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EVIDENCE BASED POLICY RESEARCH PROJECT 2021

A report for the Evidence Based Policy Research Project

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Introduction¹

Australia's governments, both state and federal, are failing to undertake best practice policy making. This failure is undermining the quality of public policy and is having a detrimental impact on faith in public institutions. Public policy in Australia is often made on the run, built on shabby foundations, motivated by short term political gain, and consequently has mediocre outcomes. Policymakers face the challenge of limited knowledge, and must remedy this by gathering evidence on the nature of the problem, alternatives to fix the problem and undertake public consultation on the impact of policies. Good process does not guarantee good policy – but bad process has a much higher chance of producing lower quality, uninformed, and harmful policy outcomes.

The challenge of limited knowledge

The core difficulty of limited knowledge faced by policymakers is outlined in economist and Nobel prize winner Friedrich A. Hayek's *The Use of Knowledge in Society*.² Hayek argues, in the context of central economic planning, that "knowledge of the circumstances of which we must make use never exists in concentrated or integrated form but solely as the dispersed bits of incomplete and frequently contradictory knowledge which all the separate individuals possess." The core challenge, therefore, is the "utilization of knowledge which is not given to anyone in its totality."

A good policy making process attempts to address the knowledge problem by gathering a substantial quantity of evidence, consulting widely, and considering different options. This process, however, is inherently difficult. This is because, as political scientist Herbert Simon outlined, humans suffer from 'bounded rationality'. Policymakers are humans who cannot weigh all costs and benefits of all policy options, and instead, due to limited time, cognitive ability, and knowledge, policymakers must selectively address a limited set of issues and policy options at any time.

It is essential that policymakers are humble and self-aware of their limitations.³ Acknowledging uncertainty, and seeking out more information is an absolute necessity in the context of limited knowledge. A good public policy process includes the establishment of the facts, identifying alternative policy options (including maintaining the status quo), weighing the pros and cons both quantitatively and qualitatively, and an open consultation with the public and stakeholders - all before the policy decision is finalised or legislation is developed. Subsequently, the decision would be communicated clearly with ample planning for implementation and review of the policy.

1 This introduction is based on previous Institute of Public Affairs reports to the Evidence Based Research Project.

2 Friedrich. A. Hayek, "The Use of Knowledge in Society," *The American Economic Review*, 1945, vol. 35, no. 4, pp. 519–530.

3 For discussion of humility and policymaking, see Sheila Jasanoff, "Technologies of Humility: Citizen Participation in Governing Science," *Minerva*, vol. 41, no. 3, <https://doi.org/10.1023/A:1025557512320>.

A failure of process

There is substantial evidence that decisions are being made on an ad hoc basis, responding to immediate political concerns without the full analysis of alternatives, potential implications and consideration of implementation strategies and a policy design framework. As the Institute of Public Administration Australia's *Public Policy Drift* paper found, "there is pressure for senior politicians in governments and oppositions to make decisions quickly and confidently in order to appear decisive, pander to populist ideas to appear responsive, manufacture wedge issues to distinguish themselves from their opponents, and to put a spin on everything to exaggerate its significance."⁴ Additionally, bureaucrats themselves are humans with preferences, which include both their own concept of what is the public good, and natural human interests in improving their salary, work conditions, and power.⁵ The failure of process has wider institutional implications for Australia's system of government. Professor Gary Banks, former Dean of the Australia and New Zealand School of Government and former Chairman of the Productivity Commission, has argued that policy development and administration is "integral to how government is perceived by the public".⁶ While the public may, rationally, have limited interest in the specifics of policy processes they do expect best practice policymaking. It is therefore likely that the failure to follow best practice is contributing to Australia's political discontent and loss of faith in democracy and key institutions.⁷ The Lowy Institute's 2019 poll found that just 13% of Australians are very satisfied with how democracy is working, while 30% are dissatisfied.⁸

Analysis

The Institute of Public Affairs, for the fourth year running, has undertaken analysis of 20 public policies using the ten criteria of the Wiltshire test for good policymaking. This research project was commissioned "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" shown 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).

4 Institute of Public Administration Australia, "Public Policy Drift: Why governments must replace 'policy on the run' and 'policy by fiat' with a 'business case' approach to regain public confidence," IPAA Public Policy Discussion Paper, 4 April 2012, <https://www.howardpartners.com.au/assets/public-policy-drift.pdf>, p. vi.

5 For the classic theory on this issue, see Gordon Tullock, *The Politics of Bureaucracy*, Public Affairs Press, 1965; William A. Niskanen, "The Peculiar Economics of Bureaucracy," *The American Economic Review*, 1968, vol. 58, no. 2, pp. 293–305.

6 Gary Banks, The Sir Robert Garran Oration Restoring Trust in Public Policy: What Role for the Public Service?, 21 November 2013, <https://www.ipaa.org.au/wp-content/uploads/2019/06/2013-Garran-Oration-Gary-Banks.pdf>, p. 2.

7 Australian National University, "Voter interest hits record low in 2016 - ANU Election Study," 20 December 2016, <https://www.anu.edu.au/news/all-news/voter-interest-hits-record-low-in-2016-anu-election-study>.

8 Lowy Institute, "Democracy," Lowy Institute Poll 2019, 2019, <https://lowyinstitutepoll.lowyinstitute.org/themes/democracy/#theme-description-democracy-democracy>.

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.
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.

A series of questions have been designed to specifically evaluate these criteria in this analysis:

1. **Need:** Is there a statement of why the policy was needed based on factual evidence and stakeholder input?
2. **Objectives:** Is there a statement of the policy's objectives couched in terms of the public interest?
3. **Options:** Is there a description of the alternative policy options considered before the preferred one was adopted?
4. **Mechanisms:** Is there a disclosure of the alternative ways considered for implementing the chosen policy?
5. **Analysis:** Is there a published analysis of the pros/cons and benefits/costs of the alternative options/mechanisms considered in 3 and 4?
6. **Pathway:** Is there evidence that a comprehensive project management plan was designed for the policy's rollout?

7. **Consultation:** Was there further consultation with affected stakeholders after the preferred policy was announced?
8. **Papers:** Was there (a) a Green paper seeking public input on possible policy options and (b) a White paper explaining the final policy decision?
9. **Legislation:** Was the policy initiative based on new or existing legislation that enabled comprehensive parliamentary debate and public discussion?
10. **Communication:** Is there an online official media release or website that explains the final policy in simple, clear and factual terms?

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. This analysis has found that both state and federal governments are failing to consistently apply best practice in the development of public policy.

Ten of the 20 policies assessed were assessed to have met most of the Wiltshire Criteria. The other 10 policies failed the test.

The following policies were assessed to have followed more than five of the Wiltshire Criteria:

- Federal: Fair Work Amendment (7/10)
- Federal: Federal Circuit and Family Court (8/10)
- Federal: Drug Testing Trial (6/10)
- Federal: Freedom of Speech (7/10)
- Federal: Corporate Insolvency (8/10)
- NSW: Domestic Violence Reforms (6/10)
- NSW: Electricity Infrastructure (6/10)
- Queensland: Child Sexual Offences Reform (7/10)
- Queensland: Wage Theft (6/10)
- Queensland: Forest Wind Farm Development (8/10)

These policies were typically based on a demonstrable evidence-based need, included wider consultation, were communicated and legislation was developed.

The following policies were found to have followed five or fewer of the Wiltshire Criteria:

- Federal: Strengthening Income Support (4/10)
- Federal: Digital Platform Bargaining Code (5/10)
- Federal: JobMaker Hiring Credit (4/10)
- NSW: Bushfires Legislation (3/10)
- NSW: COVID-19 Recovery (5/10)
- Victoria: Drug Court (3/10)
- Victoria: Conversion Practices Prohibition (5/10)
- Victoria: Public Drunkenness (5/10)

- Victoria: Constitutional Fracking Ban (2/10)
- Queensland: Future Fund (5/10)

These policies typically lacked an evidence-based assessment of need, consideration of alternatives, cost-benefit analyses, a clear policy design framework, or a full consultation process.

Limitations

There are several limitations of this analysis. The EBP project required analysis of a large number of policies in a short period of time. This analysis is limited to publicly available documents and news reports. It is possible that there were further private consultations between the government and stakeholders, or additional analysis of policy alternatives, that are not accounted for in public documents, and therefore not reflected in the below analysis. In other words, just like policy development suffers from the knowledge problem, this analysis also struggles with the same limitation. Nevertheless, as a premise, a good public policy process requires transparency and openness. If there was additional process behind closed doors this in itself could be considered a worrying sign. Best practice policy making is transparent and should therefore be easy to access. This project has demonstrated that there is a need for transparency.

Governments could improve the ability to undertake the analysis of the Evidence Based Policy Research Project, and provide the public with greater assurance about policy process, by including in explanatory memorandums specific sections explaining the background of the policy. The Commonwealth explanatory memorandums include some sections discussing whether a regulatory impact statement has been undertaken and the genesis of the policy process. In Queensland, there is an explicit "Consultation," "Alternative ways of achieving policy objectives" and "Estimated cost for government implementation" (though not cost-benefit) sections. These sections could be expanded at the Commonwealth and Queensland levels and introduced in New South Wales and Victoria to specifically address whether the Wilshire criteria has been met.

Additionally, the rise of delegated legislation poses a serious problem for those concerned with evidence-based policymaking, and those concerned with democratic legitimacy of public policy and parliamentary scrutiny more broadly. The Institute of Public Affairs has expressed its concern about the rise of delegated legislation in the past, and particularly the rise of delegated legislation that is exempt from the Senate's disallowance process and which has "undermined parliament's role in scrutinising executive actions and enabled the executive to circumvent the democratic process."⁹

The Senate Legal and Constitutional Affairs References Committee expressed similar concerns in its final report of the inquiry into nationhood, national identity and democracy, noting that

9 Dara Macdonald and Morgan Begg, "Bypassing Democracy: A Report on The Exemption Of Delegated Legislation From Parliamentary Oversight," Institute of Public Affairs, June 2020, <https://ipa.org.au/wp-content/uploads/2020/08/Bypassing-Democracy-A-report-on-the-exemption-of-delegated-legislation-from-parliamentary-oversight.pdf>.

Nearly half of all legislation is now delegated legislation, and some of it cannot be disallowed by parliament. That figure must be reduced if the government is to restore trust in its accountability to the people's elected representatives.¹⁰

Delegated legislation does not fall under the purview of this study, which imposes a significant limitation over the range of legislation the Institute of Public Affairs was able to review. Additionally, delegated legislation does not maintain the same standard of democratic legitimacy because it is not subject to the same level of public or parliamentary scrutiny as ordinary legislation which must pass through the parliament. The preference in a democracy should always be for rules that are deliberated in the parliament, rather than for those that are unilaterally enacted by the executive branch.

¹⁰ Legal and Constitutional Affairs References Committee, "Nationhood, national identity and democracy, final report," The Senate, 2021, https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024372/toc_pdf/Nationhood,nationalidentityanddemocracy.pdf;fileType=application%2Fpdf, p. xvi.

Summary of Findings

Policy	Establish need	Set objectives	Identify options	Consider mechanisms	Brainstorm alternatives	Design pathway	Consult further	Publish proposals	Introduce legislation	Communicate decision	Total
Federal: Fair Work Amendment	Y	Y	Y	Y	Y	Y	Y	N	N	N	7
Federal: Federal Circuit and Family Court	Y	Y	Y	Y	N	N	Y	Y	Y	Y	8
Federal: Strengthening Income Support	Y	Y	N	N	N	N	N	N	Y	Y	4
Federal: Digital Platform Bargaining Code	N	N	N	Y	N	Y	Y	Y	Y	N	5
Federal: JobMaker Hiring Credit	Y	Y	N	N	N	N	N	N	Y	Y	4
Federal: Drug Testing Trial	Y	Y	N	N	N	Y	Y	N	Y	Y	6
Federal: Freedom of Speech	Y	Y	N	Y	N	Y	Y	N	Y	Y	7
Federal: Corporate Insolvency	Y	Y	Y	N	Y	N	Y	Y	Y	Y	8
NSW: Bushfires Legislation	Y	Y	N	N	N	N	N	N	Y	N	3
NSW: Domestic Violence Reforms	Y	Y	N	N	N	Y	Y	N	Y	Y	6
NSW: Electricity Infrastructure	N	Y	N	Y	N	Y	N	Y	Y	Y	6
NSW: COVID-19 Recovery	Y	Y	N	Y	N	Y	N	N	Y	N	5
Victoria: Drug Court	Y	Y	N	N	N	N	N	N	Y	N	3
Victoria: Conversion Practices Prohibition	N	Y	Y	Y	N	N	N	N	Y	Y	5
Victoria: Public Drunkenness	N	Y	N	N	N	N	Y	Y	Y	Y	5
Victoria: Constitutional Fracking Ban	N	N	N	N	N	N	N	N	Y	Y	2
Queensland: Child Sexual Offences Reform	Y	Y	N	N	N	Y	Y	Y	Y	Y	7
Queensland: Wage Theft	Y	Y	N	N	N	N	Y	Y	Y	Y	6
Queensland: Future Fund	Y	Y	N	Y	N	N	N	N	Y	Y	5
Queensland: Forest Wind Farm Development	Y	Y	Y	Y	Y	N	Y	Y	Y	N	8

Commonwealth

Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020

The *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020*, commonly referred to as the 'Omnibus Bill', amended the *Fair Work Act 2009* with the aim of supporting Australia's economic recovery from the 2020 recession. It included nine major changes, outlined in the Explanatory Memorandum as:

- Providing certainty to businesses and employees about casual employment.
- Giving regular casual employees a statutory pathway to ongoing employment by including a casual conversion entitlement in the National Employment Standards (NES) of the Fair Work Act.
- Extending two temporary JobKeeper flexibilities to businesses, in identified industries significantly impacted by the pandemic.
- Giving employers confidence to offer part-time employment and additional hours to employees, promoting flexibility and efficiency.
- Streamlining and improving the enterprise agreement making and approval process to encourage participation in collective bargaining.
- Ensuring industrial instruments do not transfer where an employee transfers between associated entities at the employee's initiative.
- Providing greater certainty for investors, employers and employees by allowing the nominal life of greenfields agreements made in relation to the construction of a major project to be extended.
- Strengthening the Fair Work Act compliance and enforcement framework to address wage underpayments, ensure businesses have the confidence to hire and ensure employees receive their correct entitlements.
- Introducing measures to support more efficient Fair Work Commission (FWC) processes.

Ultimately, the government was unable to pass the Bill as first drafted through Parliament. The only component from the list of nine identified above to make it into legislation was the changes to the nature of casual work.¹¹ The Bill as passed provided a definition of casual work, a statutory pathway for casual workers to become ongoing employees, and clarified the entitlements of casual workers. As summarised in the Regulatory Impact Statement contained in the Explanatory Memorandum for the Bill:

Despite having a long industrial history in Australia, the current legal framework around casual employment... does not provide certainty or confidence for employers or employees to use casuals as a genuine employment option.

¹¹ Tom Lowry, Emily Baker and Stephanie Dalzell, "Government abandons bulk of industrial relations package in effort to save definition of casual work," ABC News, 18 March 2021, <https://www.abc.net.au/news/2021-03-18/industrial-relations-changes-pass-parliament-casual-work/13259566>.

Prior to the Bill, for example, the term ‘casual employee’ was not defined in legislation but instead was based on common law rulings. In recent years, this has started to create issues of uncertainty for employers. For example, a Federal Court ruling in May 2020 held that regular, ongoing casual workers were entitled to various paid leave entitlements in addition to any benefits paid for being casual workers (most prominently, the hourly pay premium known as ‘casual loading’), that employers would be liable to back-pay these entitlements, and that these entitlements could not be offset by casual loading that employers paid to their casual employees.¹² This ruling upheld a previous one regarding the entitlements of casual workers¹³ and was expected to impact between 1.6 and 2.2 million casual workers¹⁴ and expose employers to between \$18 and \$39 billion in retrospective back-pay liabilities.¹⁵ These rulings were expected to have a very broad impact across the economy, and especially on small businesses and their employees. It was widely acknowledged that this issue would need to be addressed, particularly in the wake of the COVID-19 pandemic which caused significant labour market disruption. In August 2021, the High Court overturned the Federal Court ruling in a unanimous decision which was described as a “vindication of the Morrison government’s workplace reforms”.¹⁶

On 11 June 2020, the Commonwealth Government established five working groups to discuss options to improve Australia’s industrial relations system by looking at five areas for reform: casuals and fixed term employees, award simplification, enterprise agreement making, compliance and enforcement, and greenfields agreements for new enterprises.¹⁷ The casuals and fixed term employees working group was comprised of: the Australian Chamber of Commerce and Industry; Ai Group; Council of Small Business Associations of Australia; Australian Retailers Association; Australian Higher Education Industrial Association; the Australian Council of Trade Unions; National Tertiary Education Union; Australian Nursing and Midwifery Federation; United Workers Union; Health Services Union; along with representatives of the Commonwealth government. The members of the working group were also welcomed to invite third party organisations and individuals to provide advice, expert evidence and real-world perspectives.¹⁸

12 Federal Court of Australia, *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84.

13 Federal Court of Australia, *WorkPac Pty Ltd v Skene* [2018] FCAFC 131.

14 David Martin-Guzman, “Court upholds casuals ‘double dipping’ precedent,” *Australian Financial Review*, 20 May 2020, <https://www.afr.com/work-and-careers/workplace/late-court-upholds-casuals-double-dipping-precedent-20200520-p54utr>.

