating and voting on the Bill clause by clause.

Criterion 10 – Communicate Decision: Design and implement a clear, simple, and inexpensive communication strategy based on information not propaganda, regarding the new policy initiative.

Guiding question: Is there an online official media release that explains the final policy in simple, clear and factual terms?

While there was a media release and communications around Stage One of the bail laws, there does not appear to have been a media release dealing with the changes specified in Stage Two, nor is there a dedicated page on the Department of Justice's website describing the changes to bail laws.

Final scores

	Criterion	Yes/No
1	Establish Need (demonstrable, evidence-based need)	Yes
2	Set Objectives (public interest parameters)	Yes

EVIDENCE BASED POLICY ANALYSIS

3	Identify Options (consideration of alternatives)	No
4	Consider Mechanisms (implementation choices)	Yes
5	Brainstorm Alternatives (cost-benefit analysis)	No
6	Design Pathway (policy design framework)	No
7	Consult Further (further consultation after policy announcement)	Yes
8	Publish Proposals (produce Green then White paper, or equivalents)	No
9	Introduce Legislation (comprehensive parliamentary debate)	Yes
10	Communicate Decision (information not propaganda)	No
		5/10

Residential Tenancies Amendment Act 2018

Policy background

Victorian Labor's intention to amend the Residential Tenancies Act was first floated as part of an election policy document released during the 2014 Victorian state election entitled *Labor's plan for fairer, safer housing*.²⁴⁶ Having won that election, the Labor government launched their review of the Act in June 2015 with a consultation paper called *Laying the Groundwork*.²⁴⁷

Over the next two years, the government published a series of six public issues papers covering the main issues identified in submissions to *Laying the Groundwork*: security of tenure; rents, bonds and other charges; rights and responsibilities of landlords and tenants, dispute resolution; regulation of property conditions in the rental market; and alternative forms of tenure.²⁴⁸ The government opened for public responses through a variety of channels, including written submissions, social media, and online forums.²⁴⁹

The government supplemented this public consultation process with a commissioned piece of market research that collected quantitative and qualitative data on the experiences of various stakeholders in the rental market.²⁵⁰ In January 2017, the government released an options paper, which summarised all of this research and consultation, presenting more than 200 consultation questions and canvassing various options for amending the Act.²⁵¹ This paper was also open for public feedback and submissions.

In an October 2017, the Premier announced an "unprecedented package of tenancy reforms" that drew on the long consultation process.²⁵² The new *Rent Fair Victoria* website proposed six initial reform areas for a future intended Bill: rental security; tenant rights; rental bonds and payments; rental prices; pets; and modifications. The first reform was the Residential Tenancies Amendment (Long-Term Tenancy Agreements) Act 2018, which legislated to provide for residential tenancy agreements for a fixed term of more than five years.²⁵³

The second tranche of reforms were introduced to the Legislative Assembly in August 2018 as the Residential Tenancies Amendment Bill. The Bill comprised around 130 amendments to the Residential Tenancies Act, including but not limited to:

- allowing pets to be kept in rented premises
- allowing renters to make minor modifications to a rental property
- establishing new minimum standards for residential rental properties
- removing the 'no specified reason' notice to vacate

²⁴⁶ https://www.parliament.vic.gov.au/publications/research-papers/download/36-research-papers/13872-residential-tenancies-amendment-Bill-2018#_ftn6

²⁴⁷ https://engage.vic.gov.au/download_file/2086/634

²⁴⁸ All issues papers can be downloaded here: <https://engage.vic.gov.au/fairersaferhousing>

²⁴⁹ https://www.parliament.vic.gov.au/publications/research-papers/download/36-research-papers/13872-residential-tenancies-amendment-Bill-2018#_ftn8

²⁵⁰ https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/5814/8781/7797/Victorian_Renting_Research_Report_-_RTA_Review_1.pdf

²⁵¹ https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/4714/8660/2001/Publication_-_External_-_FSH_Residential_Tenancies_Act_Options_Paper_final_-_December_2016.pdf

²⁵² <https://www.premier.vic.gov.au/andrews-labor-government-will-make-renting-fair/>

²⁵³ [http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/f932b66241ecf1b7ca256e92000e23be/BC2941AE83C9E5C3CA2582F7000A98D0/\\$FILE/18-040aa%20authorised.pdf](http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/f932b66241ecf1b7ca256e92000e23be/BC2941AE83C9E5C3CA2582F7000A98D0/$FILE/18-040aa%20authorised.pdf)

- restricting rental bidding
- mandating that rent increases can occur yearly, rather than six-monthly
- mandating that where tenants have paid for urgent repairs, reimbursement should occur within 7 days, rather than 14
- enabling automatic bond repayments within 14 days
- establishing a non-compliance register or 'blacklist' of residential rental providers who fail to meet their obligations²⁵⁴

During debate, the Opposition countered that the new amendments would represent significant cost and hassle to landlords, who would take properties off the rental market, thereby driving rents up. The Opposition also stressed that the new regulations would put significant pressure on VCAT, the court that would deal with breaches, without the government allocating any new budget to the Tribunal.²⁵⁵ Then Liberal MP Heidi Victoria moved an amendment to delay the debate subject to further consultation, but the motion was negated.²⁵⁶

The Greens supported the Bill but argued that the legislation did not deal with two fundamental challenges: housing affordability and the system's reliance on an overburdened and adversarial VCAT.²⁵⁷ The Bill passed the Legislative Assembly with no amendments on 23 August 2018 and was introduced to the Legislative Council the following day.

Debated in the Legislative Council on 4 and 6 September 2018, the Opposition argued that many important stakeholders had been excluded from the consultation process, giving the example of student accommodation providers.²⁵⁸ The Greens expressed support but again raised the issues of more general housing affordability and the need to create a less adversarial dispute resolution process than VCAT.²⁵⁹

The Bill was debated extensively, clause by clause, at the committee stage, with the Opposition moving a number of amendments, including:

- specifying that pets should be 'domesticated' animals, and requiring extra bond for pets
- maintaining the status quo of six-monthly rent increases, rather than yearly
- mandating a 2-year transition period for landlords to reach the new minimum standards
- reducing the legislation's allowed five notices for non-payment of rent before eviction to three
- defining student accommodation in the legislation and allowing for shorter term leases for student accommodation
- tightening the definition of works that can be done on a property without landlord consent
- retaining the status quo of 14 days for reimbursing repair costs, rather than seven days

However, all of the Opposition's amendments were negated.

²⁵⁴ Legislative Assembly Hansard (9 August 2018) page 2735 https://www.parliament.vic.gov.au/images/stories/daily-hansard/Assembly_2018/Assembly_Daily_Extract_Thursday_9_August_2018_from_Book_10.pdf

²⁵⁵ See for example, Legislative Assembly Hansard (23 August 2018) pages 3000-3005

https://www.parliament.vic.gov.au/images/stories/daily-hansard/Assembly_2018/Assembly_Daily_Extract_Thursday_23_August_2018_from_Book_11.pdf

²⁵⁶ Ibid, page 3005

²⁵⁷ Ibid, pages 3023-3025

²⁵⁸ Legislative Council Hansard (4 September 2018) page 4654 https://www.parliament.vic.gov.au/images/stories/daily-hansard/Council_2018/Council_Daily_Extract_Tuesday_4_September_2018_from_Book_13.pdf

²⁵⁹ Legislative Council Hansard (6 September 2018) pages 4751-4753 https://www.parliament.vic.gov.au/images/stories/daily-hansard/Council_2018/Council_Daily_Extract_Thursday_6_September_2018_from_Book_13.pdf

During the debate, the government also promised an 18-month process of further stakeholder consultation on the specifics of the regulation, explaining the legislation's commencement date of 1 July 2020.²⁶⁰

The Bill passed the Legislative Council without amendments on 6 September 2018 and received assent on 18 September 2018.

Policy process

Criterion 1 - Establish Need: Identify a demonstrable need for the policy, based on hard evidence and consultation with all the stakeholders involved, particularly interest groups who will be affected.

Guiding question: Is there a statement of why the policy was needed based on factual evidence and stakeholder input?

The four-year review of the Residential Tenancies Act, comprising the three stages of consultation paper, issues papers, and options paper, established a demonstrable need for the policy based on hard evidence and consultation with stakeholders.

Criterion 2 - Set Objectives: Outline the public interest parameters of the proposed policy and clearly establish its objectives.

Guiding question: Is there a statement of the policy's objectives couched in terms of the public interest?

The public interest argument was made that, with a third of Victorians renting their homes and with renting becoming a more long-term prospect, reforms were needed to the Residential Tenancies Act to ensure better quality of life and protections for Victorian renters.

Criterion 3 – Identify Options: Identify alternative approaches to the design of the policy, preferably with international comparisons where feasible. Engage in realistic costings of key alternative approaches.

Guiding question: Is there a description of the alternative policy options considered before the preferred one was adopted?

This was explicitly done in the consultation papers, which canvassed a number of different options for comparison and feedback, including options drawn from elsewhere in Australia or overseas. Alternative approaches to rental reform were also considered in the initial issues paper. As an example, when considering reforms to the dispute resolution process, the consultation paper for that reform compared five alternative models and mechanisms for dispute resolution.²⁶¹

Criterion 4 – Consider Mechanisms: Consider implementation choices along a full spectrum from incentives to coercion.

²⁶⁰ Ibid, page 4799

²⁶¹ https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/7514/8781/9785/RTA_Review_-_Issues_paper_-_Dispute_Resolution.pdf

Guiding question: Is there a disclosure of the alternative ways considered for implementing the chosen policy?

The options paper presented a range of implementation choices for different policy options and outlined the issues accompanying each one. For example, when considering reforms to the processes for breach of duty, the options paper considered and compared three implementation options for tightening the obligations on landlords who breach duty.²⁶²

Criterion 5 – Brainstorm Alternatives: Consider the pros and cons of each option and mechanism. Subject all key alternatives to a rigorous cost-benefit analysis.

Guiding question: Is there a published analysis of the pros/cons and benefits/costs of the alternative options/mechanisms considered in 3 and 4?

The consultation papers and the options paper all considered the pros and cons of different options and mechanisms, as well as accepting public feedback on this analysis.