15 Regulatory Impact Statement, *Fair Work Amendment (Supporting Australia’s Jobs and Economic Recovery) Bill 2020*, https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6653_ems_25563409-64de-4650-b28f-2f5b1084c374/upload_pdf/JC000766.pdf;fileType=application%2Fpdf, pp. vii-viii.

16 David Marin-Guzman, “High Court rejection of casual backpay ‘far-reaching’,” *Australian Financial Review*, 4 August 2021, <https://www.afr.com/work-and-careers/workplace/high-court-rejection-of-casual-backpay-far-reaching-20210804-p58fpb>.

17 Attorney-General for Australia and Minister for Industrial Relations, “Memberships of IR working groups announced,” Media release, 11 June 2020, <https://webarchive.nla.gov.au/awa/20210325235041/https://www.attorneygeneral.gov.au/media/media-releases/memberships-ir-working-groups-announced-11-june-2020>.

18 Ibid.

	Criteria	Conclusion	Comment
1	Establish need	Yes	The Bill encompassed responses to a range of issues which were broadly acknowledged as significant issues in Australia's industrial relations system. For example, a response to common law developments was needed to prevent employers from becoming retrospectively liable for further entitlements and provide greater certainty to employees and employers around the nature of casual work. Additionally, the issue of incorrect wage payments, often referred to in public debates as 'wage theft', had become notable some time before the Bill was introduced.
2	Set objectives	Yes	Objectives were clearly stated in terms of the public interest in the context of the economic recovery from the 2020 recession.
3	Identify options	Yes	The Regulatory Impact Statement provided different policy options, including maintaining the status quo, which were outlined for each major area of change proposed in the Bill.
4	Consider mechanisms	Yes	The different policy options included a discussion of to what extent the desired outcome could be achieved through different means.
5	Brainstorm alternatives	Yes	Cost benefit analyses of different major components of the Bill were undertaken as part of the Regulatory Impact Statement.
6	Design pathway	Yes	A clear pathway for the design, implementation, and review of the policies were outlined in the Explanatory Memorandum. These ranged from the working groups initially consulted on how to address the issues to a commitment that "The Attorney-General's Department will monitor ABS data on casual employment as well as any disputes before the FWC or courts regarding the operation of the new provisions," and that "The department will... continue to engage in stakeholder consultation with employer groups and unions to gauge the impact of reforms." ¹⁹
7	Consult further	Yes	Working groups were established prior to the drafting and introduction of the legislation.

¹⁹ Regulatory Impact Statement, *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020*, https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6653_ems_25563409-64de-4650-b28f-2f5b1084c374/upload_pdf/JC000766.pdf;fileType=application%2Fpdf, p. xxvii.

8	Publish proposals	No	No discussion papers were released, and outside of the initial working groups and amendments in Parliament, there was no mechanism for public feedback/consultation.
9	Introduce legislation	No	Although legislation was introduced to Parliament, debate was limited and the Bill that passed was substantially different to the one introduced.
10	Communicate decision	No	Media coverage of the Omnibus Bill was extensive, but while there was a media release from the Fair Work Commission there was no such release from the Commonwealth explaining the changes to the <i>Fair Work Act 2009</i> .
		7/10	

Federal Circuit and Family Court of Australia Bill 2019

The *Federal Circuit and Family Court of Australia Bill 2019* was designed to merge the Family Court of Australia and the Federal Circuit Court under a new, overarching, unified administrative structure known as the Federal Circuit and Family Court of Australia (FCFC). The Bill was first introduced into Parliament in 2018, but due to the prorogation of the 45th Parliament ahead of the 2019 election, that Bill expired before it passed both Houses. The 2019 version, which had some differences to the 2018 version, was introduced to Parliament in December 2019. The Bill should be seen as one part of the Commonwealth Government's broader family law system reform agenda.²⁰ As explained in the Explanatory Memorandum issued in conjunction with the Bill, the intention was to:

- Create a consistent pathway for Australian families in having their family law disputes dealt with in the federal courts.
- Improve the efficiency of the federal court system.
- Ensure outcomes for Australian families are resolved in the most timely, informed and cost effective manner possible.²¹

According to the Attorney-General's Department, the problem the Bill would address is that both the Family Court and the Federal Circuit Court "maintain almost the same jurisdiction in family law (except for some limited application types such as nullity of marriage), but have very different rules and processes to deal with the same matters," leading to unnecessary confusion, delay, and costs.²² The Department explained that the reforms "will increase the efficiency of the courts in dealing with family law disputes safely and effectively," and that these "anticipated efficiency gains will be even more critical in a post-COVID-19 environment where the courts anticipate a significant increase in caseload notwithstanding the best efforts of the courts to deal with urgent family law matters during the pandemic."²³

As explained in the Explanatory Memorandum, the reforms would in no way "constitute either court absorbing the other, or either court being disbanded." Rather, the Federal Circuit and Family Court "would become the single point of entry into the family law jurisdiction of the federal court system."²⁴ The new Court would contain two Divisions;

20 See the Introduction to the Australian Government's response to the Australian Law Reform Commission Report *Family Law for the Future – An Inquiry into the Family Law System*. Australian Government, "Government Response to ALRC Report 135: Family Law for the Future – An Inquiry into the Family Law System," March 2021, <https://www.alrc.gov.au/wp-content/uploads/2021/03/alrc-government-response-2021.pdf>, pp. 3-7.

21 Attorney-General, "Federal Circuit and Family Court of Australia Bill 2019 Explanatory Memorandum," https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6475_ems_e0f4b252-ccb7-4771-848a-0b748d053514/upload_pdf/723581.pdf;fileType=application%2Fpdf, p. 3.

22 Attorney-General's Department, "Attorney-General's Department submission to the Senate Legal and Constitutional Affairs Legislation Committee," Australian Government, 3 June 2020, <https://www.aph.gov.au/DocumentStore.ashx?id=82a5cf22-b880-4036-8a94-2cf03e7b97b8&subId=684964>, p. 4.

23 Attorney-General's Department, "Attorney-General's Department submission to the Senate Legal and Constitutional Affairs Legislation Committee," Australian Government, 3 June 2020, <https://www.aph.gov.au/DocumentStore.ashx?id=82a5cf22-b880-4036-8a94-2cf03e7b97b8&subId=684964>, p. 3.

24 Attorney-General, "Federal Circuit and Family Court of Australia Bill 2019 Explanatory Memorandum," https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6475_ems_e0f4b252-ccb7-4771-848a-0b748d053514/upload_pdf/723581.pdf;fileType=application%2Fpdf, p. 18.

Division 1 being a continuation of the Family Court and Division 2 being a continuation of the Federal Circuit Court. Division 1 will only deal with family law matters, while Division 2 will deal with both first instance family law and general law matters. The single point of entry was designed to reduce the confusion, delays, additional costs, and unequal experiences of applicants which can arise from differences in the case management processes and operational and cultural practices within the separate Courts.²⁵

The need for reform of the family court system has been widely acknowledged amongst stakeholders and arises from the fact that both the Family Court and the Federal Circuit Court have original jurisdiction in respect of matters under the *Family Law Act 1975*.²⁶ As identified by the Senate Legal and Constitutional Affairs Legislation Committee in its inquiry report into the Bill, reform in the family law courts, and the family law system more broadly, have been considered in a range of reviews for government, including:

- 2008 Semple Review, *Future Governance Operations for the Federal Family Law Courts in Australia: Striking the Right Balance*.
- 2014 KPMG Review, *Review of the Performance and Funding of the Federal Court of Australia, the Family Court of Australia and the Federal Circuit Court of Australia*.
- 2015 EY Report, *High Level Financial Analysis of Court Reform Initiatives*.
- 2017 House of Representatives Standing Committee on Social Policy and Legal Affairs Report, *A better family law system to support and protect those affected by family violence: Recommendations for an accessible, equitable and responsive family law system which better prioritises safety of those affected by family violence*.
- 2018 PricewaterhouseCoopers Report, *Review of the efficiency of the operation of the federal courts*.
- 2019 Australian Law Reform Commission Report, *Family law for the Future – An Inquiry into the Family Law System*.²⁷

In the course of its inquiry for the most recent report into the issue, the Australian Law Reform Commission (ALRC) produced an issues paper, which received 240 submissions, and subsequently a discussion paper, which attracted 186 submissions.²⁸ The ALRC also engaged in three rounds of consultation through the inquiry process. This, along with the series of inquiries and reports undertaken in recent years,

²⁵ Ibid.

²⁶ Claire Petrie, "Federal Circuit and Family Court of Australia Bill 2019 [and] Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2019," Bills Digest no. 42, 27 January 2021, https://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/7775339/upload_binary/7775339.pdf;fileType=application/pdf, p. 5.

²⁷ Legal and Constitutional Affairs Legislation Committee, "Federal Circuit and Family Court of Australia Bill 2019 [Provisions] Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2019 [Provisions]," The Senate, November 2020, [https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024525/toc_pdf/FederalCircuitandFamilyCourtOfAustraliaBill2019\[Provisions\]FederalCircuitandFamilyCourtOfAustralia\(ConsequentialAmendmentsandTransitionalProvisions\)Bill2019\[Provisions\].pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024525/toc_pdf/FederalCircuitandFamilyCourtOfAustraliaBill2019[Provisions]FederalCircuitandFamilyCourtOfAustralia(ConsequentialAmendmentsandTransitionalProvisions)Bill2019[Provisions].pdf;fileType=application%2Fpdf), pp. 4-5.

²⁸ Australian Law Reform Commission, "Review of the family law system: Submissions," 6 April 2018, <https://www.alrc.gov.au/inquiry/review-of-the-family-law-system/submissions-7/>.

demonstrates the significant interest displayed by the government, bureaucracies, and broader stakeholders, in family law reform.

As identified by PricewaterhouseCoopers in their report, between 2012-13 and 2016-17, there was a notable increase in the number of matters pending in both the Family Court and the Federal Circuit Court, which came in conjunction with an increase in the number of cases older than 12 months, and an increase in the national median time to trial. The number of matters pending increased from 17,200 in 2012-13 to 21,000 in 2016-2017, a 22% increase, with the majority of this increase seen in the Federal Circuit Court. Over the same period, the national median time to trial in the Family Court increased from 11.5 months to 17 months, and increased in the Federal Circuit Court from 10.8 months to 15.2 months.²⁹

	Criteria	Conclusion	Comment
1	Establish need	Yes	The need for reform in the family law system has been established over a number of years, with widespread agreement amongst stakeholders and government that reform is required.
2	Set objectives	Yes	The Attorney-General clearly articulated that the reforms were intended to “increase the efficiency of the courts in dealing with family law disputes safely and effectively”. ³⁰ The Attorney-General elsewhere outlined that the reforms would improve efficiency, reduce backlog, and drive faster, cheaper, and more consistent dispute resolution within the family law system. ³¹
3	Identify options	Yes	The reforms in the 2019 Bill are slightly different to those in the 2018 Bill, indicating that different options for reform were considered.
4	Consider mechanisms	Yes	A range of mechanisms for reforming the court system in the context of family law appear to have been considered. For example, the Attorney-General’s Department has outlined that the 2019 Bill is slightly different to the 2018 Bill, and that there has been “disagreement as to how to address the structural issues of a split court system” among stakeholders. ³²

29 PricewaterhouseCoopers, “Review of efficiency of the operation of the federal courts: Final report,” April 2018, <https://www.ag.gov.au/sites/default/files/2020-03/pwc-report.pdf>, p. 4.

30 Attorney-General’s Department, “Attorney-General’s Department submission to the Senate Legal and Constitutional Affairs Legislation Committee,” Australian Government, 3 June 2020, <https://www.aph.gov.au/DocumentStore.ashx?id=82a5cf22-b880-4036-8a94-2cf03e7b97b8&subId=684964>, p. 3.

31 Attorney-General’s Department, “Structural reform of the federal courts,” <https://www.ag.gov.au/legal-system/courts/structural-reform-federal-courts>.

32 Attorney-General’s Department, “Attorney-General’s Department submission to the Senate Legal and Constitutional Affairs Legislation Committee,” Australian Government, 3 June 2020, <https://www.aph.gov.au/DocumentStore.ashx?id=82a5cf22-b880-4036-8a94-2cf03e7b97b8&subId=684964>, pp. 4-5.

5	Brainstorm alternatives	No	Although different policy options and mechanisms for implementation were considered, it does not appear that benefits and drawbacks of different options were adequately considered.
6	Design pathway	No	The Bill was introduced together with the <i>Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2019</i> which sets out arrangements for the rollout of the broader reforms. However, this deals with a technical transition and does not lay out a framework for implementation and review of the policy.
7	Consult further	Yes	Extensive consultation was undertaken throughout the design and implementation of the Bill, including through multiple parliamentary inquiries and the ALRC inquiry.
8	Publish proposals	Yes	Both the 2018 and 2019 Bills were subject to inquiries by the Senate Legal and Constitutional Affairs Legislation Committee. This allowed further stakeholder feedback, and in both instances resulted in amendments to the Bills as introduced.
9	Introduce legislation	Yes	Relevant Bill was introduced to Parliament on 5 December 2019 and passed with some amendments on 18 February 2021.
10	Communicate decision	Yes	The Attorney-General's Department issued a media release on 18 February 2021 after the Bill passed Parliament. ³³ Additionally, the Family Court issued a media release five days later explaining the reforms. ³⁴
		8/10	

33 Attorney-General's Department, "Parliament backs overdue reform of family courts," 18 February 2021. Available from <https://webarchive.nla.gov.au/awa/20210325234555/https://www.attorneygeneral.gov.au/media/media-releases/parliament-backs-overdue-reform-family-courts-18-february-2021>.

34 Family Court of Australia, "Media Release – Statement from the Family Court of Australia and Federal Circuit Court of Australia," 23 February 2021, <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/news/mr230221>.

Social Services Legislation Amendment (Strengthening Income Support) Bill 2021

The *Social Services Legislation Amendment (Strengthening Income Support) Bill 2021* had five key purposes, outlined in the Explanatory Memorandum issued with the Bill.

These were:

- To increase the maximum basic rates of working-age social security payments by \$50 per fortnight.
- To permanently increase the ordinary income-free area or earnings threshold for the JobSeeker, Youth Allowance (other), Parenting Payment Partnered, and other related payments by \$150 per fortnight.
- To extend until 30 June 2021:
 - The criteria for a person to qualify for Youth Allowance (other) or JobSeeker in circumstances where the person is in quarantine or self-isolation or caring for a family or household member in quarantine or self-isolation due to COVID-19.
 - The waiver of the ordinary waiting period for JobSeeker and Youth Allowance (other).
 - The portability period for certain age pensioners and recipients of the Disability Support Pension unable to return to, or depart from, Australia within 26 weeks due to the impact of COVID-19.³⁵

The level of financial support offered to welfare recipients has been a political issue in Australia for some time. In the lead up to the 2019 federal election, various stakeholders campaigned for an increase in unemployment payments and the federal Labor party committed to conducting a review into the Newstart (now known as JobSeeker) payment.³⁶ After that election, the Senate referred an inquiry into the adequacy of the Newstart and related payments to the Senate Community Affairs References Committee.³⁷ The report of that inquiry recommended further reviews into Australia's welfare system and explicitly called for an increase in welfare payments, although it did not quantify what that increase might be.³⁸ The Coalition government Senators who were members of that Committee provided a dissenting report which did not endorse the recommendations of the Committee's report, and which highlighted the fact that welfare payments are designed to be a temporary support measure,

35 Minister for Families and Social Services, "Social Services Legislation Amendment (Strengthening Income Support) Bill 2021 Explanatory Memorandum," https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6684_ems_d53107bb-5028-47bc-a43f-d2d30b50eccb/upload_pdf/21024EM.pdf;fileType=application%2Fpdf, p. 1.

36 Judith Ireland, "What do the major parties have in store for parents, kids and people on welfare?," *The Sydney Morning Herald*, 19 May 2019, <https://www.smh.com.au/federal-election-2019/what-do-the-major-parties-have-in-store-for-parents-kids-and-people-on-welfare-20190507-p51kro.html>.

37 Senate Standing Committees on Community Affairs, "Adequacy of Newstart and related payments and alternative mechanisms to determine the level of income support payments in Australia," Parliament of Australia, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Newstartrelatedpayments.

38 Community Affairs References Committee, "Adequacy of Newstart and related payments and alternative mechanisms to determine the level of income support payments in Australia," The Senate, April 2020, https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024323/toc_pdf/AdequacyofNewstartandrelatedpaymentsandalternativemechanismstodeterminethelevelofincomesupportpaymentsinAustralia.pdf;fileType=application%2Fpdf.

rather than a replacement for income, and that Australia's welfare system should "ensure that general reliance on welfare is limited and income from employment is the primary mode by which individuals and families support themselves."³⁹

In March 2020, as the coronavirus emerged in Australia and lockdown measures were implemented, the Commonwealth government announced a temporary \$550 per fortnight Coronavirus Supplement available to welfare recipients. This effectively doubled the then-maximum base rate of \$565.70 and was provided in conjunction with other changes to the welfare system designed to streamline the application process and bolster support for the expected wave of recipients.⁴⁰ In February 2020 there were 724,826 recipients of the Newstart Allowance (which was renamed the JobSeeker Payment the following month), which spiked after lockdowns were implemented, reaching a peak of 1,463,863 in May. The number of Youth Allowance (other) recipients increased from 85,736 to 171,423 over the same period.⁴¹

The Coronavirus Supplement was gradually phased out, being reduced to \$250 per fortnight on 26 September 2020, reduced again to \$150 per fortnight on 1 January 2021, and terminated on 31 March 2021.⁴² Prior to the termination of the Supplement, the Governor of the Reserve Bank of Australia, Phillip Lowe, noted that "there is a wide consensus in the community that the previous level [of welfare payments] should be increased permanently and I've said on previous occasions that I would join that consensus".⁴³ On 23 February 2021, the Commonwealth government announced that it would increase the maximum base rate of working-age welfare payments by \$50 per fortnight and allow recipients to earn up to \$150 per fortnight without effecting their base rate, up from \$106 prior to the coronavirus pandemic.⁴⁴ The increase brought the JobSeeker maximum base rate to 41.2% of the national minimum wage,⁴⁵ and was estimated in the 2021-22 Budget to cost \$9.5 billion over the next five years.⁴⁶ These changes, along with an extension of the Ordinary Waiting Period waiver and the expanded eligibility for those isolating or caring for others as a result of COVID-19, were later introduced to the Parliament in the *Social Services Legislation Amendment (Strengthening Income Support) Bill 2021*.

39 Ibid, p. 163.

40 Luke Henriques-Gomes, "Australian jobseekers to get \$550 payment increase as part of huge coronavirus welfare package," *The Guardian*, 22 March 2020, <https://www.theguardian.com/world/2020/mar/22/australian-jobseekers-to-get-550-increase-as-part-of-huge-coronavirus-welfare-package>.

41 Department of Social Services, "JobSeeker Payment and Youth Allowance recipients - monthly profile - April 2021," May 2021, <https://data.gov.au/data/dataset/jobseeker-payment-and-youth-allowance-recipients-monthly-profile/resource/e3e3041c-a486-4e48-bcb0-10020db05af5>.

42 Department of Social Security, "Social Security Guide: Government response to Coronavirus," 10 May 2021, <https://guides.dss.gov.au/guide-social-security-law/coronavirus>.

43 Paul Karp, Reserve bank governor warns against lowering jobseeker payment," *The Guardian*, 3 February 2021, <https://www.theguardian.com/australia-news/2021/feb/03/reserve-bank-forecasts-australian-economy-will-return-to-pre-pandemic-size-by-mid-year>.

44 Prime Minister, Minister for Families and Social Services, Minister for Employment Skills Small and Family Business, "Morrison Government Commits Record \$9B to Social Security Safety Net," Media Release, 23 February 2021, <https://www.pm.gov.au/media/morrison-government-commits-record-9b-social-security-safety-net>.

45 Maani Truu and Evan Young, "Scott Morrison confirms a permanent increase to JobSeeker - by \$3.57 a day," SBS News, 23 February 2021, <https://www.sbs.com.au/news/scott-morrison-confirms-a-permanent-increase-to-jobseeker-by-3-57-a-day>.

46 The Treasury, "Budget 2021-22: Budget Strategy and Outlook," Commonwealth of Australia, 11 May 2021, https://budget.gov.au/2021-22/content/bp1/download/bp1_2021-22.pdf, p. 81.

	Criteria	Conclusion	Comment
1	Establish need	Yes	There have long been calls from various stakeholders for an increase in the maximum base rate of welfare payments, including a recommendation from a Senate inquiry.
2	Set objectives	Yes	Although no specific justification for increasing the maximum base rate of welfare payments was offered, the government highlighted that the policy was designed to “get the balance right between providing support for people and incentives to work”, and that the design and sustainability of the welfare system would be maintained while providing the increase. ⁴⁷
3	Identify options	No	It was reported that the Treasury provided a “range of options” to the government, ⁴⁸ but these were not released to the public.
4	Consider mechanisms	No	No alternate policy measures appear to have been considered.
5	Brainstorm alternatives	No	The increase was estimated to cost \$9.5 billion over the forward estimates in the 2021-22 Budget, but no detailed analysis of the policy or any alternatives were publicly provided.
6	Design pathway	No	No specific pathway was outlined for the design, implementation, or review of the changes found in the Bill. There are existing reporting requirements for the Department of Social Services which provide some oversight, but these were not affected by the Bill.
7	Consult further	No	Aside from an initial consultation with Treasury, there was no consultation with stakeholders or interested parties.
8	Publish proposals	No	No proposals or discussion papers were released prior to the announcement of proposed changes or the Bill being introduced to Parliament.
9	Introduce legislation	Yes	The relevant Bill was introduced into Parliament on 25 February 2021 and passed the following month.

47 Prime Minister, Minister for Families and Social Services, Minister for Employment Skills Small and Family Business, “Morrison Government Commits Record \$9B to Social Security Safety Net,” Media Release, 23 February 2021, <https://www.pm.gov.au/media/morrison-government-commits-record-9b-social-security-safety-net>.

48 Luke Henriques-Gomes, “Scott Morrison ‘still considering’ changes to jobseeker when Covid supplement ends,” *The Guardian*, 11 February 2021, <https://www.theguardian.com/australia-news/2021/feb/11/scott-morrison-still-considering-changes-to-jobseeker-when-covid-supplement-ends>.

10	Communicate decision	Yes	The Prime Minister gave a press conference to outline the proposed changes, and the government and relevant departments published media releases.
		4/10	

Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020

The *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020* aims to address the bargaining power imbalance between digital platforms and Australian news businesses by establishing a mandatory bargaining code of conduct. This Bill is the result of a lengthy process which began in December 2017 when the then-Treasurer, Scott Morrison, directed the Australian Competition and Consumer Commission (ACCC) to conduct an inquiry into digital platforms. According to the ACCC:

The inquiry looked at the effect that digital search engines, social media platforms and other digital content aggregation platforms have on competition in media and advertising services markets. In particular, the inquiry looked at the impact of digital platforms on the supply of news and journalistic content and the implications of this for media content creators, advertisers and consumers.⁴⁹

One key finding of the inquiry was that major digital platforms are unavoidable trading partners for Australian news businesses, and that they therefore have significant bargaining power over these news businesses. The Government directed the ACCC to engage major platforms and Australian news businesses to develop and implement a voluntary code of conduct to navigate this bargaining situation, but when the ACCC indicated to the Government that it was unlikely such a code could be finalised before November 2020, the Government directed the ACCC to develop a mandatory code of conduct instead.⁵⁰ The Bill was developed to establish and implement this mandatory code, allows the Minister to designate which digital platforms must comply with the code, and sets out which news businesses will qualify to participate in the code.

The impetus for the code can be understood as the intersection between the growing dominance and power of major digital platforms combined with the lack of a new news “business model that can effectively replace the advertiser model, which has historically funded the production... of journalism in Australia.”⁵¹ As the final report of the ACCC inquiry explains:

For many news media businesses, the expanded reach and the reduced production costs offered by digital platforms have come at a significant price. For traditional print (now print/online) media businesses in particular, the rise of the digital platforms has marked a continuation of the fall in advertising revenue that began with the loss of classified advertising revenue in the early days of the internet. Without this advertising revenue, many print/online news media businesses have struggled to survive and have reduced their provision of news and

49 Australian Competition and Consumer Commission, “Digital platforms inquiry,” <https://www.accc.gov.au/focus-areas/inquiries-finalised/digital-platforms-inquiry-0>.

50 Treasurer, “Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 Revised Explanatory Memorandum,” https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6652_ems_c352c005-974d-47e4-8999-35a566907f89/upload_pdf/JC001309_Revised%20EM.pdf;fileType=application%2Fpdf, pp. 9-10.

51 Australian Competition and Consumer Commission, “Digital Platforms Inquiry: Final Report,” June 2019, <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>, p. 1.

journalism. New digital-only publications have not replaced what has been lost and many news media businesses are still searching for a viable business model for the provision of journalism online. The impact of this reduction in advertising revenue is most evident in relation to local and regional news providers, which do not have the large potential audience of metropolitan and national titles.⁵²

As the Chair of the ACCC, Rod Sims, explained at an on-the-record question and answer event, the purpose of the code is to “arrest the decline in money going to journalism”, and to get “more money into journalism”.⁵³ The mechanism for doing this is to force digital platforms to negotiate a payment structure with news businesses, whose content is used on these platforms. This mechanism is enabled in Section 52E of the Act, which gives the Minister the *option* of determining that a digital platform is designated under the Act, and that the mandatory code therefore applies to them. As financial journalist Alan Kohler cynically suggested, “As for the code, it will never be more than a threat.”⁵⁴

	Criteria	Conclusion	Comment
1	Establish need	No	ACCC claimed that there was a need to address the issue of power imbalance in bargaining, but the Bill does not actually do this. Additionally, a clear intention of the Bill is to address the decline of the traditional news business model, but it was not made clear why addressing this was necessary.
2	Set objectives	No	There appear to be competing objectives, and it is not clear if the aim of the code is in the public interest, or private, commercial interests.
3	Identify options	No	No alternates to a code of conduct appear to have been considered.
4	Consider mechanisms	Yes	The code morphed from being voluntary to being mandatory, and under the current Act does not apply to any organisation.
5	Brainstorm alternatives	No	No adequate, quantitative cost benefit analysis of the policy, alternative policies, or the status quo was provided.
6	Design pathway	Yes	The Bill was the result of an extensive ACCC review which argued for a code of conduct. The Bill outlines that there must be a review of the code within a year of the laws coming into effect. ⁵⁵

⁵² Ibid.

⁵³ Alan Kohler, “Alan Kohler: The News Bargaining Code is dead. Long live the News bargaining chip,” *The New Daily*, 17 March 2021, <https://thenewdaily.com.au/news/2021/03/17/alan-kohler-news-bargaining-code-dead/>.

⁵⁴ Ibid.

⁵⁵ Treasurer, “Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 Revised Explanatory Memorandum,” https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6652_ems_c352c005-974d-47e4-8999-35a566907f89/upload_pdf/JC001309_Revised%20EM.pdf;fileType=application%2Fpdf, p. 49.

7	Consult further	Yes	Extensive consultation with the public, other stakeholders, and with news businesses and digital platforms throughout the development and implementation of the Bill.
8	Publish proposals	Yes	Extensive consultation with stakeholders was undertaken throughout the process, from the initial ACCC inquiry through to the introduction of the Bill in Parliament.
9	Introduce legislation	Yes	Bill was introduced into the Parliament on 9 December 2020 and passed on 25 February 2021.
10	Communicate decision	No	There was extensive media coverage of the issue, but no apparent communication strategy after the Bill passed Parliament.
		5/10	

Economic Recovery Package (JobMaker Hiring Credit) Amendment Bill 2020

The coronavirus pandemic, and particularly the lockdowns and other public health measures introduced in response to it, caused significant disruption to the Australian economy and labour market. The national unemployment rate spiked from 5.3% in March 2020 to a peak of 7.4% in July; peak-to-trough job losses between March and May saw over 856,000 Australians lose their jobs.⁵⁶ Additionally, in April there were 766,800 Australians who were still technically employed but who worked no hours because there was no work, not enough work, or because they were stood down. This was a ten-fold increase from March.⁵⁷ As outlined in previous Institute of Public Affairs research, the lockdown measures were implemented in an effort to ‘hibernate’ the economy; an academic abstraction which was never possible and which caused significant and long-term harm to Australian society and the Australian workforce.⁵⁸ These effects were especially pronounced among younger Australians. As previous IPA research has highlighted:

The unemployment crisis caused by the lockdowns has disproportionately affected young Australians. At the height of the crisis in May 2020, when employment had fallen by 6.7% in just two months, Australians aged 15 to 34 accounted for 62% of the net job losses despite the age group accounting for just 39% of the workforce. This represented 544,000 young Australians out of work.⁵⁹

In an effort to mitigate these disruptions, the Commonwealth government introduced a number of measures to maintain the relationship between employers and employees, and to support Australians’ livelihoods. The primary policy was the JobKeeper wage subsidy which was estimated to have preserved approximately 700,000 jobs.⁶⁰ A range of additional policies were designed to support Australia’s economic recovery and encourage job creation; these range from fast-tracked income tax cuts, an extension of the Instant Asset Write-Off, additional and expedited infrastructure spending, changes to the Child Care Subsidy, the Boosting Apprenticeships Commencements policy,⁶¹ and proposed changes to the *Fair Work Act 2009*.⁶² Additionally, the Commonwealth announced the JobMaker Hiring Credit in the 2020-21 Budget. JobMaker is an incentive

56 Australian Bureau of Statistics, “Labour Force, Australia, April 2021,” May 2021, <https://www.abs.gov.au/statistics/labour/employment-and-unemployment/labour-force-australia/apr-2021>.

57 Australian Bureau of Statistics, “Labour Force, Australia, Detailed, April 2021,” May 2021, <https://www.abs.gov.au/statistics/labour/employment-and-unemployment/labour-force-australia-detailed/apr-2021>.

58 Cian Hussey and Kurt Wallace, “Economic Scars: How the Lockdowns Have Permanently Disfigured the Australian Economy,” Institute of Public Affairs, October 2020, <https://ipa.org.au/wp-content/uploads/2020/10/IPA-Report-Economic-Scars.pdf>.

59 Cian Hussey and Kurt Wallace, “Not in this Together: An Analysis of the Economic and Social Impact of the COVID-19 Lockdowns,” Institute of Public Affairs, February 2021, <https://ipa.org.au/wp-content/uploads/2021/03/IPA-Report-Not-in-This-Together.pdf>.

60 James Bishop and Iris Day, “How Many Jobs did JobKeeper Keep?,” Reserve Bank of Australia Research Discussion Paper, July 2020, <https://rba.gov.au/publications/rdp/2020/pdf/rdp2020-07.pdf>.

61 Treasurer, “Budget 2021-22: Budget Strategy and Outlook,” 11 May 2021, https://budget.gov.au/2021-22/content/bp1/download/bp1_2021-22.pdf.

62 See, for example, the *Fair Work Amendment (Supporting Australia’s Jobs and Economic Recovery) Bill 2020* discussed above.

payment available to some businesses that hire new employees between the ages of 16 and 35 years old in the 12 months after 7 October 2020. The payment is \$200 per week for those aged 16 to 29, and \$100 per week for those aged 30 to 35. It was originally expected to lead to the creation of 450,000 positions for young Australians and to cost \$4 billion between 2020-21 and 2022-23.⁶³ During its first six weeks of existence the JobMaker Hiring Credit was accessed to create 521 jobs, rather than the 10,000 indicated by Treasury projections.⁶⁴ This was somewhat unsurprising, given the testimony of the deputy secretary of the Treasury's fiscal working group, Jenny Wilkinson, in Senate Estimates that "about 10% of employment [growth under the Hiring Credit] is genuinely additional".⁶⁵

	Criteria	Conclusion	Comment
1	Establish need	Yes	The Budget outlined that JobMaker would "help young people access job opportunities and rebuild their connection to the labour force as the economy recovers from the COVID-19 pandemic." ⁶⁶
2	Set objectives	Yes	The objective was to re-engage young Australians in the workforce and expand their opportunities for work, along with incentivising businesses to create jobs for younger Australians who were disproportionately impacted by the pandemic.
3	Identify options	No	It does not appear that alternative policy options were considered.
4	Consider mechanisms	No	It does not appear that a range of implementation mechanisms were considered.
5	Brainstorm alternatives	No	The policy was exempted from a Regulatory Impact Statement, ⁶⁷ and no alternative policies appear to have been explored or costed.
6	Design pathway	No	No comprehensive plan or pathway from design to implementation to review was provided.
7	Consult further	No	No consultation with the public or other stakeholders.
8	Publish proposals	No	No proposals published, the policy was announced in the Budget and later introduced into Parliament.