Criterion 6 – Design Pathway: Develop a complete policy design framework including principles, goals, delivery mechanisms, program or project management structure, the implementation process and phases, performance measures, ongoing evaluation mechanisms and reporting requirements, oversight and audit arrangements, and a review process ideally with a sunset clause.

Guiding question: Is there evidence that a comprehensive project management plan was designed for the policy's rollout?

The *Fairer Safer Housing* section of the Engage Victoria website does some of this, but there does not appear to be a comprehensive project management plan that includes performance measures, ongoing evaluation, and review processes.

Criterion 7 – Consult Further: Undertake further consultation with key affected stakeholders of the policy initiative.

Guiding question: Was there further consultation with affected stakeholders after the preferred policy was announced?

The government mentioned during debate that it would continue to consult with stakeholders on the specifics of the regulatory changes over the 18 months following the legislation's passage.

Criterion 8 – Publish Proposals: Produce a Green and then a White paper for public feedback and final consultation purposes and to explain complex issues and processes.

²⁶² https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/4714/8660/2001/Publication_-_External_-_FSH_Residential_Tenancies_Act_Options_Paper_final_-_December_2016.pdf, page 47

EVIDENCE BASED POLICY ANALYSIS

Guiding question: Was there a) a Green paper seeking public input on possible policy options and b) a White paper explaining the final policy decision?

The consultation paper, issues papers, and options paper represent the equivalent of a Green and White paper process.

Criterion 9 – Introduce Legislation: Develop legislation and allow for comprehensive parliamentary debate especially in committee, and also intergovernmental discussion where necessary.

Guiding question: Was there legislation and adequate Parliamentary debate on the proposed policy initiative?

Legislation was introduced and debated extensively in Parliament, including clause by clause at the committee stage.

Criterion 10 – Communicate Decision: Design and implement a clear, simple, and inexpensive communication strategy based on information not propaganda, regarding the new policy initiative.

Guiding question: Is there an online official media release that explains the final policy in simple, clear and factual terms?

Clear and simple information about the changes to renters' rights are available on a dedicated area of the Engage Victoria website,²⁶³ as well as on the Victorian government's main website.²⁶⁴ The former includes lists of reforms in multiple languages, updates on implementation, access to all reports and submissions, as well as information about where to go for renting advice in Victoria.

Final scores

	Criterion	Yes/No
1	Establish Need (demonstrable, evidence-based need)	Yes
2	Set Objectives (public interest parameters)	Yes
3	Identify Options (consideration of alternatives)	Yes
4	Consider Mechanisms (implementation choices)	Yes
5	Brainstorm Alternatives (cost-benefit analysis)	Yes
6	Design Pathway (policy design framework)	No
7	Consult Further	Yes

²⁶³ <https://engage.vic.gov.au/fairersaferhousing>

²⁶⁴ <https://www.vic.gov.au/rentfair-rental-reforms-victorians>

EVIDENCE BASED POLICY ANALYSIS

	(further consultation after policy announcement)	
8	Publish Proposals (produce Green then White paper, or equivalents)	Yes
9	Introduce Legislation (comprehensive parliamentary debate)	Yes
10	Communicate Decision (information not propaganda)	Yes
		9/10

Fire Services Reform Act 2019

Policy background

This legislation can be traced all the way back to the 2009 Victorian Bushfires Royal Commission, which in the aftermath of the devastating Black Saturday bushfires made a number of recommendations for improving the operational performance of Victoria's fire services.²⁶⁵ Including the Royal Commission's report, there were a total of eight reviews of Victoria's fire services system over the decade leading up to the first introduction of the Fire Services Reform Bill.

The Bill was first introduced in May 2017 as the Fire Services Reform Bill 2017. There were two main parts to the Bill:

- legislating a presumptive right to compensation for cancer claims for firefighters, meaning that firefighters would no longer have to prove that firefighting caused their cancer
- structural changes to the fire services system, including:
 - replacing the Metropolitan Fire Brigade with an agency called Fire Rescue Victoria (FRV)
 - splitting the Country Fire Authority (CFA) into career firefighters and volunteer firefighters; CFA career firefighters would be integrated into FRV, bringing all the state's career firefighters into one organisation
 - restoring the CFA to a volunteer firefighting, community-based organisation, no longer employing or engaging career firefighters

It passed the Legislative Assembly in June 2017 and, after its second reading in the Legislative Council, it was referred to a Select Committee to consult and review on the proposed changes.²⁶⁶ The Committee tabled its final report in August 2017, in which it recommended that "due to the lack of implementation, operational and funding certainty; failure to undertake consultation; and consequential polarisation of fire services volunteers and staff, the Bill should be withdrawn" and that the part of the Bill dealing with firefighters' presumptive rights to compensation should be split off from the Bill and introduced as a stand-alone piece of legislation.²⁶⁷ The Committee also noted that none of the many reviews over the previous decade had recommended the structural changes proposed in the Bill.

After the Committee reported back, the Bill was debated extensively in the Legislative Council and then delayed for a number of months by the government, which brought it back to the Legislative Council in March 2018 with a number of amendments. It was debated extensively in Committee on 29 March 2018.²⁶⁸

The legislation was then derailed by one of the most controversial moments in Victorian parliamentary history. The debate had strayed into the early hours of 30 March, which was Good Friday. Two Liberal Party MPs – Craig Ondarchie and Bernie Finn – expressed that they did not want to sit on Good Friday for religious reasons. The government offered them each a pair: an arrangement where a government MP agrees to abstain from voting while a member of the Opposition is unavailable. The pairs applied

²⁶⁵ http://royalcommission.vic.gov.au/finaldocuments/summary/PF/VBRC_Summary_PF.pdf

²⁶⁶ https://www.parliament.vic.gov.au/images/Fire_Services_Bill/Media_Release_FSBSC_2017-06-28.pdf

²⁶⁷ https://www.parliament.vic.gov.au/images/Fire_Services_Bill/final_report/FSBSC_58-02_Text_WEB.pdf

²⁶⁸ https://www.parliament.vic.gov.au/images/stories/daily-hansard/Council_2018/Council_Daily_Extract_Thursday_29_March_2018_from_Book_4.pdf

throughout that morning until the very final vote on the third reading of the Bill, when Craig Ondarchie and Bernie Finn unexpectedly re-entered the house to vote while the paired Labor MPs were absent, giving the Opposition the numbers to defeat the Bill.²⁶⁹ As the granting of pairs is a parliamentary convention and not part of the formal procedures of the house, there was nothing the government could do, and the Bill was defeated at the third reading.²⁷⁰

The Andrews Labor government promised to re-introduce the Bill as part of their 2019 election platform. After winning the 2019 election with an increased number of seats, the Bill was reintroduced as the Fire Services Reform Bill 2019 in May 2019, with the government having the numbers in both houses to pass it comfortably. It was debated in the Legislative Assembly between 4 and 6 June 2019. The government argued that the reforms would streamline and modernise the state's fire services, bringing the legislation up to date with Victoria's changing geography and growing population, as well as the threat of climate change.²⁷¹

The Opposition outlined many similar arguments against the Bill as it had done in 2017/2018. These included:

- that splitting off volunteer firefighters and treating them separately was disrespectful and would result in less resources for volunteer firefighters, since firefighting resources would likely be channelled almost entirely through FRV
- that volunteer numbers would fall even further, reducing surge capacity
- that whereas in CFA stations volunteers and career firefighters had worked well together, there were too many unknowns as to how the services would work together and the role of volunteers in the new model, and that it was not clear what the rights of volunteers would be at integrated stations
- that the government did not have community safety at heart but was legislating to "pay back" the United Firefighters Union (UFU) for their election support
- that the government had presented no evidence for their claim that the legislation would benefit urban growth areas²⁷²

The Opposition moved to allow standard two weeks' adjournment for consultation, but the government insisted on debating the legislation the following day, arguing that it was the same legislation that had been considered in detail and nearly passed a few months prior.²⁷³ The Opposition then moved to split the Bill, retaining the provisions regarding presumptive rights and putting the governance reforms to further consultation, but the motion was negated.²⁷⁴ The Bill passed the Legislative Assembly on 6 June 2019 and was introduced to the Legislative Council on the same day.

²⁶⁹ <https://www.abc.net.au/news/2018-03-30/vic-fire-Bill-voted-down-after-opposition-mps-reappear-for-vote/9605148>

²⁷⁰ Legislative Council Hansard (29 March 2018) page 1374 https://www.parliament.vic.gov.au/images/stories/daily-hansard/Council_2018/Council_Daily_Extract_Thursday_29_March_2018_from_Book_4.pdf

²⁷¹ Legislative Assembly Hansard (4 June 2019) pages 1876-1879 https://www.parliament.vic.gov.au/images/stories/daily-hansard/Assembly_2019/Legislative_Assembly_2019-06-04.pdf

²⁷² For example, Legislative Assembly Hansard (5 June 2019) pages 1952, 1974, 1981, 1985 https://www.parliament.vic.gov.au/images/stories/daily-hansard/Assembly_2019/Legislative_Assembly_2019-06-05.pdf

²⁷³ Legislative Assembly Hansard (4 June 2019) page 1886 https://www.parliament.vic.gov.au/images/stories/daily-hansard/Assembly_2019/Legislative_Assembly_2019-06-04.pdf

²⁷⁴ Legislative Assembly Hansard (5 June 2019) pages 1957, https://www.parliament.vic.gov.au/images/stories/daily-hansard/Assembly_2019/Legislative_Assembly_2019-06-05.pdf, and Legislative Assembly Hansard (6 June 2019), page 2315 https://www.parliament.vic.gov.au/images/stories/daily-hansard/Assembly_2019/Legislative_Assembly_2019-06-06.pdf

After the second reading on 7 June, a motion to adjourn debate for one week was agreed to.²⁷⁵ The debate resumed on 18 June, where again a motion to split the Bill was moved and negated.²⁷⁶ The Bill entered committee stage on 20 June. Once again, the debate was extremely detailed and lengthy, with a significant number of clarifying questions asked and answered, and a number of amendments moved. Perhaps the most significant of these amendments was a motion to equalise access to compensation between volunteer and career firefighters by removing the requirement for volunteer firefighters to be assessed by a panel, but this motion was negated.²⁷⁷ The Bill passed the Legislative Council without amendment on 20 June 2019 and received assent on 2 July 2019.