63 Treasurer, "Budget 2020-21: Budget Strategy and Outlook," 6 October 2020, https://archive.budget.gov.au/2020-21/bp1/download/bp1_w.pdf, p. 1-23.

64 Matthew Cranston, "Companies shun \$4b JobMaker, force changes," *Australian Financial Review*, 22 March 2021, <https://www.afr.com/politics/federal/companies-shun-4b-jobmaker-force-changes-20210321-p57cmf>.

65 Jack Derwin, "The JobMaker scheme may fail to create 90% of the 450,000 jobs the federal government promised, Treasury admits," *Business Insider Australia*, 27 October 2020, <https://www.businessinsider.com.au/jobmaker-scheme-jobs-australia-unemployment-budget-policies-2020-10/>.

66 Treasurer, "Budget 2020-21: Budget Strategy and Outlook," p. 1-23.

67 Treasurer, "Economic Recovery Package (JobMaker Hiring Credit) Amendment Bill 2020 Explanatory Memorandum," https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6609_ems_3fa8a35d-f7a2-41a1-a775-cd34ff110cd8/upload_pdf/JC000184.pdf;fileType=application%2Fpdf, p. 3.

9	Introduce legislation	Yes	The relevant Bill was introduced to Parliament on 7 October 2020 and passed on 11 November 2020.
10	Communicate decision	Yes	Although there were media releases explaining the policy once the Bill passed, it appears there was no effective communication strategy in place. A number of high-profile businesspeople claimed to be unaware of the existence of JobMaker almost six months after it was announced. ⁶⁸
		4/10	

⁶⁸ Matthew Cranston, "Companies shun \$4b JobMaker, force changes," *Australian Financial Review*, 22 March 2021, <https://www.afr.com/politics/federal/companies-shun-4b-jobmaker-force-changes-20210321-p57cmf>.

Social Services Legislation Amendment (Drug Testing Trial) Bill 2019

The *Social Services Legislation Amendment (Drug Testing Trial) Bill 2019* sought to establish a mandatory drug testing trial of 5,000 Newstart Allowance (now JobSeeker Payment) and Youth Allowance (other) recipients in three discrete geographic locations over two years. These locations are: Canterbury-Bankstown, New South Wales; Logan, Queensland; and Mandurah, Western Australia.⁶⁹

As explained in the Explanatory Memorandum issued in conjunction with the Bill:

Substance abuse is a major barrier to social and economic participation and is not consistent with community expectations around receiving taxpayer funded welfare payments. The aim of the trial is to improve a recipient's capacity to find employment or participate in education or training by identifying people with drug use issues and assisting them to undertake treatment. The trial will test the effectiveness of decreasing substance abuse through random drug testing, in an effort to improve employment outcomes for trial participants.⁷⁰

According to the Parliamentary Library's *Bills Digest*, relevant Ministers and the Department of Social Services have cited three objectives for the drug testing trial. These are to assist recipients who are drug dependent into employment, to deter drug use among recipients, and to maintain the integrity of, and public trust in, the social security system.⁷¹ In his second reading speech, the relevant Minister, Ben Morton, noted that:

Data shows us that substance abuse is directly impacting the ability of jobseekers to undertake job search or activities to get them into work.

In the 2018-19 financial year, there were 5,247 occasions when a jobseeker attempted to use drug or alcohol dependency as a reason for not meeting their mutual obligation requirements.

In addition, between 1 January 2018 and 31 July 2019, a total of 8,638 jobseekers participated in a drug or alcohol treatment activity as part of their mutual obligation requirements.⁷²

⁶⁹ Minister for Families and Social Services, "Social Services Legislation Amendment (Drug Testing Trial) Bill 2019 Explanatory Memorandum," https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6395_ems_1871e79c-6e2c-4685-a704-d456be73e0c6/upload_pdf/716957.pdf;fileType=application%2Fpdf, p. 3.

⁷⁰ Ibid.

⁷¹ Don Arthur and Paula Pyburne, "Social Services Legislation Amendment (Drug Testing Trial) Bill 2019," *Bills Digest* no. 68, 9 January 2020, https://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/7120148/upload_binary/7120148.pdf, pp. 6-7.

⁷² Ben Morton, "Social Services Legislation Amendment (Drug Testing Trial) Bill 2019 Second Reading," 11 September 2019, <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F55419124-25ea-455e-bf57-1d1fab05abeb%2F0033%22>.

According to the University of Leeds' Emma Wincup, proposals to introduce drug testing for welfare recipients became more popular in the late 2000s and early 2010s across the United Kingdom, New Zealand, and a number of states in the United States.⁷³ These proposals are based on similar objectives to those outlined for Australia.

Stakeholders and other political parties have expressed criticisms about the reforms, ranging its intention, evidence base, and implementation. The University of New South Wales' Sue Olney, for example, has argued that "There is no evidence that random drug-testing of the unemployed is an effective strategy to reduce substance abuse", and that "research suggests it is likely to adversely affect both the wellbeing and the employment prospects of those tested".⁷⁴ However, it is worth noting that such drug testing for welfare recipients has never been tried before in Australia, and the models used in overseas jurisdictions "differ significantly from that proposed for Australia."⁷⁵ Additionally, while evidence of the efficacy from overseas jurisdictions is relevant to informing a trial in Australia, it should be acknowledged that Australia is a unique country with specific cultural and social circumstances and that international evidence cannot be solely relied upon to dictate domestic policy. As then-Chairman of the Productivity Commission Gary Banks noted in a research paper promoting the importance of evidence-based policy making:

[There is a risk that] overseas studies will be resorted to inappropriately as a substitute for domestic studies. Sometimes this is akin to the old joke about the fellow who loses his keys in a dark street, but is found searching for them metres away under a lamp post, because there is more light. Translating foreign studies to Australia can sometimes be perilous, given different circumstances and the scope for misinterpretation.⁷⁶

In this sense, the Bill can be thought of as an attempt to develop an evidence base for drug testing of welfare recipients in Australia which will inform future policy making decisions. This appears to be the precise intention of the Bill; as noted in the *Bills Digest*, "Officers of the Department argued in 2017 that there is no evaluation evidence on the effectiveness of drug testing initiatives and the purpose of the trial is to provide such evidence."⁷⁷ As noted by then-Prime Minister Malcolm Turnbull, who first introduced these reforms under the current Government, "this is a good exercise, it's worthwhile... It is a trial."⁷⁸

73 Emma Wincup, "Thoroughfares, crossroads and cul-de-sacs: Drug testing of welfare recipients," *International Journal of Drug Policy*, vol. 25, 2014, doi: 10.1016/j.drugpo.2014.02.011, pp. 1031-1037.

74 Sue Olney, "Should Love Conquer Evidence in Policy-Making? Challenges in Implementing Random Drug-Testing of Welfare Recipients in Australia," *Australian Journal of Public Administration*, vol. 77, no. 1, doi:10.1111/1467-8500.12297, p. 115.

75 Don Arthur and Paula Pyburne, "Social Services Legislation Amendment (Drug Testing Trial) Bill 2019," *Bills Digest* no. 68, 9 January 2020, https://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/7120148/upload_binary/7120148.pdf, pp. 8.

76 Gary Banks, "Evidence-based policy making: What is it? How do we get it?," Productivity Commission, February 2009, <https://www.pc.gov.au/news-media/speeches/cs20090204/20090204-evidence-based-policy.pdf>, p. 11.

77 Don Arthur and Paula Pyburne, "Social Services Legislation Amendment (Drug Testing Trial) Bill 2019," *Bills Digest* no. 68, 9 January 2020, https://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/7120148/upload_binary/7120148.pdf, pp. 4.

78 Katherine Murphy, "Turnbull says he's not sure if drug testing welfare recipients will work," *The Guardian*, 27 August 2017, <https://www.theguardian.com/australia-news/2017/aug/27/turnbull-says-hes-not-sure-if-drug-testing-welfare-recipients-will-work>.

That being said, the Parliamentary Joint Committee on Human Rights argued that the trial was “likely to be incompatible with the right to privacy, the right to social security and right to an adequate standard of living, and the right to equality and non-discrimination”, and sought to bring these implications to the attention of the Parliament.⁷⁹

The Bill had not passed the Parliament at the time of writing.

	Criteria	Conclusion	Comment
1	Establish need	Yes	The Minister outlined that the policy is needed to help drug users overcome challenges they have meeting mutual obligations and gaining employment. ⁸⁰
2	Set objectives	Yes	The three objectives of assisting welfare recipients who are drug dependent into employment, to deter drug use among recipients, and to maintain the integrity of, and public trust in, the social security system were clearly outlined.
3	Identify options	No	It is not clear whether or not the government considered other policy options to pursue the given objectives.
4	Consider mechanisms	No	It does not appear that alternatives to implementing the policy were considered; the three legislative attempts at the reform were almost identical.
5	Brainstorm alternatives	No	Concerningly, the Explanatory Memorandum notes that the “financial impact of these amendments is not for publication”. ⁸¹
6	Design pathway	Yes	The Government outlined a pathway for the policy to be implemented in the relevant Bill and Explanatory Memorandum. Additionally, the Government has indicated that an evaluation strategy will be established and published prior to the trial commencing, and that an independent consultancy would be commissioned to evaluate the trial. ⁸²

79 Parliamentary Joint Committee on Human Rights, “Human rights scrutiny report,” 27 March 2018, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018/Report_3_of_2018, p. 128.

80 Ben Morton, “Social Services Legislation Amendment (Drug Testing Trial) Bill 2019 Second Reading,” 11 September 2019, <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F55419124-25ea-455e-bf57-1d1fab05abeb%2F0033%22>.

81 Minister for Families and Social Services, “Social Services Legislation Amendment (Drug Testing Trial) Bill 2019 Explanatory Memorandum,” https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6395_ems_1871e79c-6e2c-4685-a704-d456be73e0c6/upload_pdf/716957.pdf;fileType=application%2Fpdf, p. 1.

82 Australian Government, “Australian Government Response to the Senate Community Affairs Legislation Committee report: Inquiry into the Social Services Legislation Amendment (Drug Testing Trial) Bill 2018,” July 2018, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/DrugTestingTrial/Government_Response.

7	Consult further	Yes	There has been ongoing consultation since the policy was first proposed, including through three parliamentary committee reports which directly engaged with various stakeholders.
8	Publish proposals	No	It does not appear that a range of proposals were made publicly available before the Bill was introduced into Parliament.
9	Introduce legislation	Yes	The relevant Bill was introduced to Parliament on 11 September 2019 but had not passed at the time of writing.
10	Communicate decision	Yes	Some information about the policy and Bill is available on the Department of Social Services website, ⁸³ as is a fact sheet which contains relevant information. ⁸⁴
		6/10	

83 Department of Social Services, "Drug Testing Trial," Australian Government, 25 February 2020, <https://www.dss.gov.au/benefits-payments/drug-testing-trial>.

84 Department of Social Services, "Drug Testing Trial Fact Sheet," Australian Government, 27 August 2020, https://www.dss.gov.au/sites/default/files/documents/09_2020/d20-990234-dacdt-overarching20200204-27-august-2020-updates.pdf.

Higher Education Support Amendment (Freedom of Speech) Bill 2020

In November 2018, the then-Minister for Education Dan Tehan announced a review into the rules and regulations protecting freedom of speech on university campuses in Australia.⁸⁵ This review was, in part, a response to extensive research and analysis by the Institute of Public Affairs in prior years outlining the crisis of free speech on Australian university campuses. In May 2016, the IPA released *Free Speech on Campus Audit 2016: The state of intellectual debate at Australian universities*, the first in a series of comprehensive analyses of the state of freedom of speech at Australia's 42 universities.⁸⁶ The Audit placed universities into 'red', 'amber', and 'green' categories, based on "formal university policies that restrict speech, and previous university administration and student actions that have suffocated the diversity of ideas on campus."⁸⁷ A "red" institution is one that actively restricts free speech on campus through policies that either clearly and substantially restrict speech, or alternately has taken action that limits the diversity of ideas. An "amber" institution is one that maintains policies that could be interpreted to restrict speech, though the exact impact on the free speech depends on how the policy is implemented, or there have been unsuccessful actions, taken by either university administrators or students, to limit the diversity of ideas on campus. And a "green" institution is one that has no policies, and has taken no action, that threatens campus expression.

The IPA's 2016 Audit found that 33 Australian universities (79%) were 'red', eight (19%) were 'amber', and just one (2%) was green. The 2017 Audit found a deterioration, with 34 (81%) ranked 'red', seven (17%) ranked 'amber', and only one (2%) ranked 'green'. The 2017 Audit also found that just eight of Australia's 42 universities (19%) have an explicit policy that protects intellectual freedom, as mandated by the *Higher Education Support Act 2003*.⁸⁸ The 2018 Audit, published after the government announced a review into freedom of speech at universities, found a further deterioration; 35 (83%) were 'red', six (14%) were 'amber', and still only one (2%) was 'green'.⁸⁹

In December 2018, University of Melbourne's former vice-chancellor Professor Glyn Davis AC, in a speech critiquing the IPA's Audit, described the Audit as "the most detailed publication that address this alleged [free speech on campus] crisis".⁹⁰ Earlier that year, and in the time since, the issue of freedom of speech and academic freedom in Australian universities was made more prominent after the sacking of Dr Peter Ridd by James Cook University for allegedly breaching the University's Code of Conduct.⁹¹

85 Dan Tehan, "Review into university freedom of speech," Department of Education, Skills and Employment, Media Release, 14 November 2018, <https://ministers.dese.gov.au/tehan/review-university-freedom-speech>.

86 Matthew Lesh, "Free Speech on Campus Audit 2016: The state of intellectual debate at Australian universities," Institute of Public Affairs, May 2016, <https://ipa.org.au/wp-content/uploads/2016/12/18May16-ML-FreeSpeechonCampusAudit2016-May2016.pdf>.

87 Ibid, p. 2.

88 Matthew Lesh, "Free Speech on Campus Audit 2017," Institute of Public Affairs, December 2017, <https://ipa.org.au/wp-content/uploads/2017/12/IPA-Report-Free-Speech-on-Campus-Audit-2017.pdf>.

89 Matthew Lesh, "Free Speech on Campus Audit 2018," Institute of Public Affairs, December 2018, <https://ipa.org.au/wp-content/uploads/2018/12/Free-Speech-on-Campus-Audit-2018.pdf>.

90 Glyn Davis, "Special pleading: free speech and Australian universities", December 4, 2018.

91 Peter McCutcheon, "James Cook University staff avoid using emails after climate change sceptic sacked," ABC News, 14 June 2018, <https://www.abc.net.au/news/2018-06-14/james-cook-uni-search-emails-before-sacking-academic-peter-ridd/9869890>.

In April 2019, the final report of the review announced by Minister Tehan was released. The *Report of the Independent Review of Freedom of Speech in Australian Higher Education Providers*, more commonly known as the French Review (after its author, Robert S. French AC) made the principal recommendation that “protection for the freedoms [of speech and academic inquiry] be strengthened, within the sector, on a voluntary basis by the adoption of umbrella principles embedded in a Code of practice for each institution.”⁹² French outlined a proposed Model Code, which all Australian universities subsequently sought to implement by the end of 2020.⁹³ The government announced an independent review (the Walker Review) into this implementation in August 2020,⁹⁴ which was released in December 2020.⁹⁵ The Walker Review found that, of the 33 universities that had completed their work to implement the Model Code, nine (27%) had policies that were fully-aligned with the Code, 14 (42%) had policies that were mostly-aligned, four (12%) had policies that were partially-aligned, and six (18%) had policies that were not aligned. Of the eight universities that had not completed their work implementing the Model Code, two (25%) had draft policies that, if implemented, would fully-align with the Code, while six (75%) did not have policies or draft policies that were fully aligned.⁹⁶

The *Higher Education Support Amendment (Freedom of Speech) Bill 2020* would amend the *Higher Education Support Act 2003* to insert a new definition of ‘academic freedom’, as recommended by the French Review. It would also align terminology in the Act with the Model Code. After introducing the Bill to Parliament, Dan Tehan revealed that part of the motivation for the Bill was what happened to Dr Peter Ridd, noting that “The legal advice that [he has] is that [James Cook University] wouldn’t have been able to prosecute Peter Ridd if these laws had of been in place”.⁹⁷

	Criteria	Conclusion	Comment
1	Establish need	Yes	The French Review noted that protections for freedom of speech and academic freedom within universities needed to be strengthened. The Review also supported changes to the <i>Higher Education Support Act 2003</i> which are reflected in the Bill. ⁹⁸

92 Robert French, “Report of the Independent Review of Freedom of Speech in Australian Higher Education Providers,” March 2019, <https://www.dese.gov.au/higher-education-publications/resources/report-independent-review-freedom-speech-australian-higher-education-providers-march-2019>, p. 14.

93 Dan Tehan, “Evaluating progress on free speech,” Department of Education, Skills and Employment, Media Release, 7 August 2020, <https://ministers.dese.gov.au/tehan/evaluating-progress-free-speech>.

94 Ibid.

95 Sally Walker, “Review of the Adoption of the Model Code on Freedom of Speech and Academic Freedom,” December 2020, <https://www.dese.gov.au/higher-education-reviews-and-consultations/resources/report-independent-review-adoption-model-code-freedom-speech-and-academic-freedom>.

96 Ibid, p. 27.

97 Lisa Visentin, “Academic freedom definition would have protected sacked JCU professor,” *The Sydney Morning Herald*, 28 October 2020, <https://www.smh.com.au/politics/federal/academic-freedom-definition-would-have-protected-sacked-jcu-professor-20201028-p569bm.html>

98 French, “Report of the Independent Review of Freedom of Speech in Australian Higher Education Providers,” pp. 226-227.

2	Set objectives	Yes	The Bill was designed to “strengthen protections for academic freedom and freedom of speech in Australian universities” ⁹⁹ which the Government view as a central characteristic of the university sector, and which “contribute to a healthy, robust democracy.” ¹⁰⁰ The Government also noted that these changes would enhance the right to education and right to freedom of expression under Articles 13 and 19, respectively, of the <i>International Covenant on Civil and Political Rights</i> . ¹⁰¹
3	Identify options	No	It does not appear that alternatives to the Bill were considered.
4	Consider mechanisms	Yes	It appears that the Government has considered alternate mechanisms for promoting freedom of speech and academic freedom in universities. Specifically, the Model Code is being rolled out on a voluntary basis, while the Bill aligns the <i>Higher Education Support Act 2003</i> with the Code, rather than enforcing it through legislation. That being said, the Government has also indicated its willingness to further regulate in the future if necessary. ¹⁰²
5	Brainstorm alternatives	No	While alternate mechanisms for the chosen option have been considered, alternate options were not considered. Cost-benefit analyses were not applicable to this Bill.
6	Design pathway	Yes	Design and delivery framework was set out in the French Review and adopted by the government. No reporting requirements necessary.
7	Consult further	Yes	Relevant stakeholders (principally universities) were consulted throughout the French Review, throughout the design and implementation of the Code, and in the lead up to the introduction of the Bill.
8	Publish proposals	No	Proposals were not published for public consultation or feedback.

⁹⁹ Minister for Education, “Higher Education Support Amendment (Freedom of Speech) Bill 2020 Explanatory Memorandum,” https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6619_ems_040a43f2-4cb4-4030-8116-2ea3c51288a7/upload_pdf/JC000281.pdf;fileType=application%2Fpdf, p. 4.

¹⁰⁰ Department of Education, Skills and Employment, “Review of Adoption of the Model Code on Freedom of Speech and Academic Freedom in Higher Education: Australian Government Response,” <https://www.dese.gov.au/download/11528/australian-government-response-walker-review-model-code-implementation/22079/document/pdf>, p. 2.

¹⁰¹ Minister for Education, “Higher Education Support Amendment (Freedom of Speech) Bill 2020 Explanatory Memorandum,” p. 4.

¹⁰² Department of Education, Skills and Employment, “Review of Adoption of the Model Code on Freedom of Speech and Academic Freedom in Higher Education: Australian Government Response,” p. 5.

9	Introduce legislation	Yes	Relevant Bill was introduced to Parliament on 28 October 2020 and passed on 15 March 2021.
10	Communicate decision	Yes	The Bill was covered extensively in the media, and the relevant Minister issued a media release to explain the reforms. ¹⁰³
		7/10	

¹⁰³ Alan Tudge, "Protecting freedom of speech at Australian universities," Department of Education, Skills and Employment, 16 March 2021, <https://ministers.dese.gov.au/tudge/protecting-freedom-speech-australian-universities>.

Corporations Amendment (Corporate Insolvency Reforms) Bill 2020

The lockdown measures implemented in response to the COVID-19 pandemic had an immediate and devastating impact on small businesses across Australia. Data from the Australian Bureau of Statistics indicated that 10% of all businesses, or around 242,000 firms, ceased operating as lockdowns were first introduced.¹⁰⁴

In the early stages of the pandemic, the Australian Parliament passed the *Coronavirus Economic Response Package Omnibus Act 2020*, which put into effect three temporary measures intended to reduce the number of unnecessary insolvencies which might arise due to business closures caused by lockdown measures. These measures took the form of amendments to the *Corporations Act 2001* and its subsidiary legislation to:¹⁰⁵

- Extend the time within which a debtor must respond to a statutory demand.
- Increase the minimum amount for which a statutory demand could be issued.
- Creating a temporary safe harbour so that a breach of the duty to prevent insolvent trading does not occur if debt is incurred:
 - In the ordinary course of the company's business.
 - During the six months after 25 March 2020, or a longer period prescribed by the *Corporations Regulations 2001*.
 - Before any appointment during that period of an administrator, or liquidator, of the company.

These temporary measures were extended on 7 September 2020 to last until the end of the year. The Treasurer, Josh Frydenberg, then announced a set of permanent reforms, which would be found in the *Corporations Amendment (Corporate Insolvency Reforms) Bill 2020*, on 24 September 2020. The Bill was introduced into Parliament in November, and the reforms came into effect on 1 January 2021. The reforms were said to draw on key features of Chapter 11 of the United States Bankruptcy Code which offers a far more flexible system than that in Australia.¹⁰⁶ The key elements of the reforms announced included:

- The introduction of a new debt restructuring process for incorporated businesses with liabilities of less than \$1 million.
- Moving from a rigid one-size-fits-all 'creditor in possession' model to a more flexible 'debtor in possession' model which allows eligible small businesses to restructure their debts while remaining in control of their business.
- A rapid 20 business day period for the development of a restructuring plan by a small business restructuring practitioner, followed by 15 business days for creditors to vote on the plan.

¹⁰⁴ Australian Bureau of Statistics, "Business Indicators, Business Impacts of COVID-19, Week Commencing 30 March 2020," April 2020, <https://www.abs.gov.au/statistics/economy/business-indicators/business-conditions-and-sentiments/week-commencing-30-march-2020>.

¹⁰⁵ Paula Pyburne, "Corporations Amendment (Corporate Insolvency Reforms) Bill 2020," Bills Digest No. 38, Department of Parliamentary Services, 9 December 2020, https://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/7695481/upload_binary/7695481.pdf, pp. 6-7.

¹⁰⁶ Josh Frydenberg, "Insolvency reforms to support small business recovery," Media Release, Treasury, 24 September 2020, https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/7575578/upload_binary/7575578.pdf;fileType=application%2Fpdf#search=%22media/pressrel/7575578%22.

- A new, simplified liquidation pathway for small businesses to allow faster and lower cost liquidation.
- Complementary measures to ensure the insolvency sector could respond effectively both in the short and long term to increased demand and to meet the needs of small businesses.¹⁰⁷

The policy proposal was announced in the 2020-21 Budget with the intention of “reducing complexity, time and costs, [and introducing] a simplified restructuring process [to] encourage more Australian small businesses to restructure when in financial distress to improve their chances of survival.”¹⁰⁸ The Treasurer released an exposure draft of the Bill and stakeholders were able to lodge submissions with their feedback to the Treasury. A total of 48 submissions were received and subsequently published on the Treasury website.¹⁰⁹

Although finally addressed in the context of the COVID-19 pandemic, issues around Australia’s corporate insolvency regime have been in the public debate for some time. In a 2015 inquiry report, for example, the Productivity Commission argued that “there is considerable scope to streamline insolvency processes for the majority of businesses”.¹¹⁰ This followed a Treasury report the prior year which flagged the need for the government to engage stakeholders on Australia’s corporate insolvency system.¹¹¹ Additionally, Recommendation 61 of the 2014 Senate Economics References Committee review into the performance of the Australian Securities and Investments Commission was that the government conduct a review into corporate insolvency law and reform in Australia.¹¹² Finally, in July 2020, after the temporary reforms outlined above came into effect, the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) released its *Insolvency Inquiry Report* which recommended a series of emergency and longer-term reforms to Australia’s corporate insolvency system. Specifically, ASBFEO called for simplified liquidation processes for smaller businesses, and a ‘hibernation instrument’ to be made available in the case of systemic shocks (such as the COVID-19 pandemic, but also natural disasters).¹¹³

¹⁰⁷ Ibid.

¹⁰⁸ Treasurer, “Budget 2020-21: Budget Strategy and Outlook,” 6 October 2020, https://archive.budget.gov.au/2020-21/bp1/download/bp1_w.pdf, p. 1-21.

¹⁰⁹ The Treasury, “Insolvency reforms to support small business,” Australian Government, <https://treasury.gov.au/consultation/c2020-118203>.

¹¹⁰ Productivity Commission, “Business Set-up, Transfer and Closure,” Productivity Commission Inquiry Report, 2015, <https://www.pc.gov.au/inquiries/completed/business/report/business.pdf>, p. 26.

¹¹¹ The Treasury, “Financial System Inquiry: Final Report,” Australian Government, November 2014, <https://treasury.gov.au/sites/default/files/2019-03/p2014-FSI-01Final-Report.pdf>, p. 266.

¹¹² Economics References Committee, “Performance of the Australian Securities and Investments Commission,” The Senate, June 2014, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/ASIC/Final_Report/index, p. xxxiv.

¹¹³ Australian Small Business and Family Enterprise Ombudsman, “Insolvency Inquiry Report,” Australian Government, July 2020, <https://www.asbfeo.gov.au/sites/default/files/Insolvency%20Inquiry%20Final%20Report.pdf>.

	Criteria	Conclusion	Comment
1	Establish need	Yes	Lockdown measures implemented in response to the COVID-19 pandemic caused immediate and significant stresses for business owners. Need for insolvency reform was clearly outlined in this context.
2	Set objectives	Yes	Desire to reduce red tape, address structural issues with insolvency law, and improve the survival chances of small businesses impacted by lockdowns was clearly outlined.
3	Identify options	Yes	Although not technically included with the Bill, a Regulation Impact Statement was included with the explanatory statement for the Regulations under the Bill, which included different policy options and their costings. ¹¹⁴
4	Consider mechanisms	No	It is not clear how the policy could have been implemented other than through legislative changes.
5	Brainstorm alternatives	Yes	The Regulation Impact Statement included with the explanatory statement of the relevant Regulations includes the positives and negatives of three different options, and their costings. ¹¹⁵
6	Design pathway	No	There appears to be no plan for the management of the implementation of the policy, nor for the review of the reforms after they were implemented.
7	Consult further	Yes	Stakeholders were invited to provide feedback to an exposure draft of the Bill and relevant Regulations.
8	Publish proposals	Yes	It is reasonable to consider the extensive reviews and inquiries undertaken by Treasury, the Productivity Commission, and the ASBFEO as evidence of published proposals. Additionally, stakeholders were invited to provide feedback to these reports, as they were to the exposure drafts of the Bill and Regulations.
9	Introduce legislation	Yes	Relevant Bill introduced to Parliament on 12 November 2020 and passed on 10 December 2020.

¹¹⁴ The Treasurer, "Corporations Amendment (Corporate Insolvency Reforms) Regulations 2020 Explanatory Statement," Australian Government, <https://www.legislation.gov.au/Details/F2020L01654/Explanatory%20Statement/Text>.

¹¹⁵ The Treasurer, "Corporations Amendment (Corporate Insolvency Reforms) Regulations 2020 Explanatory Statement," Australian Government, <https://www.legislation.gov.au/Details/F2020L01654/Explanatory%20Statement/Text>.

10	Communicate decision	Yes	The reforms were first announced by the Government in late March 2020. ¹¹⁶ In September 2020, the Treasurer announced that the reforms would be made permanent, ¹¹⁷ and they were subsequently included in the 2020-21 Budget. ¹¹⁸ A number of relevant bodies issued media releases or notes explaining the changes. ¹¹⁹
		8/10	

116 Treasury, "Temporary relief for financially distressed businesses," Australian Government, https://treasury.gov.au/sites/default/files/2020-03/Fact_sheet-Providing_temporary_relief_for_financially_distressed_businesses.pdf.

117 Josh Frydenberg, "Insolvency reforms to support small business recovery," Media Release, Treasury, 24 September 2020, https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/7575578/upload_binary/7575578.pdf;fileType=application%2Fpdf#search=%22media/pressrel/7575578%22.

118 Treasurer, "Budget 2020-21: Budget Strategy and Outlook," 6 October 2020, https://archive.budget.gov.au/2020-21/bp1/download/bp1_w.pdf.

119 See, for example, Australian Taxation Office, "New insolvency reforms to support small business," Australian Government, 21 May 2021, <https://www.ato.gov.au/Tax-professionals/Your-practice/Insolvency-practitioners/New-insolvency-reforms-to-support-small-business/>; The Treasury, "Insolvency reforms to support small business," September 2020, <https://ministers.treasury.gov.au/sites/ministers.treasury.gov.au/files/2020-09/Insolvency-Reforms-fact-sheet.pdf>; Australian Securities and Investments Commission, "Insolvency laws for small business are changing," 29 December 2020, <https://asic.gov.au/about-asic/news-centre/news-items/insolvency-laws-for-small-business-are-changing/>.

New South Wales

Bushfires Legislation Amendment Bill 2020

The *Bushfires Legislation Amendment Bill 2020* amends the *Rural Fires Act 1997*, the *Biodiversity Conservation Act 2016*, *National Parks and Wildlife Act 1974*, and other legislation in response to the findings and recommendations of the Final Report of the NSW Bushfire Inquiry. As explained by David Elliott, the Minister for Police and Emergency Services, in his second reading speech, the Bill “will help to reduce bushfire risk and protect life and property or help those who are recovering and rebuilding in the wake of the [2019-20 season] fires.” The reforms contained in the Bill, Elliott continued, “are critical in responding to the New South Wales Bushfire Inquiry and ensuring that our State is in the best possible position to combat future natural disasters such as bushfires.”¹²⁰

As explained by Elliott in his second reading speech, some of the key reforms found in the Bill aim to:

- Achieve greater clarity and simplicity for rural landholders by empowering owners and occupiers to clear vegetation on their property without the need for a license, approval, consent, or other authorisation in certain circumstances.
- Create greater consistency between public and private landholders in an effort to make the quest for public safety ‘tenure blind’.
- Allow senior Rural Fire Service (RFS) officers to serve bushfire hazard reduction notices on public authorities.
- Open all bush fire risk management plans, plans of operations, and fire access and fire trail plans to audit and oversight by the Commissioner of the NSW RFS.
- Close a loophole whereby bushfire hazard complaints about public land made to public bodies may not be passed onto the RFS Commissioner. The aim is to ensure that bushfire hazard complaints about public lands are appropriately and centrally managed.
- Provide an exemption from biodiversity assessment and offsetting for people seeking to rebuild property that was damaged or destroyed in the 2019-20 bushfires.¹²¹

As indicated above, the reforms in the Bill were largely based on the recommendations set out in the Final Report of the NSW Bushfire Inquiry. The Inquiry was announced by the Premier on 30 January 2020, who asked for a report with recommendations in relation to bushfire preparedness and response by 31 July 2020 ahead of the 2020-21 bushfire season.¹²²

¹²⁰ “Bushfires Legislation Amendment Bill 2020 Second Reading Speech,” Legislative Assembly Hansard, 10 November 2020, <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-113993>.

¹²¹ Ibid.

¹²² Dave Owens and Mary O’Kane, “Final Report of the NSW Bushfire Inquiry,” 31 July 2020, <https://www.dpc.nsw.gov.au/assets/dpc-nsw-gov-au/publications/NSW-Bushfire-Inquiry-1630/Final-Report-of-the-NSW-Bushfire-Inquiry.pdf>, p. iv.