Policy process

Criterion 1 - Establish Need: Identify a demonstrable need for the policy, based on hard evidence and consultation with all the stakeholders involved, particularly interest groups who will be affected.

Guiding question: Is there a statement of why the policy was needed based on factual evidence and stakeholder input?

The government did not establish a demonstrable need for the policy. In fact, the committee review process that was instigated to gather the evidence and conduct consultation explicitly recommended against the policy.

Criterion 2 - Set Objectives: Outline the public interest parameters of the proposed policy and clearly establish its objectives.

Guiding question: Is there a statement of the policy's objectives couched in terms of the public interest?

The government did make a public interest argument for this policy, in that the fire services system needed to account for the changing nature of fire risk in Victoria (due to population growth, geographic change, and climate change) in order to keep people safe.

Criterion 3 – Identify Options: Identify alternative approaches to the design of the policy, preferably with international comparisons where feasible. Engage in realistic costings of key alternative approaches.

Guiding question: Is there a description of the alternative policy options considered before the preferred one was adopted?

There does not appear to be a published description of alternative policy options considered. The many reviews that were undertaken in the decade prior to the legislation's introduction considered a number of policy options, but not the one that the government eventually decided to introduce.

²⁷⁵ Legislative Council Hansard (7 June 2019) page 1947 https://www.parliament.vic.gov.au/images/stories/daily-hansard/Council_2019/Legislative_Council_2019_06_07.pdf

²⁷⁶ Legislative Council Hansard (18 June 2019) page 2014 https://www.parliament.vic.gov.au/images/stories/daily-hansard/Council_2019/Legislative_Council_2019-06-18.pdf

²⁷⁷ Legislative Council Hansard (20 June 2019) pages 2256-2257 https://www.parliament.vic.gov.au/images/stories/daily-hansard/Council_2019/Legislative_Council_2019-06-20.pdf

Criterion 4 – Consider Mechanisms: Consider implementation choices along a full spectrum from incentives to coercion.

Guiding question: Is there a disclosure of the alternative ways considered for implementing the chosen policy?

There does not appear to be a public disclosure of the alternative ways considered for implementing the chosen policy. The Committee review specifically criticised the government for failing to develop an implementation plan.

Criterion 5 – Brainstorm Alternatives: Consider the pros and cons of each option and mechanism. Subject all key alternatives to a rigorous cost-benefit analysis.

Guiding question: Is there a published analysis of the pros/cons and benefits/costs of the alternative options/mechanisms considered in 3 and 4?

There does not appear to be a published analysis of the pros, cons, benefits, or costs of different policy options or implementation mechanisms.

Criterion 6 – Design Pathway: Develop a complete policy design framework including principles, goals, delivery mechanisms, program or project management structure, the implementation process and phases, performance measures, ongoing evaluation mechanisms and reporting requirements, oversight and audit arrangements, and a review process ideally with a sunset clause.

Guiding question: Is there evidence that a comprehensive project management plan was designed for the policy's rollout?

There does not appear to be a complete policy design framework or comprehensive project management plan.

Criterion 7 – Consult Further: Undertake further consultation with key affected stakeholders of the policy initiative.

Guiding question: Was there further consultation with affected stakeholders after the preferred policy was announced?

There do not appear to be plans for further consultation.

Criterion 8 – Publish Proposals: Produce a Green and then a White paper for public feedback and final consultation purposes and to explain complex issues and processes.

Guiding question: Was there a) a Green paper seeking public input on possible policy options and b) a White paper explaining the final policy decision?

EVIDENCE BASED POLICY ANALYSIS

There was no Green/White paper, or equivalent process.

Criterion 9 – Introduce Legislation: Develop legislation and allow for comprehensive parliamentary debate especially in committee, and also intergovernmental discussion where necessary.

Guiding question: Was there legislation and adequate Parliamentary debate on the proposed policy initiative?

Legislation was introduced and debated extensively for both versions of the Bill.

Criterion 10 – Communicate Decision: Design and implement a clear, simple, and inexpensive communication strategy based on information not propaganda, regarding the new policy initiative.

Guiding question: Is there an online official media release that explains the final policy in simple, clear and factual terms?

There is a dedicated page on the Victorian government's website outlining the fire services reforms containing detailed information.

Final scores

	Criterion	Yes/No
1	Establish Need (demonstrable, evidence-based need)	No
2	Set Objectives (public interest parameters)	Yes
3	Identify Options (consideration of alternatives)	No
4	Consider Mechanisms (implementation choices)	No
5	Brainstorm Alternatives (cost-benefit analysis)	No
6	Design Pathway (policy design framework)	No
7	Consult Further (further consultation after policy announcement)	No
8	Publish Proposals (produce Green then White paper, or equivalents)	No
9	Introduce Legislation (comprehensive parliamentary debate)	Yes
10	Communicate Decision (information not propaganda)	Yes
		3/10

Environment Protection Amendment Bill 2019

Policy background

In May 2016, then Victorian Greens MP Nina Springle introduced the Environment Protection Amendment (Banning Plastic Bags, Packaging and Microbeads) Bill 2016 as a private member's Bill in the Legislative Council.²⁷⁸ The Bill was defeated at the third reading but was referred to the Environment and Planning Committee for consultation and review.

The Committee held a series of public consultations and received nearly 3,000 public submissions, the majority of which were supportive of a plastic bag ban.²⁷⁹ The Committee tabled its report in June 2017 and recommended that the government undertake a formal assessment of the impact of the Bill on communities, families, individuals, businesses, and the environment.²⁸⁰

In October 2017, Victorian Minister for Energy, Environment and Climate Change Lily D'Ambrosio announced that the Andrews Labor government intended to ban single-use, lightweight plastic shopping bags in Victoria, subject to consultation with community and business as to how best to implement the policy.²⁸¹

That consultation was launched on the Engage Victoria website as a discussion paper titled *Reducing the impacts of plastic on the Victorian Environment*.²⁸² The consultation received more than 8,000 submissions, with 96% of those submissions supporting a ban on single-use, lightweight plastic shopping bags.²⁸³ The government published a consultation paper summarising the key themes from the consultation process and outlining its next steps towards the ban as well as other plastic pollution.²⁸⁴

The government then developed the legislation with retailers and the community, engaging the National Retail Association to deliver a 12-month education and engagement program for small-to-medium businesses, and engaging Sustainability Victoria to deliver the 2018 campaign *Better Bag Habits* to prepare the public for the ban.²⁸⁵

²⁷⁸ http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/PubPDocs_Arch.nsf/5da7442d8f61e92bca256de50013d008/ca257cca00177a46ca257fd9007c863e!OpenDocument

²⁷⁹ https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/6915/3015/4057/Reducing_the_impacts_of_plastics_on_the_Victorian_environment_-_join_the_discussion.pdf, page 3

²⁸⁰ https://www.parliament.vic.gov.au/images/stories/committees/SCEP/Plastic_Bags/Report/EPC_58-08_Plastic_Bags_For_web.pdf

²⁸¹ <https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/5915/0829/6362/171018-Banning-Single-Use-Plastic-Shopping-Bags.pdf>

²⁸² https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/6915/3015/4057/Reducing_the_impacts_of_plastics_on_the_Victorian_environment_-_join_the_discussion.pdf

²⁸³ Legislative Assembly Hansard (20 June 2019) page 2382 https://www.parliament.vic.gov.au/images/stories/daily-hansard/Assembly_2019/Legislative_Assembly_2019_06_20.pdf

²⁸⁴ https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/8015/3205/3934/Reducing_the_impacts_of_plastic_on_the_Victorian_Environment_-_Consultation_Report.pdf

²⁸⁵ Legislative Assembly Hansard (20 June 2019) page 2381 https://www.parliament.vic.gov.au/images/stories/daily-hansard/Assembly_2019/Legislative_Assembly_2019_06_20.pdf

The government promised to have a legislated ban in place by the end of 2019.²⁸⁶ In July 2018, the phase out of single-use lightweight plastic bags in Woolworths and Coles, announced 12 months prior, took effect, creating some controversy around the retailers' policy and the intended legislation.²⁸⁷

The Environment Protection Amendment Bill was introduced to the Legislative Assembly in August 2019. The Bill enjoyed bipartisan support and passed the lower house on 15 August.²⁸⁸ Introduced to the Legislative Council on the same day, the debate was adjourned for a week and debate continued on 29 August 2019. The Greens moved an amendment in the committee stage to also ban a further list of single-use plastic and polystyrene containers, like drinking straws, cutlery, food and beverage containers, lids on disposable coffee cups, cotton buds, beverage stirrers, and balloon sticks, but the motion was negated.²⁸⁹ The Bill passed the Legislative Council with very little opposition.²⁹⁰ At the time of writing, the Act was yet to receive Assent.

Policy process

Criterion 1 - Establish Need: Identify a demonstrable need for the policy, based on hard evidence and consultation with all the stakeholders involved, particularly interest groups who will be affected.

Guiding question: Is there a statement of why the policy was needed based on factual evidence and stakeholder input?

The government used the Committee inquiry, the discussion paper, and the consultation paper, as well as evidence of international best practice and plastic bag bans in other jurisdictions, to establish a demonstrable need for the policy.

Criterion 2 - Set Objectives: Outline the public interest parameters of the proposed policy and clearly establish its objectives.

Guiding question: Is there a statement of the policy's objectives couched in terms of the public interest?

The public interest argument made was that the ban would reduce plastic pollution and the consequent impacts on our environment, wildlife, and public amenity.

Criterion 3 – Identify Options: Identify alternative approaches to the design of the policy, preferably with international comparisons where feasible. Engage in realistic costings of key alternative approaches.

Guiding question: Is there a description of the alternative policy options considered before the preferred one was adopted?