Under Section 139 of the Bill, inserted after an amendment proposed by the Labor Party, the Minister is required to review the amendments made “to determine whether the policy objectives of the amendments remain valid and whether the terms of the amendments remain appropriate for securing those objectives.”¹²³

Many of the reforms in the Bill appear to be driven directly by the recommendations found in the Inquiry report. For example, in Recommendation 27 the Inquiry called for the Government to “decrease the costs associated with recovery and rebuilding”,¹²⁴ which likely informed the policy providing some exemptions from biodiversity assessment and offsetting. The Inquiry also noted that, during consultation with stakeholders, “many landowners and communities told the Inquiry that they felt unable to manage and prepare for the 2019-20 season effectively because of the complexity of approval processes for vegetation management.”¹²⁵ As a result, part of Recommendation 28 was that the Government

review vegetation clearing policies to ensure that the processes are clear and easy to navigate for the community, and that they enable appropriate bush fire risk management by individual landowners without undue cost or complexity.¹²⁶

As a result, the Government adopted the reform of allowing owners and occupiers to clear vegetation from their property provided certain conditions were met. Despite this, some criticised the government for this specific policy. The Greens’ David Shoebridge, for example, claimed that “the Government is yet to produce any cogent evidence that... [it] will provide any protection to property”.¹²⁷ Additionally, Labor’s Tara Moriarty claimed that the Bill “falls short of the level of transparency and accountability expected by the community”, and that relevant stakeholders were not consulted by the Government before the Bill was introduced to Parliament.¹²⁸ It is possible that some consultations were undertaken, but there appears to be no public record of such consultations.

	Criteria	Conclusion	Comment
1	Establish need	Yes	The Government set out that the reforms were needed in response to the 2019-20 bushfire season and to give effect to the recommendations of the NSW Bushfire Inquiry. The Inquiry received almost 2,000 submissions from stakeholders and held consultations with affected communities across NSW.

¹²³ *Bushfires Legislation Amendment Bill 2020* (NSW) s. 139 (Austl.).

¹²⁴ Dave Owens and Mary O’Kane, “Final Report of the NSW Bushfire Inquiry,” 31 July 2020, <https://www.dpc.nsw.gov.au/assets/dpc-nsw-gov-au/publications/NSW-Bushfire-Inquiry-1630/Final-Report-of-the-NSW-Bushfire-Inquiry.pdf>, p. xii.

¹²⁵ *Ibid.*, p. 192.

¹²⁶ *Ibid.*, p. xii.

¹²⁷ “Bushfires Legislation Amendment Bill 2020 Second Reading Debate,” 17 November 2020, <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1820781676-84140'>.

¹²⁸ *Ibid.*

2	Set objectives	Yes	The Government clearly articulated that the objectives of the reforms were to reduce bushfire risk, protect life and property, and assist those who are recovering and rebuilding in the wake of the 2019-20 bushfire season. ¹²⁹
3	Identify options	No	While these reforms sit within a broader set of reforms the Government has embarked upon, it does not appear that specific alternative policy options to those set out in the Bill were considered.
4	Consider mechanisms	No	It does not appear that alternate mechanisms for implementing the reforms were considered.
5	Brainstorm alternatives	No	There is no analysis of the chosen reforms of any alternatives.
6	Design pathway	No	There is no publicly available policy design or rollout framework. There will be a review of the Bill as a result of amendments adopted by the Government.
7	Consult further	No	No stakeholder consultation was undertaken after the Bill was published and introduced.
8	Publish proposals	No	No proposals were published, and no avenue for feedback or consultation was established after the reforms were announced.
9	Introduce legislation	Yes	Relevant Bill was introduced into the Legislative Assembly on 10 November 2020 and passed both houses on 19 November 2020. ¹³⁰ Some amendments were made to the original Bill, and there was limited debate in the Parliament.
10	Communicate decision	No	There is no media release available that explains the reforms.
		3/10	

129 "Bushfires Legislation Amendment Bill 2020 Second Reading Speech," Legislative Assembly Hansard, 10 November 2020, <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1323879322-113993'>.

130 Parliament of New South Wales, "Bushfires Legislation Amendment Bill 2020," <https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=3817>.

Stronger Communities Legislation Amendment (Domestic Violence) Bill 2020

The *Stronger Communities Legislation Amendment (Domestic Violence) Bill 2020* is one component of the current NSW Government's domestic violence reform agenda. The Bill amends the *Crimes (Domestic and Personal Violence) Act 2007* and the *Criminal Procedure Act 1986* in relation to domestic violence matters. It also repeals the *Crimes Legislation Amendment Act 2018*, which itself had provided miscellaneous amendments to various Acts with respect to domestic violence. The stated objects of the Bill are, among other things, to:

- Extend the meaning of intimidation, as defined in the *Crimes (Domestic and Personal Violence) Act 2007* to include harm to an animal in particular circumstances.
- Require that an apprehended domestic violence order, imposed by the court for certain offenders who are sentenced to imprisonment, continues for a period of 2 years after the term of imprisonment is completed, or another period specified by the court.
- To provide that a court may grant leave to make an application to vary or revoke an indefinite apprehended domestic violence order if it is in the interests of justice.
- To clarify that the prohibition imposed by an apprehended violence order under the *Crimes (Domestic and Personal Violence) Act 2007* relating to destroying or damaging property of a protected person, which is taken to be specified in every order, extends to the harming of an animal.
- To provide that certain parts of domestic violence proceedings in which a complainant gives evidence must be held in closed court, unless a court otherwise directs.
- To provide domestic violence complainants with the entitlement to give evidence using alternative arrangements or by alternative means, including audio visual link, in certain domestic violence proceedings.
- To amend the *Criminal Procedure Act 1986* to provide for a warning that may be given by a Judge in relation to domestic violence offences.

As explained by the NSW Attorney General and Minister for the Prevention of Domestic Violence, Mark Speakman, in his second reading speech,

Domestic violence is a complex crime like no other because of the intimate relationships between perpetrators and victims. Those close personal connections intertwine complainants and defendants in ways that maintain a callous grip on victims. This grip can silence reports of abuse, delay reports when victims are brave enough to come forward, and intimidate victims to discontinue cooperating with prosecutions... Reforms contained within [the] bill seek to ease that burden.¹³¹

¹³¹ Mark Speakman, "Stronger Communities Legislation Amendment (Domestic Violence) Bill 2020 Second Reading Speech," Legislative Assembly Hansard, 22 October 2020, <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1323879322-113810'>.

The Bill is part of the Government's broader domestic violence reform agenda, which is set out in the 2016 *Domestic and Family Violence Blueprint for Reform 2016-2021*. The Blueprint

sets out the direction for a domestic violence system... that will prevent violence, intervene early with vulnerable communities, support victims, hold perpetrators accountable, and deliver evidence-based quality services to make victims safer and support their recovery.¹³²

The Blueprint states that it is the "culmination of an intensive process of consultation" with both victims and those who work in the field of domestic violence.¹³³

According to the Principle Solicitor of Women's Legal Service NSW, Pip Davis, the reform to allow victims of domestic violence to give evidence remotely or in a closed court is consistent with providing a "trauma-informed approach". Davis also indicated that the reform to allow for apprehended violence orders to be extended after a defendant was released from custody was consistent with recommendations made by the NSW Domestic Violence Death Review Team.¹³⁴

	Criteria	Conclusion	Comment
1	Establish need	Yes	Although there was no clear explanation of the need for these reforms, they are supported by a broader need established by the Government and some of its departments over some time in conjunction with other stakeholder engagement.
2	Set objectives	Yes	Stated objectives are to ease burdens on victims of domestic violence.
3	Identify options	No	It does not appear that alternate options were considered to achieve the aims of the policy.
4	Consider mechanisms	No	It does not appear that alternate mechanisms for implementing the policy were considered
5	Brainstorm alternatives	No	There is no publicly available consideration of the benefits and costs of the chosen policy or any alternative policies.

¹³² Women NSW, "NSW Domestic and Family Violence Blueprint for Reform 2016-2021: Safer Lives for Women, Men and Children," NSW Government, August 2016, http://domesticviolence.nsw.gov.au/__data/assets/pdf_file/0004/379849/dfv-blueprint-for-reform.pdf, p. 1.

¹³³ Ibid.

¹³⁴ Lucy Cormack, "'Why don't they leave?': Domestic violence court reforms proposed to dispel myths," *Sydney Morning Herald*, 21 October 2020, <https://www.smh.com.au/national/nsw/why-don-t-they-leave-domestic-violence-court-reforms-proposed-to-dispel-myths-20201020-p566ts.html>.

6	Design pathway	Yes	The Bill comes in the context of a broader reform initiative of the Government, which is subject to regular reviews and opportunities for feedback and engagement. ¹³⁵
7	Consult further	Yes	The Government states that stakeholders were consulted on this Bill, and it was noted during debate in the Legislative Council that the "Attorney General commenced his own formal consultation on the link between domestic violence and animal abuse", although there is very limited information about this consultation available publicly. ¹³⁶
8	Publish proposals	No	It does not appear that the proposed reforms were published prior to the Bill being introduced. It does not appear that public input or feedback was sought either before or after the Bill was introduced.
9	Introduce legislation	Yes	The relevant Bill was introduced into Parliament on 21 October 2020 and was passed with amendments on 18 November 2020.
10	Communicate decision	Yes	A media release which explains the reforms is available on the Department of Communities and Justice website. ¹³⁷
		6/10	

¹³⁵ See, for example, the regular reports by the Domestic Violence Death Review Team, and the Government's responses to them, Coroners Court, "Domestic violence death review," <https://www.coroners.nsw.gov.au/coroners-court/resources/domestic-violence-death-review.html>; See also the Annual Report Cards for the NSW Domestic and Family Violence Blueprint for Reform 2016-2021, and the KPMG Evaluation of the Blueprint, Women NSW, "Domestic and Family Violence Blueprint," NSW Government, <https://www.women.nsw.gov.au/strategies/nsw-domestic-and-family-violence/domestic-and-family-violence-blueprint>.

¹³⁶ "Stronger Communities Legislation Amendment (Domestic Violence) Bill 2020 Second Reading Debate," Legislative Council Hansard, 12 November 2020, <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1820781676-84081'>; Zathia Bazeer, "Law to link sadistic attacks on pets with domestic violence," *The Junction*, <https://junctionjournalism.com/2020/11/02/law-to-link-sadistic-attacks-on-pets-with-domestic-violence/>.

¹³⁷ "Domestic violence reforms pass parliament," Department of Communities and Justice, 19 November 2020, <https://www.dcj.nsw.gov.au/news-and-media/media-releases/domestic-violence-reforms-pass-parliament>.

Electricity Infrastructure Investment Bill 2020

The *Electricity Infrastructure Investment Bill 2020* was introduced as a key part of the NSW Government's *Electricity Infrastructure Roadmap*, a "plan to deliver the major infrastructure needed to modernise [the] electricity system and power [the] economy."¹³⁸ The stated objectives of the Bill are to:

- Improve the affordability, reliability, security and sustainability of electricity supply.
- Co-ordinate investment in new generation, storage, network and related infrastructure.
- Encourage investment in new generation, storage, network and related infrastructure by reducing risk for investors.
- Foster local community support for investment in new generation, storage, network and related infrastructure.
- Support economic development and manufacturing.¹³⁹

The Bill comes in the context of significant change in the NSW electricity system, driven in large part by Government policy which has prioritised the penetration of renewable energy into the market and driven out traditional coal-fired power with the effect of increasing the cost of electricity for households and businesses. In 2018, the Government released its *NSW Transmission Infrastructure Strategy* which sought to boost interconnection with Victoria, South Australia and Queensland, and unlock more power from the Snowy Hydro Scheme; increase energy capacity by prioritizing Energy Zones which would become a driving force to deliver affordable energy into the future; and streamline regulation and improve conditions for investment through work with other states and regulators.¹⁴⁰ Put simply, the aim of that Strategy is to boost connectivity to access existing energy supplies, to unlock energy resources and regional development, and reduce barriers to investment.

The following year, the Government released its *NSW Electricity Strategy*, which built on the Infrastructure Strategy by setting out a Strategy focused on improving "the efficiency and competitiveness of the NSW electricity market" and encouraging "investment in new price-reducing generation and energy saving technology."¹⁴¹ While the Transmission Strategy focused on infrastructure and regulation related to energy transmission, this Strategy focused on infrastructure and regulation related to electricity generation.

138 NSW Department of Planning, Industry and Environment, "NSW Electricity Infrastructure Roadmap: Building an Energy Superpower Overview," November 2020, https://apo.org.au/sites/default/files/resource-files/2020-11/apo-nid309302_0.pdf, p. 12.

139 *Electricity Infrastructure Investment Bill 2020* (NSW), <https://www.parliament.nsw.gov.au/bill/files/3818/First%20Print.pdf>, p. 1.

140 Department of Planning and Environment, "NSW Transmission Infrastructure Strategy: Supporting a modern energy system," NSW Government, November 2018, https://www.energy.nsw.gov.au/sites/default/files/2018-11/DPE8754%20NSW%20Transmission%20Infrastructure%20Strategy_WEB.ACC_.PDF, p. 5.

141 Department of Planning, Industry & Environment, "NSW Electricity Strategy: Our plan for a reliable, affordable and sustainable electricity system," NSW Government, <https://www.energy.nsw.gov.au/sites/default/files/2019-11/Electricity%20Strategy%20Overview.pdf>, p. 11.

The Roadmap mentioned above builds upon these two Strategies, and is implemented through the Bill. Together, they allow the Government to:

- Declare five Renewable Energy Zones (REZs) in the Central West Orana, Illawarra, New England, South West, and Hunter-Central Coast regions. The Zones will deliver an intended network capacity of 12 gigawatts.
- Establish an Electricity Infrastructure Investment Safeguard to deliver new, long duration storage and firming capacity.
- Establish an Electricity Infrastructure Jobs Advocate and NSW Renewable Energy Sector Board to ensure the use of manufactured and supplied goods and services, and maximise the engagement of local workers.
- Establish a Transmission Development Scheme that will de-risk REZ investment.¹⁴²

As explained by Deloitte, the Bill is part of the NSW Government's "aggressive agenda on renewables investment, with a focus on renewable energy zones", and the Bill will likely provide "investors with an avenue for investment certainty and a relatively easier route to connection."¹⁴³ Greater investment is required because the Government is seeking to shut down coal-fired power stations in an effort to achieve net zero emissions by 2050. As explained by the Government in its Roadmap, infrastructure is required to "replace four coal-fired power stations that are scheduled to close within the next 15 years, starting in 2023." These four coal-fired power stations "currently provide around three quarters of the State's energy supply; if they are not replaced before they close there will likely be substantial price rises."¹⁴⁴

The director of the energy program at the Grattan Institute, Tony Wood, criticised the NSW policy saying that:

It transfers too much risk from investors to consumers and taxpayers. The idea is to transfer basically as much risk as possible away from the project proponent so they will get the lowest possible price – and of course that works... but the risk doesn't go away because you've given it to somebody else.¹⁴⁵

The chief of the Australian Energy Council, Sarah McNamara, also raised concerns, indicating that existing mechanisms in the National Electricity Market already encourage investment in new generation and that government underwriting of specific power projects could distort market signals for private generators. McNamara also criticised the Government's NSW-specific reliability target, warning that it could lead to an over-build of energy assets and increase costs for households.¹⁴⁶ These fears

¹⁴² NSW Government, "Electricity Infrastructure Roadmap," <https://www.energy.nsw.gov.au/government-and-regulation/electricity-infrastructure-roadmap>.

¹⁴³ Deloitte, "Blues get an edge in this state of origin," 25 November 2020, <https://www2.deloitte.com/au/en/blog/energy-resources-industrials-blog/2020/blues-get-edge-in-this-state-of-origin.html>.

¹⁴⁴ NSW Department of Planning, Industry and Environment, "NSW Electricity Infrastructure Roadmap: Building an Energy Superpower Overview," November 2020, https://apo.org.au/sites/default/files/resource-files/2020-11/apo-nid309302_0.pdf, p. 5.

¹⁴⁵ Angela Macdonald-Smith, "NSW energy plan raises worries on risks for consumers," *Australian Financial Review*, 9 November 2020, <https://www.afr.com/companies/energy/nsw-energy-plan-raises-worries-on-risks-for-consumers-20201109-p56cqn>.