²⁸⁶ <https://engage.vic.gov.au/waste/plastic-pollution>

²⁸⁷ <https://www.abc.net.au/news/2017-07-14/woolworths-to-phase-out-plastic-bags-around-the-country/8709336>

²⁸⁸ Legislative Assembly Hansard (13 August 2019) page 2486 https://www.parliament.vic.gov.au/images/stories/daily-hansard/Assembly_2019/Legislative_Assembly_2019-08-13.pdf

²⁸⁹ Legislative Council Hansard (29 August 2019) pages 71-72 https://www.parliament.vic.gov.au/images/stories/daily-hansard/Council_2019/Legislative_Council_2019-08-29.pdf

²⁹⁰ Ibid, page 76

Alternative approaches to the policy's design were considered in the Committee review and also in the discussion paper. For example, the discussion paper asked for feedback on options including banning the bags, charging a levy for them, conducting information campaigns about plastic pollution, and improving litter management and infrastructure. Both reports also looked at the impacts of plastic bag bans in other jurisdictions, including international comparisons.

Criterion 4 – Consider Mechanisms: Consider implementation choices along a full spectrum from incentives to coercion.

Guiding question: Is there a disclosure of the alternative ways considered for implementing the chosen policy?

Various implementation choices were considered in the Committee review, the discussion paper, and the consultation paper. For example, the Committee review recommended that the ban should discriminate between different types of plastic bag rather than making the supply of all plastic bags unlawful, which the government ultimately did, banning only single-use lightweight plastic bags with a thickness of less than 35 microns.

Criterion 5 – Brainstorm Alternatives: Consider the pros and cons of each option and mechanism. Subject all key alternatives to a rigorous cost-benefit analysis.

Guiding question: Is there a published analysis of the pros/cons and benefits/costs of the alternative options/mechanisms considered in 3 and 4?

The Department of Environment, Land, Water and Planning commissioned an independent cost-benefit analysis on options for a plastic bag ban, which was published in November 2016. The analysis compared four options for reducing plastic bags: the status quo; a ban on high density polyethylene (HDPE) bags and biodegradable shopping bags, a ban on HDPE and biodegradable shopping bags and a code of practice for retailers on reducing the use of all other plastic shopping bags, and a ban on all plastic shopping bags.²⁹¹

Criterion 6 – Design Pathway: Develop a complete policy design framework including principles, goals, delivery mechanisms, program or project management structure, the implementation process and phases, performance measures, ongoing evaluation mechanisms and reporting requirements, oversight and audit arrangements, and a review process ideally with a sunset clause.

Guiding question: Is there evidence that a comprehensive project management plan was designed for the policy's rollout?

The consultation paper, combined with the section of the Engage Victoria website dedicated to this issue, contains many of the elements of a policy design framework outlined above, but there is a lack of information about performance measures, ongoing evaluation, and oversight arrangements.

²⁹¹ https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/1915/0580/1564/Plastic_Bags_Ban_Options_-_Cost_Benefit_Analysis_Report.pdf

EVIDENCE BASED POLICY ANALYSIS

Criterion 7 – Consult Further: Undertake further consultation with key affected stakeholders of the policy initiative.

Guiding question: Was there further consultation with affected stakeholders after the preferred policy was announced?

The discussion paper and subsequent consultation process took place after the preferred policy was announced.

Criterion 8 – Publish Proposals: Produce a Green and then a White paper for public feedback and final consultation purposes and to explain complex issues and processes.

Guiding question: Was there a) a Green paper seeking public input on possible policy options and b) a White paper explaining the final policy decision?

The discussion paper followed by a consultation paper can be seen as the equivalent of a Green/White paper process.

Criterion 9 – Introduce Legislation: Develop legislation and allow for comprehensive parliamentary debate especially in committee, and also intergovernmental discussion where necessary.

Guiding question: Was there legislation and adequate Parliamentary debate on the proposed policy initiative?

Legislation was introduced and debated in parliament, including in committee stage.

Criterion 10 – Communicate Decision: Design and implement a clear, simple, and inexpensive communication strategy based on information not propaganda, regarding the new policy initiative.

Guiding question: Is there an online official media release that explains the final policy in simple, clear and factual terms?

There has been a broad communications strategy around this legislation, including television adverts and public education campaigns, as well as a dedicated section on the Engage Victoria website which contains a large amount of information on the process and timeline.

Final scores

	Criterion	Yes/No
1	Establish Need (demonstrable, evidence-based need)	Yes
2	Set Objectives (public interest parameters)	Yes
3	Identify Options (consideration of alternatives)	Yes

EVIDENCE BASED POLICY ANALYSIS

4	Consider Mechanisms (implementation choices)	Yes
5	Brainstorm Alternatives (cost-benefit analysis)	Yes
6	Design Pathway (policy design framework)	No
7	Consult Further (further consultation after policy announcement)	Yes
8	Publish Proposals (produce Green then White paper, or equivalents)	Yes
9	Introduce Legislation (comprehensive parliamentary debate)	Yes
10	Communicate Decision (information not propaganda)	Yes
		9/10

Queensland case studies

Termination of Pregnancy Act 2018

Policy background

In May 2016, Queensland Independent MP Rob Pyne introduced the Abortion Law Reform (Woman's Right to Choose) Amendment Bill 2016 to the Queensland Parliament as a private member's bill. The Bill aimed to remove abortion from the Criminal Code, legalising all abortion in Queensland, and did not set any gestational limit for legal abortions.²⁹² The Bill was referred to the Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee for inquiry.

A week before the Committee was due to report and facing significant public backlash for the absence of a gestational limit to abortion in his Bill, Rob Pyne MP introduced a second private member's bill: the Health (Abortion Law Reform) Amendment Bill 2016. This version of the Bill added the requirements of two doctors' approval and a reasonable belief that the continuation of the pregnancy would involve greater risk of injury to the physical or mental health of the woman than a termination for a termination to take place after 24 weeks.²⁹³ That Bill was also referred to the same Committee, although the Parliament approved debating and voting on both Bills together after the Committee reported.²⁹⁴

The inquiry into the first Bill received over 1,400 submissions and conducted a series of public hearings, while the second inquiry received over 1,200 submissions. The Committee recommended against passing the first Bill,²⁹⁵ but was not able to reach agreement on whether or not the second Bill should be passed.²⁹⁶

With LNP MPs indicating they would not support the second Bill, and with some Labor MPs expected to oppose it as well, Rob Pyne withdrew both his Bills from Parliament before the cognate debate in February 2017.²⁹⁷ Instead, the issue was referred to the Queensland Law Reform Commission (QLRC), with the Palaszczuk Labor government committing to introduce a Bill reflecting the QLRC's recommendations if re-elected.

In June 2017, Terms of Reference were issued to the QLRC for an independent review of Queensland's termination of pregnancy laws. The QLRC published a consultation paper in December 2017 that outlined a number of different policy options.²⁹⁸ After receiving nearly 1,200 submissions, the QLRC tabled its final report in June 2018, making 28 recommendations for legislative changes to decriminalise safe termination practices and provide a new legislative framework clearly setting out the circumstances in which a termination is lawfully permitted.²⁹⁹

²⁹² <https://www.legislation.qld.gov.au/view/pdf/Bill.first/Bill-2016-058>

²⁹³ <https://www.legislation.qld.gov.au/view/pdf/Bill.first/Bill-2016-093>

²⁹⁴ Parliament Hansard (29 November 2016) page 4581

https://www.parliament.qld.gov.au/documents/hansard/2016/2016_11_29_WEEKLY.pdf

²⁹⁵ <https://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2016/5516T1337.pdf>, page xvii

²⁹⁶ <https://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2017/5517T220.pdf>, page 7

²⁹⁷ <https://www.abc.net.au/news/2017-02-28/abortion-decriminalisation-Bills-withdrawn-from-parliament/8309788>

²⁹⁸ https://www qlrc.qld.gov.au/_data/assets/pdf_file/0010/547165/qlrc-wp-no-76-2017.pdf

²⁹⁹ https://www qlrc.qld.gov.au/_data/assets/pdf_file/0004/576166/qlrc-report-76-2018-final.pdf

The Termination of Pregnancy Bill 2018 was introduced on 22 August 2018 to reflect the QLRC's recommendations. The Bill sought to:

- decriminalise safe termination practices and enable reasonable and safe access by women to terminations
- allow terminations up to 22 weeks at the discretion of the patient
- allow terminations after 22 weeks with approval from two doctors, who must consider the patient's current and future physical, psychological, and social circumstances
- allow doctors to conscientiously object to terminating pregnancies, but require them to refer the patient to another professional or provider who does not object
- establish 'safe access zones' around premises providing terminations that prohibit protesters within 150m

This Bill was also referred to Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee for inquiry. The Committee received over 6,000 submissions and conducted public hearings around Queensland. In its final report, tabled on 5 October 2018, the Committee recommended the Bill be passed, and that MPs should be allowed a conscious vote in Parliament.³⁰⁰

The second reading debate took place over the 16 and 17 October 2018. All MPs were allowed a conscience vote. Those that rose to oppose the Bill mainly did so on the grounds that either a) they believed terminating pregnancies to be morally wrong in some sense or b) safe termination of pregnancies is already legal in Queensland due to common law interpretation that allows termination of a pregnancy when it poses serious risk to the mother's physical or mental health. Others supported decriminalisation generally but opposed the 22-week threshold or opposed the 'social' consideration for doctors after 22 weeks.³⁰¹

LNP MP Mark McCardle moved a series of amendments, including limiting the threshold to 16 weeks, removing 'social' reasons for terminations after 22 weeks, and removing the obligation for health practitioners with conscientious objections to refer patients to other practitioners or providers who will or may perform the termination, but all amendments were negatived. The Bill passed on 17 October 2018 with a majority of nine and received assent on 25 October 2018.

Policy process

Criterion 1 - Establish Need: Identify a demonstrable need for the policy, based on hard evidence and consultation with all the stakeholders involved, particularly interest groups who will be affected.

Guiding question: Is there a statement of why the policy was needed based on factual evidence and stakeholder input?

With three parliamentary committee views and a QLRC review, the government conducted a long and thorough consultation and evidence-gathering process and identified a demonstrable need for the policy.

³⁰⁰ <https://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2018/5618T1578.pdf>

³⁰¹ See Queensland Parliament Hansard (16 October 2018) pages 2799, 2803, 2815, 2832 https://www.parliament.qld.gov.au/documents/hansard/2018/2018_10_16_WEEKLY.pdf and (17 October 2018) pages 2889, 2904, 2947, 2951 https://www.parliament.qld.gov.au/documents/hansard/Index_BV/18INDEX.pdf for the debate and consideration in detail

Criterion 2 - Set Objectives: Outline the public interest parameters of the proposed policy and clearly establish its objectives.