¹⁴⁶ Ibid.

were warranted; after the Bill was introduced to Parliament, AGL Energy announced that it was delaying a new 250-megawatt gas-fired power station and reviewing plans for a 500-megawatt battery in light of the Government's announced policy.¹⁴⁷

	Criteria	Conclusion	Comment
1	Establish need	No	The Government argued that it needs to replace coal-fired power stations, but does not articulate why this is necessary or in the public interest.
2	Set objectives	Yes	The Government's stated objectives are to co-ordinate and encourage investment to improve the affordability, reliability, security and sustainability of electricity supply.
3	Identify options	No	It does not appear that alternate policy options were considered.
4	Consider mechanisms	Yes	Alternate mechanisms for implementing the policy were considered at the Committee stage.
5	Brainstorm alternatives	No	Modelling prepared for the Government estimates that the Roadmap, given effect through the Bill, will result in \$32 billion of investment over a decade, coupled with the creation of 6,300 construction and 2,800 ongoing jobs. ¹⁴⁸ However, it does not appear that the Government has considered the costs of their policy, or the costs or benefits of alternate policy options.
6	Design pathway	Yes	The Government has developed a project management plan through the Strategies and Roadmap released ahead of the Bill. However, as noted above, the release of the Roadmap resulted in AGL Energy delaying a new gas-fired power station and reviewing plans for a large-scale battery, indicating that there could be flaws in the plan.

¹⁴⁷ Angela Macdonald-Smith, "AGL hits pause on NSW gas power after energy road map," *Australian Financial Review*, 17 November 2020, <https://www.afr.com/companies/energy/agl-hits-pause-on-nsw-gas-power-after-energy-road-map-20201117-p56fev>; Angela Macdonald-Smith, "AGL's Liddell plan: out of coal, into batteries," *Australian Financial Review*, 14 August 2020, <https://www.afr.com/companies/energy/agl-s-liddell-plan-out-of-coal-into-batteries-20200814-p55lnv>.

¹⁴⁸ NSW Department of Planning, Industry and Environment, "NSW Electricity Infrastructure Roadmap: Building an Energy Superpower Overview," November 2020, https://apo.org.au/sites/default/files/resource-files/2020-11/apo-nid309302_0.pdf.

7	Consult further	No	It does not appear that consultation was undertaken between the policy being announced and the Bill being introduced, although it is worth noting that consultation is ongoing surrounding implementation of REZs and other aspects of the Roadmap ¹⁴⁹ and was undertaken in the creation of the Roadmap and Strategies.
8	Publish proposals	Yes	The policy was developed over the course of two Strategies which were released some time ahead of the Bill, while the Roadmap was released only two weeks prior to the Bill being introduced to Parliament.
9	Introduce legislation	Yes	The relevant Bill was introduced to Parliament on 10 November 2020 and was passed on 24 November.
10	Communicate decision	Yes	While not focusing specifically on the Bill as it passed, there is a NSW Government webpage which explains the broader policy and Roadmap. ¹⁵⁰
		6/10	

¹⁴⁹ See, for example, the invitation for public submissions in NSW Department of Planning, Industry and Environment, "Renewable Energy Zones – Access Scheme: Issues Paper on Central-West Orana Renewable Energy Zone Access Scheme," March 2021, <https://www.energy.nsw.gov.au/sites/default/files/2021-05/renewable-energy-zones-access-scheme-issues-paper-central-west-orana.pdf>, p. 12.

¹⁵⁰ NSW Government, "Electricity Infrastructure Roadmap," <https://www.energy.nsw.gov.au/government-and-regulation/electricity-infrastructure-roadmap>.

COVID-19 Recovery Bill 2021

The *COVID-19 Recovery Bill 2021* amends more than 30 existing pieces of legislation and annuls some Acts altogether with the aim of temporarily remaking or extending the operation of certain measures implemented by the Government in response to the COVID-19 pandemic.¹⁵¹ As summarised by the Treasurer of NSW, Dominic Perrottet, during his second reading speech in the Legislative Assembly:

As we continue to deal with and emerge from the COVID-19 pandemic our regulatory settings must be fit for purpose, responsive and flexible. This bill extends COVID-19 temporary measures to make that possible. Some of these measures will be rigorously tested for potential permanent adoption – an important step in securing our long-term economic future. But the bill also takes important steps, particularly in relation to residential and commercial tenancies, to help businesses smoothly transition back to normal operations.¹⁵²

The Bill allowed provisions temporarily enacted during the pandemic to be extended for 12 months to 31 March 2022. As explained by the Treasurer: “This time will allow the measures to be evaluated, and a decision will be made about whether to adopt the changes permanently.”¹⁵³ Changes of significance include, but are not limited to:

- Extending provisions allowing for the conduction of meeting, medical examinations and questioning through audio or video link.
- Extend provisions that allow more flexibility for employers and their workers in determining when and how much leave may be taken during the pandemic.
- Extend provisions that ensure that where a worker is stood down without pay by their employer as a direct or indirect result of the pandemic, that the worker’s long service leave and annual leave will continue to accrue.
- Amending the *Residential Tenancies Act 2010* to transition out of the moratorium on evictions introduced in April 2020.
- Extending the permitted hours during which the construction or demolition of certain types of buildings can take place without need to submit an application for approval to do so.

The Bill passed the Parliament without difficulty, with the support of the Government and the Labor Opposition, plus the Greens. Mark Banasiak, of the Shooters, Fishers and Farmers Party, however, raised a number of concerns with the Bill. Of particular note, Banasiak argued that if “the Government sees the need for legislative reform in any area, then it needs to... introduce standalone bills.”¹⁵⁴

¹⁵¹ Parliament of New South Wales, ‘COVID-19 Recovery Act 2021 No 5’, 17 March 2021, <https://legislation.nsw.gov.au/view/pdf/asmade/act-2021-5>, p. 2.

¹⁵² “COVID-19 Recovery Bill 2021 Second Reading Speech,” Legislative Assembly Hansard, 17 March 2021, <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1323879322-115971'>.

¹⁵³ Ibid.

¹⁵⁴ “COVID-19 Recovery Bill 2021 Second Reading Debate,” Legislative Council Hansard, 23 March 2021, <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1820781676-85131'>.

	Criteria	Conclusion	Comment
1	Establish need	Yes	The Treasurer noted that, in confronting the pandemic, regulatory settings need to be “fit for purpose, responsive and flexible”, and that an extension of a range of temporary measures was required to ensure this.
2	Set objectives	Yes	The Treasurer argued that the objective of the extension of temporary measures was to “help with the continued management of the pandemic as well as our longer-term economic recovery”, and to “ensure that each element of our recovery strategy delivers the maximum benefit for the people of New South Wales.” ¹⁵⁵
3	Identify options	No	It does not appear that alternatives to the Bill were considered.
4	Consider mechanisms	Yes	Flexibility within the bill for the duration of individual regulations is given.
5	Brainstorm alternatives	No	Though there is flexibility within the bill for the duration of certain amendments, there is no indication alternatives were considered.
6	Design pathway	Yes	Outlines design and implementation of policies, and measures reviewed by LRC ¹⁵⁶ .
7	Consult further	No	No reports of consultation of measures contained within the bill.
8	Publish proposals	No	No proposals published to public or stakeholders before passing of the bill.
9	Introduce legislation	Yes	Introduced on 23 March 2021, passed on 24 March 2021.
10	Communicate decision	No	No simple, amalgamated overview of the impact of amendments within the bill is available on a central government website.
		5/10	

155 “COVID-19 Recovery Bill 2021 Second Reading Speech,” Legislative Assembly Hansard, 17 March 2021, <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-115971>.

156 Ibid, p. 3-4.

Victoria

Justice Legislation Amendment (Drug Court and Other Matters) Bill 2020

The centerpiece of the *Justice Legislation Amendment (Drug Court and Other Matters) Bill 2020* is the establishment of a pilot Drug Court in the County Court of Victoria. In Victoria, the Magistrates' Court Drug Court has been in operation since 2002, and the Bill seeks to expand the Drug Court scheme to the County Court. According to the Attorney-General, this reform will expand "the availability of specialised drug courts to a wider cohort of offenders."¹⁵⁷ In addition to the Drug Court reform, the Bill will also:

- Amend the *Victorian Civil and Administrative Tribunal Act 1998* to protect the confidentiality of applicants under the *Voluntary Assisted Dying Act 2017*.
- Amend the *Limitation of Actions Act 1958* to allow people who entered into settlement agreements between 1 July 2015 and 1 July 2018, when the Ellis defense was effectively abolished, to apply to the court to have the agreements set aside.
- Amend the *Charities Act 1978* to allow the Attorney-General to delegate any of her powers or functions under that Act and the regulations.
- Amend the *Children, Youth and Families Act 2005* to allow for an appointment of an additional, alternate chairperson, and expand eligibility for chair and alternate chair positions.¹⁵⁸

As the Drug Court reform is the most significant part of the Bill, it will be the focus of this section.

In her second reading speech, the Attorney-General outlined that

Drug courts are specialized courts that provide a therapeutic approach to addressing the complex needs of offenders with drug and alcohol dependency. Traditional sentencing options can fail to adequately address the needs of drug offenders. By contrast, the Drug Court model seeks to address underlying causes of offending by providing intensive drug treatment services to offenders. Addressing these underlying causes will ultimately enhance the wellbeing and community connectedness of participants by improving their relationships, housing stability and life skills, and reducing reoffending.¹⁵⁹

¹⁵⁷ Jill Hennessy, "Justice Legislation Amendment (Drug Court and Other Matters) Bill 2020 Second Reading Speech," 19 March 2020, https://hansard.parliament.vic.gov.au/search/?LDMS=Y&IW_DATABASE=*&IW_FIELD_ADVANCE_PHRASE=be+now+read+a+second+time&IW_FIELD_IN_SpeechTitle=Justice+Legislation+Amendment+Drug+Court+and+Other+Matters+Bill+2020&IW_FIELD_IN_HOUSENAME=ASSEMBLY&IW_FIELD_IN_ACTIVITYTYPE=Second+reading&IW_FIELD_IN_SittingYear=2020&IW_FIELD_IN_SittingMonth=March&IW_FIELD_IN_SittingDay=19.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

The Bill will establish a Drug Court Division within the County Court of Victoria, which will operate as a pilot program for three years and with an independent evaluation after two years. The key difference between the pilot and the Magistrates' Court Drug Court is that while the latter is only open to offenders who plead guilty to an offence with a sentence of up to two years, the former will be open to offenders who are liable for a maximum sentence of up to four years. Offenders will need to meet certain criteria to be eligible for the program. They must reside within a gazette catchment area, plead guilty to the offence, satisfy the court on the balance of probabilities that they are dependent on drug and/or alcohol and that this dependency contributed to the commission of the offence. As with the Magistrates' Court, those convicted of sexual offences and offences involving the infliction of actual bodily harm, along with those convicted of aggravated home invasion or carjacking, will be excluded from the program.¹⁶⁰

Eligible offenders can consent to be sentenced to a Drug and Alcohol Treatment Order (DATO) of up to four years as an alternative to conventional sentencing. DATOs consist of two parts, one involving treatment and supervision to address the offender's drug or alcohol dependency, and the other a term of imprisonment which remains inactive while the offender undertakes treatment. The imprisonment can be activated if the offender fails to comply with the conditions of their DATO.¹⁶¹

In a 2014 review of the existing Drug Court program conducted for the Government, KPMG found that while those who had been through the Drug Court were "faster to reoffend post-intervention" compared to a control group, there was a significant difference in the incidence of reoffending in the longer term.

Analysis of reoffending data post-intervention collated by [Department of Justice] indicates that the [Drug Court] has a significant impact on the likelihood of reoffending in the medium (12-24 months) term. Available evidence indicates that after 24 months, the [Drug Court] Cohort analysed was 29 per cent less likely to have reoffended than the matched Control Cohort.¹⁶²

The review concluded that "drug courts remain more effective at addressing the revolving door of drug related offending than the use of transitional criminal justice approaches in isolation." It noted that the Drug Court "targets a particular cohort of individuals who have entrenched criminal behaviour related to substance misuse that has developed often over a number of years" and that this cohort imposes "a high burden on society and front line services". However, the review also noted that the finding of reduced reoffending should be "treated with caution" because the results were "susceptible to individual results and [are] not suitable for extrapolation over a wider group."¹⁶³

Reviews such as the KPMG one have been criticised in the academic literature, including by Ryan Kornhauser who argued in a 2016 paper that "certainty in these

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² KPMG, "Evaluation of the Drug Court of Victoria: Final Report," 18 December 2014, <https://www.mcv.vic.gov.au/sites/default/files/2018-10/Evaluation%20of%20the%20Drug%20Court%20of%20Victoria.pdf>, p. 75.

¹⁶³ Ibid, pp. 3-4.

findings [of Australian drug court evaluations] is tempered by mixed results and methodological limitations”, and that there is no ‘unequivocal endorsement’ “that the model is a comparatively effective method of reducing recidivism.”¹⁶⁴ In her 2018 doctoral thesis, Dayan Eliana Sarmiento Guerra argued that the Victorian Drug Court “instantiates a conception of dependence as both an illness and a crime... [raising] questions about the viability of the court’s claim to being therapeutic and distinct from traditional (more punitive) criminal justice responses to drug use.” Guerra also argued that “the court’s use of an abstinence model may heighten exposure to alcohol and other drug-related harms and risks, segregating drug court participants from the ‘rest of society’ and increasing their isolation.”¹⁶⁵

	Criteria	Conclusion	Comment
1	Establish need	Yes	The policy is based on a need to address drug and alcohol-related problems where they are underlying causes of crime, and to trial the reform before potential wider roll-out.
2	Set objectives	Yes	The stated objective of the reform is to address drug and alcohol problems where they are the underlying causes of crime in an effort to “enhance the wellbeing and community connectedness of participants by improving their relationships, housing stability and life skills, and reducing reoffending.” ¹⁶⁶
3	Identify options	No	It does not appear that alternate policy options for reducing alcohol- and drug-related crime were considered. It does not appear that an analysis of drug courts in Victoria or elsewhere in Australia was undertaken prior to the Bill being introduced.
4	Consider mechanisms	No	It does not appear that alternate mechanisms were considered to implement the intended policy.
5	Brainstorm alternatives	No	There is no publicly available analysis of the costs and benefits of this or any alternate policy options.
6	Design pathway	No	There is no policy design framework. The reform is based on past experiences with Drug Courts in Victoria, and is designed to be a pilot in the County Court. It is encouraging that it will be subject to an independent review, although flaws in previous such reviews have been highlighted.

164 Ryan Kornhauser, “The effectiveness of Australia’s drug courts,” *Journal of Criminology*, vol 51, no.1, doi: 10.1177/0004865816673412, pp. 94-95.

165 Dayan Eliana Sarmiento Guerra, “Producing Alcohol or Other Drug ‘Dependence’ in an Australian Drug Court: A Victorian Case Study,” Curtin University Faculty of Health Sciences, July 2018, <https://espace.curtin.edu.au/bitstream/handle/20.500.11937/76486/Sarmiento%20Guerra%20D%202018.pdf?sequence=1&isAllowed=y>, p. vi.

166 Ibid.

7	Consult further	No	It does not appear that any public or stakeholder consultation was undertaken before or after the Bill was introduced into Parliament.
8	Publish proposals	No	There was no process of consultation or feedback at any stage of the policy design and implementation.
9	Introduce legislation	Yes	The relevant Bill was introduced to Parliament on 18 March 2020 and was passed on 26 November 2020.
10	Communicate decision	No	A media release was issued when the Bill was introduced into Parliament, ¹⁶⁷ but it does not appear that the reform was communicated to the public when the Bill was passed.
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¹⁶⁷ Premier of Victoria, "Drug Court Expanded to Regional Victoria," 18 March 2020, <https://www.premier.vic.gov.au/drug-court-expanded-regional-victoria>.

Change or Suppression (Conversion) Practices Prohibition Bill 2020

The *Change or Suppression (Conversion) Practices Prohibition Bill 2020* seeks to prohibit “change” or “suppression” practices (more commonly referred to as ‘conversion therapy’), as they relate to sexual orientation and gender identity. The Bill gives the Victorian Equal Opportunity and Human Rights Commission the power to investigate reports of conversion practices and refer matters to the police.

The objects of the Bill include eliminating so far as possible the occurrence of change or suppression practices in Victoria and further promoting and protecting the rights set out in the Charter of Human Rights and Responsibilities. The stated purposes of the Bill are to:

- Denounce and prohibit change or suppression practices.
- Establish a civil response scheme within the Victorian Equal Opportunity and Human Rights Commission.
- Prohibit engaging in change or suppression practices, including through creating offences in relation to engaging in change or suppression practices and certain related activities.
- To amend the definitions of sexual orientation and gender identity in the *Equal Opportunity Act 2010*.
- To include sex characteristics as a protected attribute under the *Equal Opportunity Act 2010*.¹⁶⁸

The Bill creates four criminal offences, including to prohibit a person from:

- Intentionally carrying out a change or suppression practice where that conduct causes injury to another person.
- Intentionally carrying out a change or suppression practice where that conduct causes serious injury to another person.
- Taking another person from Victoria for the purposes of that person being subject to a change or suppression practice, where that practice causes injury.
- Advertising a change or suppression practice.¹⁶⁹

As explained by the Attorney-General during her second reading speech, the definition of change or suppression practice has three elements:

- The conduct must be directed at an individual.
- The conduct must be “on the basis” of the victim’s sexual orientation or gender identity.
- The purpose of the person engaging in the conduct must be to change or induce another person to change or suppress their sexual orientation or gender identity.¹⁷⁰

¹⁶⁸ *Change or Suppression (Conversion) Practices Prohibition Bill 2020* (Vic) (Austl.).