Guiding question: Is there a statement of the policy's objectives couched in terms of the public interest?

The public interest argument made was that the Bill would allow women in Queensland to access a full range of safe healthcare services.

Criterion 3 – Identify Options: Identify alternative approaches to the design of the policy, preferably with international comparisons where feasible. Engage in realistic costings of key alternative approaches.

Guiding question: Is there a description of the alternative policy options considered before the preferred one was adopted?

The reviews, particularly the QLRC review, considered different approaches to the design of the policy. For example, the QLRC's consultation paper asked for feedback on different approaches to questions around which health practitioners should be permitted to perform terminations, and around safe access zones.

Criterion 4 – Consider Mechanisms: Consider implementation choices along a full spectrum from incentives to coercion.

Guiding question: Is there a disclosure of the alternative ways considered for implementing the chosen policy?

All of the reviews considered a spectrum of implementation choices. The number of reviews shows us how the implementation decisions changed over time as a result of these reviews. For example, the review of the first Bill (which did not have a gestational threshold) recommended against passing it, the review of the second Bill (with a 24-week threshold) could not come to a decision, the QLRC review recommended a 22-week threshold, and the final review recommended passing the Bill with a 22-week threshold.

Criterion 5 – Brainstorm Alternatives: Consider the pros and cons of each option and mechanism. Subject all key alternatives to a rigorous cost-benefit analysis.

Guiding question: Is there a published analysis of the pros/cons and benefits/costs of the alternative options/mechanisms considered in 3 and 4?

The QLRC's final report considered and compared many options and mechanisms against each other, including models used in other Australian jurisdictions, and considered the pros and cons of each option before coming to a conclusion. For example, on the question of gestational limits and grounds, the review compared 'on request' approaches, 'combined' approaches, the Tasmanian model, the Victorian model, and six different options for grounds.

Criterion 6 – Design Pathway: Develop a complete policy design framework including principles, goals, delivery mechanisms, program or project management structure, the implementation process and phases, performance measures, ongoing evaluation mechanisms and reporting requirements, oversight and audit arrangements, and a review process ideally with a sunset clause.

Guiding question: Is there evidence that a comprehensive project management plan was designed for the policy's rollout?

There does not appear to be a complete policy design framework or comprehensive project management plan for the rollout of the policy.

Criterion 7 – Consult Further: Undertake further consultation with key affected stakeholders of the policy initiative.

Guiding question: Was there further consultation with affected stakeholders after the preferred policy was announced?

The final review, which conducted extensive consultation, occurred after the preferred policy was announced.

Criterion 8 – Publish Proposals: Produce a Green and then a White paper for public feedback and final consultation purposes and to explain complex issues and processes.

Guiding question: Was there a) a Green paper seeking public input on possible policy options and b) a White paper explaining the final policy decision?

The QLRC's consultation paper followed by final report, and the subsequent committee review, can be seen as equivalent to the Green/White paper process.

Criterion 9 – Introduce Legislation: Develop legislation and allow for comprehensive parliamentary debate especially in committee, and also intergovernmental discussion where necessary.

Guiding question: Was there legislation and adequate Parliamentary debate on the proposed policy initiative?

Legislation was developed and debated extensively in Parliament, with all MPs allowed a conscience vote.

Criterion 10 – Communicate Decision: Design and implement a clear, simple, and inexpensive communication strategy based on information not propaganda, regarding the new policy initiative.

Guiding question: Is there an online official media release that explains the final policy in simple, clear and factual terms?

EVIDENCE BASED POLICY ANALYSIS

The Queensland Health website launched a dedicated section to termination of pregnancy in Queensland after the new legislation.³⁰² There was also an official media release.³⁰³

Final scores

	Criterion	Yes/No
1	Establish Need (demonstrable, evidence-based need)	Yes
2	Set Objectives (public interest parameters)	Yes
3	Identify Options (consideration of alternatives)	Yes
4	Consider Mechanisms (implementation choices)	Yes
5	Brainstorm Alternatives (cost-benefit analysis)	Yes
6	Design Pathway (policy design framework)	No
7	Consult Further (further consultation after policy announcement)	Yes
8	Publish Proposals (produce Green then White paper, or equivalents)	Yes
9	Introduce Legislation (comprehensive parliamentary debate)	Yes
10	Communicate Decision (information not propaganda)	Yes
		9/10

³⁰² <https://www.health.qld.gov.au/news-alerts/news/termination-of-pregnancy-abortion-in-queensland-everything-you-need-to-know>

³⁰³ <http://statements.qld.gov.au/Statement/2018/10/17/palaszczuk-government-delivers-historic-abortion-laws>

Non-consensual Sharing of Intimate Images Act 2019

Policy background

In May 2017 the COAG Law, Crime and Community Safety Council agreed to the *National statement of principles relating to the criminalisation of the non-consensual sharing of intimate images*.³⁰⁴ This statement identified best practice national principles to be considered for jurisdictions amending their criminal law to address the non-consensual sharing of intimate images.³⁰⁵

During the 2017 election campaign the Queensland Labor government committed to creating a new offence related to non-consensual sharing of intimate images.³⁰⁶ After winning the election in November 2017, the government made legislating the offence a policy priority, developing and providing a consultation draft of the Bill to key stakeholders including legal, youth, and women's advocacy groups.³⁰⁷

After drafting the Bill with stakeholder feedback, the government introduced the Bill on 22 August 2018. The Bill sought to:

- create a new offence related to non-consensual sharing of intimate images that would apply to sending, or threatening to send, intimate material without consent
- impose a maximum penalty of three years imprisonment
- include images that have been digitally altered
- provide that children under 16 years of age are unable to give consent³⁰⁸

The Bill was referred to the Legal Affairs and Community Safety Committee, which received 18 submissions and held a public briefing and a public hearing in September 2018. The Committee tabled its report on 5 October 2018 and recommended passing the Bill.³⁰⁹

The second reading debate took place over the 12 and 13 February 2019. The LNP did not oppose the Bill, but a few MPs raised the issues of the difficulty of prosecuting people under the proposed legislation who anonymously upload prohibited images or recordings, and the need to clarify how the legislation would apply to offenders who live outside Queensland.³¹⁰

The Bill passed without opposition on 13 February 2019 and received assent on 21 February 2019. The government had indicated there will be a review of the legislation three years after the new laws commence operation, to check its effectiveness and ensure it continues to develop in response to new technologies.³¹¹

³⁰⁴ <https://www.homeaffairs.gov.au/criminal-justice/files/criminalisation-non-consensual-sharing-intimate-images.pdf>

³⁰⁵ <https://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2018/5618T1574.pdf>, page 7

³⁰⁶ Ibid, page 8

³⁰⁷ Ibid, page 1

³⁰⁸ <https://www.legislation.qld.gov.au/view/pdf/Bill.first.exp/Bill-2018-050>

³⁰⁹ <https://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2018/5618T1574.pdf>, page vi

³¹⁰ See for example Queensland Parliament Hansard (12 February 2019) page 46

https://www.parliament.qld.gov.au/documents/hansard/2019/2019_02_12_WEEKLY.pdf

³¹¹ Ibid, page 43

Policy process

Criterion 1 - Establish Need: Identify a demonstrable need for the policy, based on hard evidence and consultation with all the stakeholders involved, particularly interest groups who will be affected.

Guiding question: Is there a statement of why the policy was needed based on factual evidence and stakeholder input?

The Bill was developed as a consultative process with key stakeholders. The details of that process are not publicly available, but it is referred to repeatedly in the Committee review.

Criterion 2 - Set Objectives: Outline the public interest parameters of the proposed policy and clearly establish its objectives.

Guiding question: Is there a statement of the policy's objectives couched in terms of the public interest?

The public interest argument made was that the legislation would protect people, including children, from having intimate images of themselves shared without their consent.

Criterion 3 – Identify Options: Identify alternative approaches to the design of the policy, preferably with international comparisons where feasible. Engage in realistic costings of key alternative approaches.

Guiding question: Is there a description of the alternative policy options considered before the preferred one was adopted?

There is evidence in the Committee review that the government considered alternative approaches to the Bill. For example, in the section on 'Education, training and procedures', the Committee notes that some stakeholders recommended implementing mandatory respectful relationships education for young Queenslanders rather than taking legislative action. The review includes a response from the government agreeing that non-legislative action would be necessary to support the Bill.³¹²

Criterion 4 – Consider Mechanisms: Consider implementation choices along a full spectrum from incentives to coercion.

Guiding question: Is there a disclosure of the alternative ways considered for implementing the chosen policy?

There is evidence in the Committee review that the government considered a range of implementation choices. For example, the review notes that some submitters suggested that the definition of intimate image be extended to reflect different cultural or religious perspectives on 'intimacy' and includes a government response that shows the department considered it before specifying that it would not be

³¹² <https://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2018/5618T1574.pdf>, page 26

EVIDENCE BASED POLICY ANALYSIS

extending the criminal offences to include religious or cultural sensitivity.³¹³ However, there is no evidence of consideration of alternative implementation choices to the passage of the legislation itself.

Criterion 5 – Brainstorm Alternatives: Consider the pros and cons of each option and mechanism. Subject all key alternatives to a rigorous cost-benefit analysis.

Guiding question: Is there a published analysis of the pros/cons and benefits/costs of the alternative options/mechanisms considered in 3 and 4?

Although there is evidence in the Committee review that the government considered different policy options and implementation mechanisms, there is no published cost-benefit analysis that takes a rigorous look at those different options.

Criterion 6 – Design Pathway: Develop a complete policy design framework including principles, goals, delivery mechanisms, program or project management structure, the implementation process and phases, performance measures, ongoing evaluation mechanisms and reporting requirements, oversight and audit arrangements, and a review process ideally with a sunset clause.

Guiding question: Is there evidence that a comprehensive project management plan was designed for the policy's rollout?

There does not appear to be public evidence of a complete policy design framework or comprehensive project management plan for the policy's rollout.

Criterion 7 – Consult Further: Undertake further consultation with key affected stakeholders of the policy initiative.

Guiding question: Was there further consultation with affected stakeholders after the preferred policy was announced?

The consultation undertaken as part of the Committee review process took place after the Bill was announced.

Criterion 8 – Publish Proposals: Produce a Green and then a White paper for public feedback and final consultation purposes and to explain complex issues and processes.

Guiding question: Was there a) a Green paper seeking public input on possible policy options and b) a White paper explaining the final policy decision?

There was no Green/White paper process or any equivalent.

Criterion 9 – Introduce Legislation: Develop legislation and allow for comprehensive parliamentary debate especially in committee, and also intergovernmental discussion where necessary.

³¹³ Ibid, page 12

Guiding question: Was there legislation and adequate Parliamentary debate on the proposed policy initiative?

Legislation was developed and debated adequately in Parliament.

Criterion 10 – Communicate Decision: Design and implement a clear, simple, and inexpensive communication strategy based on information not propaganda, regarding the new policy initiative.

Guiding question: Is there an online official media release that explains the final policy in simple, clear and factual terms?

There is a section on the Queensland Government website dedicated to the new legislation with the rules laid out simply and clearly, including a video campaign and links for further information or support.³¹⁴ There is also an official media release.³¹⁵

Final scores

	Criterion	Yes/No
1	Establish Need (demonstrable, evidence-based need)	Yes
2	Set Objectives (public interest parameters)	Yes
3	Identify Options (consideration of alternatives)	Yes
4	Consider Mechanisms (implementation choices)	No
5	Brainstorm Alternatives (cost-benefit analysis)	No
6	Design Pathway (policy design framework)	No
7	Consult Further (further consultation after policy announcement)	Yes
8	Publish Proposals (produce Green then White paper, or equivalents)	No
9	Introduce Legislation (comprehensive parliamentary debate)	Yes
10	Communicate Decision (information not propaganda)	Yes
		6/10

³¹⁴ <https://www.qld.gov.au/law/crime-and-police/types-of-crime/intimate-images>

³¹⁵ <http://statements.qld.gov.au/Statement/2019/2/13/revenge-porn-now-a-criminal-offence>

Human Rights Act 2019

Policy background

In December 2015, the Legislative Assembly directed the Legal Affairs and Community Safety Committee to inquire into the possibility of a Human Rights Act for Queensland.³¹⁶ At that time, Victoria and the ACT already had human rights legislation. In Queensland, some human rights were reflected in different pieces of legislation and recognised common law rights, but they were not consolidated into one piece of legislation.³¹⁷

The Committee received nearly 500 submissions and held public hearings across Queensland as well as consulting with individuals, organisations, interstate agencies, and stakeholders in New Zealand (which also already had human rights legislation).³¹⁸ The Committee tabled its final report in June 2016. Although both government and non-government members of the Committee acknowledged that the majority of submissions supported a Human Rights Act, they were unable to agree on whether it would be appropriate and desirable to introduce human rights legislation to Queensland.³¹⁹

Government members supported introducing human rights legislation, mainly arguing that “making rights explicit in a single piece of legislation would promote awareness of rights, make them more accessible, promote debate, and make departures from rights principles more transparent.”³²⁰ Non-government members held the opposing view that a human rights act would transfer decision-making to an un-elected judiciary, would cause undue litigation, and would weaken the ‘common law’ processes by which society already functions.³²¹

During the 2017 state election, the Labor government made a commitment to introduce a Human Rights Act for Queensland based on the Victorian Charter of Human Rights and Responsibilities Act 2006.³²² A range of stakeholders were consulted on the Bill before its introduction, and overall stakeholders were supportive of the Bill being based on the model of the Victorian Charter with the addition of social and economic rights.³²³

The Human Rights Bill was introduced to the Queensland Parliament on 31 October 2018, with a recommendation from the Governor.³²⁴ The Bill adopted a ‘dialogue model’, meaning each of the three arms of government would have a role to play in implementing the legislation and dialogue between them would be promoted.³²⁵

³¹⁶ <https://www.parliament.qld.gov.au/work-of-committees/committees/LACSC/inquiries/past-inquiries/14-HumanRights>

³¹⁷ Explanatory Notes, page 2 <https://www.legislation.qld.gov.au/view/pdf/Bill.first.exp/Bill-2018-076>

³¹⁸ <https://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2016/5516T1030.pdf>, page ix

³¹⁹ Ibid.

³²⁰ Ibid, page xi

³²¹ Ibid, page xiii-xix

³²² Queensland Parliament Hansard (26 February 2019) page 353

https://www.parliament.qld.gov.au/documents/hansard/2019/2019_02_26_WEEKLY.pdf

³²³ Explanatory Notes, pages 10-11 <https://www.legislation.qld.gov.au/view/pdf/Bill.first.exp/Bill-2018-076>

³²⁴ Queensland Parliament Hansard (31 October 2018) page 3183

https://www.parliament.qld.gov.au/documents/hansard/2018/2018_10_31_WEEKLY.pdf

³²⁵ Explanatory Notes, pages 10, 11, 34 <https://www.legislation.qld.gov.au/view/pdf/Bill.first.exp/Bill-2018-076>

The Bill sought to:

- establish and consolidate statutory protections for certain human rights, including:
 - civil and political rights drawn from the International Covenant on Civil and Political Rights
 - rights to health services and education drawn from the International Covenant on Economic, Social and Cultural Rights
 - property rights drawn from the Universal Declaration of Human Rights
 - cultural rights, in particular the distinct cultural rights of Aboriginal and Torres Strait Islander peoples
- ensure that public functions are exercised in a way that is compatible with human rights
- promote a dialogue about the nature, meaning and scope of human rights
- rename and empower the Anti-Discrimination Commission Queensland as the Queensland Human Rights Commission to:
 - provide a dispute resolution process for dealing with human rights complaints; and
 - promote an understanding, acceptance and public discussion of human rights³²⁶

The Bill was referred to Legal Affairs and Community Safety Committee for inquiry and report.³²⁷ The Committee received 149 written submissions and 135 form submissions and held a public hearing.³²⁸ Tabling its report on 4 February 2019, the Committee recommended passing the Bill, with a statement of reservation from opposition members about the “likely politicisation of litigation and the embroiling of the judiciary in political decision making”.³²⁹ Both government and non-government members noted the overwhelming support for the Bill from the vast majority of submitters.

The second reading debate took place over the 26 and 27 February, where the LNP opposition opposed the Bill on the grounds that it would transfer decisions on major policy issues from the legislature to the (un-elected) judiciary, that it would increase the power of the courts over the Parliament and that such issues should be decided by an elected Parliament, that it would be impossible to account for every single circumstance in a piece of legislation, and that “there is no evidence to suggest that a human rights act has provided any additional protection or helped service delivery to the vulnerable throughout the works...no one has been able to persuasively articulate the inadequacies in our current system...[so] no justification for the tilting of the balance of our separation of powers”.³³⁰

Pauline Hanson’s One Nation Party also opposed the Bill, while the Greens supported it, one Independent supported, and one Independent opposed. The opposition moved an amendment during the consideration in detail stage to remove the power of the courts to make a declaration of incompatibility about a statutory provision, but the time allocated for the Bill expired before the amendment could be voted on.³³¹

The Bill passed with a majority of 6 on 27 February 2019 and received assent on 7 March 2019.

³²⁶ Explanatory Notes <https://www.legislation.qld.gov.au/view/pdf/Bill.first.exp/Bill-2018-076>

³²⁷ <https://www.parliament.qld.gov.au/work-of-committees/committees/LACSC/inquiries/past-inquiries/HumanRights2018>

³²⁸ <https://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2019/5619T7.pdf>, page 1

³²⁹ Ibid, page 137

³³⁰ Queensland Parliament Hansard (26 February 2019) pages 379-380

https://www.parliament.qld.gov.au/documents/hansard/2019/2019_02_26_WEEKLY.pdf

³³¹ Queensland Parliament Hansard (27 February 2019) page 476

https://www.parliament.qld.gov.au/documents/hansard/2019/2019_02_27_WEEKLY.pdf

Policy process

Criterion 1 - Establish Need: Identify a demonstrable need for the policy, based on hard evidence and consultation with all the stakeholders involved, particularly interest groups who will be affected.

Guiding question: Is there a statement of why the policy was needed based on factual evidence and stakeholder input?

The government used the original inquiry by the Legal Affairs and Community Safety Committee to establish a demonstrable need for the policy. This inquiry looked at evidence and also consulted with stakeholders.

Criterion 2 - Set Objectives: Outline the public interest parameters of the proposed policy and clearly establish its objectives.

Guiding question: Is there a statement of the policy's objectives couched in terms of the public interest?

The government made the public interest argument that the Human Rights Act would protect the civil, political, social, and cultural rights of Queenslanders in the public sector.

Criterion 3 – Identify Options: Identify alternative approaches to the design of the policy, preferably with international comparisons where feasible. Engage in realistic costings of key alternative approaches.

Guiding question: Is there a description of the alternative policy options considered before the preferred one was adopted?

The first Legal Affairs and Community Safety Committee review compared the different approaches to human rights legislation in other jurisdictions, including the ACT, Victoria, New Zealand, and the United Kingdom.³³² In the Bill's Explanatory Notes, the government notes that it considered alternative ways of achieving its policy objectives, including constitutional (or entrenched) models of human rights legislation and representative (or parliamentary) models, before settling on the dialogue model.³³³

Criterion 4 – Consider Mechanisms: Consider implementation choices along a full spectrum from incentives to coercion.

Guiding question: Is there a disclosure of the alternative ways considered for implementing the chosen policy?

There is evidence in the second Legal Affairs and Community Safety Committee review that the government considered a range of implementation choices. For each element of the Bill, the review looked at the proposed law and noted any issues raised from submitters as well as a departmental response to those issues.

³³² <https://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2016/5516T1030.pdf>, pages 11-25

³³³ Explanatory Notes, pages 9-10 <https://www.legislation.qld.gov.au/view/pdf/Bill.first.exp/Bill-2018-076>

Criterion 5 – Brainstorm Alternatives: Consider the pros and cons of each option and mechanism. Subject all key alternatives to a rigorous cost-benefit analysis.

Guiding question: Is there a published analysis of the pros/cons and benefits/costs of the alternative options/mechanisms considered in 3 and 4?

There does not appear to be a published rigorous analysis of the pros and cons or benefits and costs of each option and mechanism.

Criterion 6 – Design Pathway: Develop a complete policy design framework including principles, goals, delivery mechanisms, program or project management structure, the implementation process and phases, performance measures, ongoing evaluation mechanisms and reporting requirements, oversight and audit arrangements, and a review process ideally with a sunset clause.

Guiding question: Is there evidence that a comprehensive project management plan was designed for the policy's rollout?

The Bill's Explanatory Notes contain many of the elements of a policy design framework including principles, goals, delivery mechanisms, implementation phases, ongoing evaluation and a review process with dates set for the first two statutory reviews.³³⁴

Criterion 7 – Consult Further: Undertake further consultation with key affected stakeholders of the policy initiative.

Guiding question: Was there further consultation with affected stakeholders after the preferred policy was announced?

The consultation that took place as part of the second Legal Affairs and Community Safety Committee review happened after the policy was announced.

Criterion 8 – Publish Proposals: Produce a Green and then a White paper for public feedback and final consultation purposes and to explain complex issues and processes.

Guiding question: Was there a) a Green paper seeking public input on possible policy options and b) a White paper explaining the final policy decision?

The two Legal Affairs and Community Safety Committee reviews, both of which were open for public submissions, could be seen as the equivalent of a Green/White paper process.

Criterion 9 – Introduce Legislation: Develop legislation and allow for comprehensive parliamentary debate especially in committee, and also intergovernmental discussion where necessary.

³³⁴ <https://www.legislation.qld.gov.au/view/pdf/Bill.first.exp/Bill-2018-076>

EVIDENCE BASED POLICY ANALYSIS

Guiding question: Was there legislation and adequate Parliamentary debate on the proposed policy initiative?

Legislation was introduced and debated in Parliament. However, the debate running out of time meant that amendments could not be introduced or voted on even though opposition members had foreshadowed that there would be amendments proposed.

Criterion 10 – Communicate Decision: Design and implement and clear, simple, and inexpensive communication strategy based on information not propaganda, regarding the new policy initiative.

Guiding question: Is there an online official media release that explains the final policy in simple, clear and factual terms?

There was an official media release when the Act passed³³⁵ and there is also a page on the Queensland Government website dedicated to the new Act, which outlines the public sector's obligations and different ways to make a complaint.³³⁶

Final scores

	Criterion	Yes/No
1	Establish Need (demonstrable, evidence-based need)	Yes
2	Set Objectives (public interest parameters)	Yes
3	Identify Options (consideration of alternatives)	Yes
4	Consider Mechanisms (implementation choices)	Yes
5	Brainstorm Alternatives (cost-benefit analysis)	No
6	Design Pathway (policy design framework)	Yes
7	Consult Further (further consultation after policy announcement)	Yes
8	Publish Proposals (produce Green then White paper, or equivalents)	Yes
9	Introduce Legislation (comprehensive parliamentary debate)	No
10	Communicate Decision (information not propaganda)	Yes
		8/10

³³⁵ <http://statements.qld.gov.au/Statement/2019/2/27/historic-day-for-queenslanders-as-human-rights-Bill-passes>

³³⁶ <https://www.qld.gov.au/law/your-rights/discrimination-and-equality/human-rights>

Final environmental approval for Adani's Carmichael mine

Policy background

The formal environmental assessment process for Adani's Carmichael mine has been a long and controversial process stretching back almost a decade.

Adani made its initial application for the Carmichael mine in central Queensland in October 2010. The Initial Advice Statement proposed the Carmichael Coal Mine and Rail Project as a combined greenfield open-cut coal mine and underground coal mine in the Galilee Basin, supported by rail facilities leading to coal export terminals, producing up to 60 million tons per annum of coal.³³⁷ At the time, Adani claimed the mine would create 4,000 jobs during construction and another 5,000 permanent jobs to operate the mine.³³⁸ The then Premier Anna Bligh declared the mine a "project of state significance"³³⁹ and the Queensland Coordinator-General declared it a "significant project", requiring Adani to produce an Environmental Impact Statement (EIS).³⁴⁰

Draft Terms of Reference for the EIS were released for public consultation from February to March 2011, with the final Terms of Reference released on 25 May 2011.³⁴¹ On 15 December 2012, Adani presented its full EIS for public consultation, directed by the Coordinator-General.³⁴² The Coordinator-General requested additional information and documentation for the EIS public consultation in March 2013, which was delivered in November 2013.³⁴³ At this point, Adani claimed to expect to create 2,475 jobs during the construction phase and 3,920 jobs during the operational phase (2,605 fewer jobs than previously claimed).³⁴⁴

In May 2014, the Coordinator-General gave initial approval to the EIS but placed 190 conditions on the approval.³⁴⁵ Among those 190 conditions were a requirement for Adani to submit a Species Management Plan for the black-throated finch that determined any impact of the Carmichael project on the finch, and a requirement for Adani to develop and implement a Groundwater Dependent Ecosystems Management Plan to detail how it would manage threats to groundwater dependent ecosystems in the area.³⁴⁶

In April 2015, environmental organisation Coast and Country took Adani to the Land Court of Australia in an attempt to block the Carmichael project receiving the two other types of approval it needed, the mining lease and the environmental authority for the mine (this approval, under Queensland's Environmental Protection Act, is different from the approval process we have been discussing so far, which

³³⁷ <http://www.statedevelopment.qld.gov.au/resources/project/carmichael/initial-advice-statement.pdf>, page 2

³³⁸ Ibid page 5

³³⁹ <https://www.brisbanetimes.com.au/national/queensland/adani-clears-last-major-hurdle-for-controversial-mine-20190613-p51x8n.html>

³⁴⁰ <http://www.statedevelopment.qld.gov.au/resources/project/carmichael/gazette-notice-carmichael-coal-project-declaration-26-november-2010.pdf>

³⁴¹ <http://www.statedevelopment.qld.gov.au/resources/project/carmichael/tor-carmichael-coal-mine-and-rail.pdf>

³⁴² <http://www.statedevelopment.qld.gov.au/coordinator-general/assessments-and-approvals/coordinated-projects/completed-projects/carmichael-coal-mine-and-rail-project/eis-documents.html>

³⁴³ <http://www.statedevelopment.qld.gov.au/coordinator-general/assessments-and-approvals/coordinated-projects/completed-projects/carmichael-coal-mine-and-rail-project/supplementary-eis-documents.html>

³⁴⁴ Ibid, page x

³⁴⁵ <http://www.statedevelopment.qld.gov.au/resources/project/carmichael/carmichael-coal-mine-and-rail-cg-report-may2014.pdf>

³⁴⁶ Ibid, pages 372-373

takes place under Queensland's Environment Protection and Biodiversity Conservation Act).³⁴⁷ However, the Land Court's decision in December 2015 recommended that the environmental authority and mining lease be granted, which they were in February and April 2016. In court, Adani's economics expert again revised down the job creation estimations, saying the project would create just 1,464 jobs in Australia, of which 1,206 would be in Queensland (more than 7,500 fewer jobs than initially claimed).³⁴⁸

In October 2015, then Commonwealth Minister for the Environment Greg Hunt MP approved the federal components of the EIS but set 36 strict conditions.³⁴⁹ Among the 36 conditions were similar requirements for Adani to submit a Groundwater Management and Monitoring Plan and meet a series of offset requirements for threatened species, which included the black-throated finch.³⁵⁰

As Adani worked to meet the various conditions over the next few years, public campaigns, protests, and legal challenges kept the controversial project in the news. In October 2018, the United Nations body for climate change, the Intergovernmental Panel on Climate Change, released a report that called for the total phasing out of coal-generated electricity and included a specific warning about the impact of coal burning in Queensland on the Great Barrier Reef, which it said faced total destruction.³⁵¹

By November 2018, environmental concerns about the Carmichael project had mostly crystallised around two issues: protecting the endangered black-throated finch; and protecting groundwater and aquifers near ancient desert springs near the proposed mine.³⁵²

In January 2019, Adani provided drafts of both groundwater management plans. The federal Department of the Environment and Energy referred the federal draft to Geoscience Australia and CSIRO for advice.³⁵³ Their final report, delivered in February 2019, was highly critical, arguing that the modelling Adani used to underpin the plan was "not suitable to ensure the outcomes sought by the Environmental Protection and Biodiversity Protection Act are met" and Adani's approach was "not sufficiently robust to monitor and minimise impacts to protected environments."³⁵⁴

Despite that advice, and under pressure from Queensland colleagues and the upcoming federal election, the then Commonwealth Minister for the Environment Melissa Price approved the federal elements of Adani's groundwater plan in April 2019.³⁵⁵ The equivalent Queensland department did not follow suit; in fact, Queensland's environment minister Leeanne Enoch later said that Queensland regulators had

³⁴⁷ <http://envlaw.com.au/carmichael-coal-mine-case/>

³⁴⁸ <https://www.brisbanetimes.com.au/national/queensland/adani-carmichael-mine-to-create-1464-jobs-not-10000-20150427-1mumbg.html>

³⁴⁹ <http://epbcnotices.environment.gov.au/entity/annotation/0b3953c8-e472-e511-a947-005056ba00a8/a71d58ad-4cba-48b6-8dab-f3091fc31cd5?t=1567407470628>

³⁵⁰ Ibid, pages 2, 6

³⁵¹ <https://www.smh.com.au/politics/federal/major-climate-report-expected-to-call-for-coal-shut-down-by-2050-20181007-p508a2.html>

³⁵² <https://www.brisbanetimes.com.au/national/queensland/adani-clears-last-major-hurdle-for-controversial-mine-20190613-p51x8n.html>

³⁵³ <http://www.environment.gov.au/system/files/pages/cb8a9e41-eba5-47a4-8b72-154d0a5a6956/files/csiro-geoscience-australia-final-advice.pdf>, page 1

³⁵⁴ Ibid pages 3, 9

³⁵⁵ <https://www.abc.net.au/news/2019-04-09/adani-gains-commonwealth-groundwater-approval/10984134>

required significant improvements to the document and that the federal government's decision to approve the plan immediately prior to the federal election "reeked of political interference."³⁵⁶

With the groundwater plan approved at the federal level but requiring improvements at the state level, the country went into the federal election on 18 May 2019. Federal Labor lost that election, lost two seats in Queensland, and experienced significant swings against them in "Adani country" marginal seats, turning them into safe LNP seats.³⁵⁷ These results were publicly perceived to be linked to both federal and state Labor's position on the Carmichael project.

In the aftermath of the election, Queensland Premier Anastacia Palaszczuk ordered new, tighter deadlines for Adani and the state government to come to a final agreement on the outstanding groundwater and black-throated finch plans.³⁵⁸ Despite Adani's black-throated finch plan having been judged inadequate and rejected less than a month earlier, at the end of May the Queensland Government gave the plan the green tick.³⁵⁹

The final environmental approval Adani needed was for the groundwater plan. Queensland's Department of Environment and Science said that it received further clarification and advice from CSIRO and Geoscience Australia on 7 June 2019 that satisfied the department on that plan.³⁶⁰ Two days later, a group of seven pre-eminent Australian groundwater scientists from four universities, who had examined the latest plan and conducted on-site analysis, warned that Adani's protections were "flawed" and that the rare desert oasis may dry up under Adani's plan.³⁶¹ Nevertheless, the final environmental approval for Adani's Carmichael mine was granted on 13 June 2019.³⁶²

The most recent estimate of Adani's job creation at the Carmichael mine, according to Nationals MP Brigid McKenzie at the end of 2018, is for 100 ongoing jobs.³⁶³

Policy process

Criterion 1 - Establish Need: Identify a demonstrable need for the policy, based on hard evidence and consultation with all the stakeholders involved, particularly interest groups who will be affected.

Guiding question: Is there a statement of why the policy was needed based on factual evidence and stakeholder input?

The government did not establish a demonstrable need for Adani to receive its final environmental approval for the Carmichael project. In fact, the research it commissioned from CSIRO and Geoscience

³⁵⁶ <https://www.theguardian.com/australia-news/2019/jun/14/queensland-says-federal-water-decision-on-adani-reeked-of-political-interference>

³⁵⁷ <https://www.abc.net.au/news/2019-05-19/election-results-how-labor-lost-queensland/11122998>

³⁵⁸ <https://www.brisbanetimes.com.au/politics/queensland/deadline-set-for-adani-approvals-20190524-p51qq8.html>

³⁵⁹ <https://theconversation.com/adanis-finch-plan-is-approved-just-weeks-after-being-sent-back-to-the-drawing-board-118114>

³⁶⁰ <https://www.des.qld.gov.au/our-department/news-media/mediareleases/2019-06-13-gdemp-approved>

³⁶¹ <https://www.brisbanetimes.com.au/politics/federal/scientists-warn-ancient-desert-springs-may-dry-up-under-adani-plan-20190608-p51vqn.html>

³⁶² <https://www.brisbanetimes.com.au/national/queensland/adani-clears-last-major-hurdle-for-controversial-mine-20190613-p51x8n.html>

³⁶³ <https://www.abc.net.au/news/2019-04-26/what-we-know-about-adanis-carmichael-coal-mine-project/11049938>

EVIDENCE BASED POLICY ANALYSIS

Australia, as well as feedback from multiple stakeholders, indicated that the evidence pointed against the demonstrable need for the mine's approval.

Criterion 2 - Set Objectives: Outline the public interest parameters of the proposed policy and clearly establish its objectives.

Guiding question: Is there a statement of the policy's objectives couched in terms of the public interest?

The government did not make a statement about the policy's objectives couched in terms of the public interest. The only media statement regarding the final approval came from the Queensland Department of Environment and Science, and this statement does not outline the government's objectives in approving the project or identify a public interest element to the decision to approve.³⁶⁴

Criterion 3 – Identify Options: Identify alternative approaches to the design of the policy, preferably with international comparisons where feasible. Engage in realistic costings of key alternative approaches.

Guiding question: Is there a description of the alternative policy options considered before the preferred one was adopted?

Since Adani submitted 11 versions of its groundwater plan before it was approved by the state government, it can be presumed that the government considered alternative approaches to the plan before approving it.

Criterion 4 – Consider Mechanisms: Consider implementation choices along a full spectrum from incentives to coercion.

Guiding question: Is there a disclosure of the alternative ways considered for implementing the chosen policy?

As the government asked Adani to make amendments to its groundwater plan on numerous occasions before approving it, it can be presumed that the government considered various implementation mechanisms before approving the plan.

Criterion 5 – Brainstorm Alternatives: Consider the pros and cons of each option and mechanism. Subject all key alternatives to a rigorous cost-benefit analysis.

Guiding question: Is there a published analysis of the pros/cons and benefits/costs of the alternative options/mechanisms considered in 3 and 4?

There is no published analysis of the pros and cons or costs and benefits of alternative approaches or mechanisms. Adani's plan itself is not available publicly, and nor is the final advice delivered by CSIRO and Geoscience Australia on 7 June 2019.

³⁶⁴ <https://www.des.qld.gov.au/our-department/news-media/mediareleases/2019-06-13-gdemp-approved>

Criterion 6 – Design Pathway: Develop a complete policy design framework including principles, goals, delivery mechanisms, program or project management structure, the implementation process and phases, performance measures, ongoing evaluation mechanisms and reporting requirements, oversight and audit arrangements, and a review process ideally with a sunset clause.

Guiding question: Is there evidence that a comprehensive project management plan was designed for the policy's rollout?

While we might presume that Adani's plan contains a project management plan, there does not appear to be a comprehensive project management plan from the government regarding Adani's rollout of the Carmichael project and the government's ongoing role in oversight and review.

Criterion 7 – Consult Further: Undertake further consultation with key affected stakeholders of the policy initiative.

Guiding question: Was there further consultation with affected stakeholders after the preferred policy was announced?

Although there was an initial round of public consultation on the EIS back in 2012-2013, there does not appear to have been public or stakeholder consultation on the groundwater plan specifically between its first draft and its approval. CSIRO and Geoscience Australia were asked for advice, but in their only published review of the groundwater plan, they reject it as inadequate.

Criterion 8 – Publish Proposals: Produce a Green and then a White paper for public feedback and final consultation purposes and to explain complex issues and processes.

Guiding question: Was there a) a Green paper seeking public input on possible policy options and b) a White paper explaining the final policy decision?

The government did not publish a Green or White paper or equivalent seeking public feedback or explaining its final decision to approve Adani's groundwater plan.

Criterion 9 – Introduce Legislation: Develop legislation and allow for comprehensive parliamentary debate especially in committee, and also intergovernmental discussion where necessary.

Guiding question: Was there legislation and adequate Parliamentary debate on the proposed policy initiative?

The decision was not legislated or debated in Parliament.

Criterion 10 – Communicate Decision: Design and implement a clear, simple, and inexpensive communication strategy based on information not propaganda, regarding the new policy initiative.

Guiding question: Is there an online official media release that explains the final policy in simple, clear and factual terms?

EVIDENCE BASED POLICY ANALYSIS

There is an online official media release that explains the state government's decision to approve the groundwater plan.³⁶⁵

Final scores

	Criterion	Yes/No
1	Establish Need (demonstrable, evidence-based need)	No
2	Set Objectives (public interest parameters)	No
3	Identify Options (consideration of alternatives)	Yes
4	Consider Mechanisms (implementation choices)	Yes
5	Brainstorm Alternatives (cost-benefit analysis)	No
6	Design Pathway (policy design framework)	No
7	Consult Further (further consultation after policy announcement)	No
8	Publish Proposals (produce Green then White paper, or equivalents)	No
9	Introduce Legislation (comprehensive parliamentary debate)	No
10	Communicate Decision (information not propaganda)	Yes
		3/10

³⁶⁵ <https://www.des.qld.gov.au/our-department/news-media/mediareleases/2019-06-13-gdemp-approved>

Concluding thoughts

Comparing 2018 and 2019

Now that we have two years of analysis for this project, we can start to make year on year comparisons. Last year 11 out of 20 policies passed the Wiltshire test, while only 10 policies passed this year. 1 fewer federal policy passed, 2 fewer Victorian policies passed, the same number of NSW policies passed, and 1 more policy passed in Queensland.

Notably, Queensland was the only jurisdiction included to not have an election during the time period considered. The fact that Queensland did better this year, while the country as a whole performed worse, may be a comment on the nature of election policymaking, which may be more likely to be carried out 'on the run'. Certainly, among the policies discussed above, there are a number that were introduced to Parliament very shortly before an election and were perceived to have been 'rushed through'.

Are state governments better at making policy?

Last year, state governments outperformed the federal government against the Wiltshire criteria, with the Victorian government in particular performing well with all of its policies passing the Wiltshire test. This year, the pattern was repeated, with 5 out of the 6 highest scoring policymaking processes happening in state governments.

This trend of state governments performing better can possibly be attributed to there being more mechanisms for detailed considering of policies at the state level. For example, in the Queensland Parliament (which performed best this year), standing orders require bills to be referred to joint parliamentary committees for consultation and review. In Victoria, the committee stage of debate often requires bills to be debated clause by clause, allowing for more thorough parliamentary consideration. In general, there appears to be more time for debate at the state level, with MPs regularly debating bills into the early hours of the morning over a number of days. This report also found that state governments, particularly Queensland and Victoria, were more likely to engage in public consultation than the federal government.

Does policy suffer when everyone agrees?

Another interesting angle on this analysis is to compare the performance of policies that were controversial or engendered significant debate with those that were not or that enjoyed bipartisan support.

As an example, Victoria's controversial changes to residential tenancy laws, which the government anticipated would be opposed by landlords, businesses, and the Opposition, were subject to rigorous mechanisms to ensure they were watertight, including a four-year review process that included a consultation paper, six issue papers, and an options paper, as well as a clause by clause debate at committee stage. The policy scored 9/10 against the Wiltshire criteria.

By contrast, NSW's laws to criminalise cyberbullying, developed in response to the tragic death of a young girl, were uncontroversial and supported by almost all MPs. As a result, the policy was not subject to the same rigorous mechanisms; there was no attempt to provide evidence that the policy would work; no review process; no policy design framework; no consultation; and no Green/White paper process. The policy scored 3/10 against the Wiltshire criteria.