¹⁶⁹ Caley Otter, “Change or Suppression (Conversion) Practices Prohibition Bill 2020 Bill Brief,” Parliamentary Library Bill Brief, February 2021, <https://www.parliament.vic.gov.au/publications/research-papers/send/36-research-papers/13979-change-or-suppression-conversion-practices-prohibition-bill-2020>, p. 3.

¹⁷⁰ Jill Hennessy, “Change or Suppression (Conversion) Practices Prohibition Bill 2020 Second Reading Speech,” 26 November 2020, https://hansard.parliament.vic.gov.au/search/?LDMS=Y&IW_DATABASE=*%26IW_FIELD_ADVANCE_PHRASE=be+now+read+a+second+time%26IW_FIELD_IN_SpeechTitle=Change+or+Suppression+Conversion+Practices+Prohibition+Bill+2020%26IW_FIELD_IN_HOUSENAME=ASSEMBLY%26IW_FIELD_IN_ACTIVITYTYPE=Second+reading%26IW_FIELD_IN_SittingYear=2020%26IW_FIELD_IN_SittingMonth=November%26IW_FIELD_IN_SittingDay=26.

In May 2018, the then-Minister for Health referred the matter of 'gay conversion therapy' or 'ex-gay ideology' to the Health Complaints Commissioner for an inquiry, which was commenced the same month. The Commissioner undertook structured interviews with individuals (and in some cases their family members) who had experienced conversion therapy, along with conducting research into the broader issue in other jurisdictions and ascertaining the views of various professional bodies. The inquiry recommended that the Government introduce legislation to prohibit conversion therapy and provide support for those who have previously been through such therapy, including resources for counselling and other support services.¹⁷¹

This inquiry report was the basis for an announcement that the Government would introduce legislation to "unequivocally denounce conversion practices and prohibit them in law",¹⁷² however it is highly concerning that the inquiry report is not available to the public.

In October 2019, the Government initiated a consultation process to determine their legislative options to implement a ban of conversion therapy by issuing a discussion paper.¹⁷³ The paper raised a number of questions surrounding implementing a ban, including what should be banned, who should be protected under such a ban, who would be regulated under the ban, whether conversion practices should be regulated by criminal or civil law (or both), and how concerns about freedom of religion could be addressed. The Government subsequently released a consultation outcomes report, which broadly grouped the responses to these questions into three different groups – those who had experienced conversion therapy, support and advocacy organisations, and religious organisations.¹⁷⁴

However, as noted by Barney Zwartz, senior fellow at the Centre for Public Christianity, faith leaders were not allowed to see a draft of the Bill before it was introduced to Parliament, and the Attorney-General declined to meet with these leaders herself. Zwartz argues that the Bill did not involve proper consultation, warning that "the apparently rushed and ill-considered overreach which could have broad and – one trusts, but is not quite certain – unintended consequences for freedom of belief, speech and religion."¹⁷⁵ An open letter published by the Islamic Council of Victoria and some Catholic leaders raised similar concerns, arguing that "at present the bill appears to target people of faith in an unprecedented way, puts limits on ordinary conversations in families, and legislates what prayer is legal and what prayer is not".¹⁷⁶

171 Karen Cusack, "Report on the Inquiry into Conversion Therapy Executive Summary," Health Complaints Commissioner, 1 February 2019, <https://www2.health.vic.gov.au/about/publications/ResearchAndReports/report-on-inquiry-into-conversion-therapy-executive-summary>.

172 Premier of Victoria, "Labor Government to Make Conversion 'Therapy' Against the Law," 3 February 2019, <https://www.premier.vic.gov.au/labor-government-make-conversion-therapy-against-law>.

173 Department of Justice and Community Safety, "Legislative options to implement a ban of conversion practices discussion paper," October 2019, https://engage.vic.gov.au/download_file/21176/2944.

174 Department of Justice and Community Safety, "Legislative options to implement a ban on conversion practices consultation outcomes report," n.d., https://engage.vic.gov.au/download_file/38361/2944.

175 Barney Zwartz, "Conversion bill: churches fear state overreach on religion," *The Age*, 14 December 2020, <https://www.theage.com.au/national/victoria/conversion-bill-churches-fear-state-overreach-on-religion-20201214-p56n8w.html>.

176 Matilda Marozzi, "Here is what we know about Victoria's gay conversion bill," *ABC News*, 4 February 2021, <https://www.abc.net.au/news/2021-02-04/victorian-gay-conversion-bill-what-is-it/13116998>.

Additionally, concerns about unintended consequences were raised by medical professionals, including the Australian Medical Association and the Royal Australian and New Zealand College of Psychiatrists, with the chair of the latter, Kerry Rubin, noting that

The wording of the bill is vague that current evidence-based, exploratory-style treatments... could be drawn into this and viewed as conversion practice... Often these things don't get clarified until there are test cases. My concern is for many practitioners that will mean they don't want to be a test case, so they will say 'look, I'm actually not going to work with this group of people because I am too concerned about the potential ambiguities'.¹⁷⁷

As highlighted in a Parliamentary Library Bill Brief, the Victorian Opposition called for a delay on voting on the Bill, requesting further consultation be undertaken with stakeholders and that clarification be provided on some specific concerns, including freedom of speech and religion.¹⁷⁸

The Bill includes a provision for an independent review of its operation and effectiveness, which the Attorney-General is required to ensure is undertaken two years after the ban commences. This review must be undertaken by an independent expert and must consider the functioning of the civil scheme and criminal offences, determine if any broader investigation or enforcement powers are required, and outline whether or not a redress scheme should be developed.¹⁷⁹

	Criteria	Conclusion	Comment
1	Establish need	No	The Government announced the reform in response to an inquiry by the Health Complaints Commissioner, however that inquiry report is not available to the public, and as noted in a Parliamentary Library Bill Brief, "There are no studies of the prevalence of conversion therapy in contemporary Australia". ¹⁸⁰
2	Set objectives	Yes	The stated objectives of the Bill are to eliminate so far as possible the occurrence of change or suppression practices in Victoria and further promote and protect the rights set out in the Charter of Human Rights and Responsibilities.

¹⁷⁷ Ibid.

¹⁷⁸ Caley Otter, "Change or Suppression (Conversion) Practices Prohibition Bill 2020 Bill Brief," Parliamentary Library Bill Brief, February 2021, <https://www.parliament.vic.gov.au/publications/research-papers/send/36-research-papers/13979-change-or-suppression-conversion-practices-prohibition-bill-2020>, p. 3.

¹⁷⁹ Ibid, p. 21.

¹⁸⁰ Ibid, p. 1.

3	Identify options	Yes	The Government issued a discussion paper in October 2019 titled "Legislative options to implement a ban of conversion practices" which asked for community feedback and highlighted examples of how conversion practices have been targeted through legislation in other jurisdictions. ¹⁸¹
4	Consider mechanisms	Yes	It appears the Government has considered some alternate mechanisms, for example whether practices should be regulated through civil or criminal law.
5	Brainstorm alternatives	No	There are no alternatives set out, and no explanation of the costs and benefits of either the proposed reform or any alternatives.
6	Design pathway	No	The Bill includes a provision for a review of the reform, however it has been noted that the policy was rushed, did not involve adequate consultation, included vague wording, and would likely involve test cases.
7	Consult further	No	It does not appear that stakeholders or members of the public were consulted beyond the six-week period before the Bill was introduced. It does not appear that any consultation regarding the draft Bill was undertaken.
8	Publish proposals	No	A draft Bill was never released for consultation or feedback, and it does not appear that the proposed reforms were released prior to being introduced into Parliament.
9	Introduce legislation	Yes	The relevant Bill was introduced to Parliament on 25 November 2020 and passed on 4 February 2021.
10	Communicate decision	Yes	A fact sheet about the Bill was published online. ¹⁸² A media release was issued when the Bill was introduced. ¹⁸³
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¹⁸¹ Department of Justice and Community Safety, "Legislative options to implement a ban of conversion practices discussion paper," October 2019, https://engage.vic.gov.au/download_file/21176/2944.

¹⁸² Department of Justice and Community Safety, "Change or Suppression (Conversion) Practices Prohibition Bill 2020 Fact Sheet," https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/5716/1232/3170/FACT_SHEET__Change_or_Suppression_Conversion_Practices_Prohibition_Bill_2020.pdf.

¹⁸³ Premier of Victoria, "Banning Cruel Conversion Practices for Good," 25 November 2020, <https://www.premier.vic.gov.au/banning-cruel-conversion-practices-good>.

Summary Offences Amendment (Decriminalisation of Public Drunkenness) Bill 2020

The *Summary Offences Amendment (Decriminalisation of Public Drunkenness) Bill 2020* removes public drunkenness as an offence in Victoria under the *Summary Offences Act 1966*. The Bill involves removing parts of the *Summary Offences Act 1966*, and making amendments to both the *Bail Act 1977* and the *Liquor Control Reform Act 1988*.

In August 2019, the Victorian Government announced its intention to decriminalise public drunkenness and replace it with a “health-based response”. This move was stimulated, in part, by the 2017 death of a woman while in police custody after being arrested for being drunk on a V/Line train. In the announcement, the Government noted that it would form an Expert Reference Group to “provide advice in consultation with the Aboriginal community, health services, alcohol and other drugs experts, local government and operators of licensed premises” about the “decriminalisation and the development of an alternative, health-based response.”¹⁸⁴

In August 2020, the Expert Reference Group provided its report to the Attorney-General. The report commenced with an argument that

There is a clear, compelling and urgent imperative to overhaul Victoria’s current approach to people who are intoxicated in public. The current punitive, criminal justice led response to intoxicated people is unsafe, unnecessary and inconsistent with current community standards.¹⁸⁵

The report contained a total of 86 recommendations to the Government based on community consultations, representative forums, meetings with key experts, government briefings, consultations with health services, a data and evidence review, meetings with other key stakeholders, and meetings amongst the Reference Group itself which occasionally included the participation of other stakeholders and experts.¹⁸⁶ The report notes that the intended outcomes of its recommendations were:

- Reduced incarceration and deaths in custody.
- Decreased contact with the criminal justice system.
- Increased access to a culturally responsive service system that is capable of addressing both immediate short-term needs and longer-term health and social care pathways.
- Reduced harm from risky drinking and related behaviors by individuals.
- Maintenance of community safety and perceptions of community safety in relation to public intoxication.¹⁸⁷

184 Premier of Victoria, “New Health-Based Response to Public Drunkenness,” 22 August 2019, <https://www.premier.vic.gov.au/new-health-based-response-public-drunkenness>.

185 Expert Reference Group, “Seeing the Clear Light of Day: Expert Reference Group on Decriminalising Public Drunkenness Report to the Victorian Attorney-General,” August 2020, <https://files.justice.vic.gov.au/2021-06/Seeing%20the%20Clear%20Light%20of%20Day%20ERG%20report.pdf>, p. 1.

186 Ibid, p. 15.

187 Ibid, p. 16.

The report outlined a five part Proposed Health Model, intended to be rolled out over a 24-month period, to “ensure that an immediate health and safety response by First Responders to public intoxication is integrated into a broader health and wellbeing approach.”¹⁸⁸

According to a Department of Parliamentary Services Bill Brief, Victoria is one of two states (the other being Queensland) where public drunkenness remains an offence. The Brief notes that most people who are arrested under the relevant sections of the *Summary Offences Act 1966* are only arrested once, and that those who are arrested more than once are likely to be homeless. It goes on to note that

A health-based response to public drunkenness – which sees alcohol and drug issues as a social issue, not a legal one – has been advocated by many legal and social organisations, especially those working with the Aboriginal and/or Torres Strait Islander communities.¹⁸⁹

The effort to decriminalise public drunkenness has a long history in Victoria. In 1989 the Law Reform Commission of Victoria recommended that public drunkenness be repealed as an offence from the *Summary Offences Act 1966*. The Royal Commission into Aboriginal Deaths in Custody, the final report of which was published in 1991, also recommended that public drunkenness should be decriminalised in jurisdictions where it had not already been. In 1998 the Kennett Government removed the offence of repeated or habitual drunkenness from the *Summary Offences Act 1966*, and in 2001 the Victorian Drugs and Crime Prevention Committee Inquiry into Public Drunkenness recommended the Government go further and decriminalise public drunkenness itself. There were two separate pushes for decriminalisation in 2005 and 2006, the former from the Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody, and the latter from the Victorian Inquiry into Strategies to Reduce Harmful Alcohol Consumption.¹⁹⁰

As noted above, the Bill repeals the offence of public drunkenness, but it does not offer a new health-based policy for dealing with the issue. Instead, the Government will allow a two-year window to “design, trial and refine the public health model and develop local solutions that are safe and effective.”¹⁹¹ This approach was criticised by the Victorian Opposition, who argued that by “decriminalising public drunkenness with no plan to manage affected individuals, [the Government] threatens to leave Victoria Police unable to intervene and the broader community fending for itself.”¹⁹²

¹⁸⁸ Ibid, p. 40.

¹⁸⁹ Annie Wright, “Summary Offences Amendment (Decriminalisation of Public Drunkenness) Bill 2020 Bill Brief,” Research Note, Department of Parliamentary Services, <https://www.parliament.vic.gov.au/publications/research-papers/send/36-research-papers/13982-summary-offences-amendment-decriminalisation-of-public-drunkenness-bill-2020>, p. 1.

¹⁹⁰ Annie Wright, “Summary Offences Amendment (Decriminalisation of Public Drunkenness) Bill 2020 Bill Brief,” Research Note, Department of Parliamentary Services, <https://www.parliament.vic.gov.au/publications/research-papers/send/36-research-papers/13982-summary-offences-amendment-decriminalisation-of-public-drunkenness-bill-2020>, pp. 4-6.

¹⁹¹ Premier of Victoria, “Historic Laws Passed to Decriminalise Public Drunkenness,” 19 February 2021, <https://www.premier.vic.gov.au/historic-laws-passed-decriminalise-public-drunkenness>.

¹⁹² Michael O’Brian, “Statement on proposed decriminalisation of public drunkenness,” 29 November 2020, <https://www.michaelobrien.com.au/statement-on-proposed-decriminalisation-of-public-drunkenness/>.

The Victorian Police Association made similar criticisms, with secretary Wayne Gatt arguing that it was premature to change the law before a safe system was in place to manage alcohol-fuelled problems. Concerns were also raised by the Australian Medical Association Victoria, with president Julian Rait noting that changes to the law would have to be managed carefully to ensure emergency departments did not become overwhelmed.¹⁹³

	Criteria	Conclusion	Comment
1	Establish need	No	The then-Health Minister claimed at the time the policy was announced that it would “save lives”, but the Government did not state exactly why the reform was needed other than it being called for multiple times in the past. ¹⁹⁴ Notably, the expert and stakeholder consultation came after the reform was announced, and was focused on a new policy to be implemented after decriminalisation.
2	Set objectives	Yes	In her second reading speech, the Attorney-General noted that the objective of the Bill is to “ensure people who are drunk in public... are supported to access the care and services they need, thereby enhancing the health and wellbeing of the drunk person and the safety of the community as a whole.” ¹⁹⁵
3	Identify options	No	It does not appear that alternate options were considered before the policy was announced. The Expert Reference Group included a section on the experiences of decriminalisation in other jurisdictions in their final report, but their focus was the policy to replace public drunkenness being a crime, not the decriminalisation itself.
4	Consider mechanisms	No	It does not appear that the Government considered different mechanisms to implement the reforms prior to introducing the Bill because no mechanism had been decided on. The Government noted after the Bill was passed that it would “design, trial and refine the public health model and develop local solutions that are safe and effective.” ¹⁹⁶

193 Matt Johnston, “Police slams Labor plan to scrap public drunkenness offence in Victoria,” *Herald Sun*, 28 November 2020, <https://www.heraldsun.com.au/news/victoria/police-slams-labor-plan-to-scrap-public-drunkenness-offence-in-victoria/news-story/b00b2516237d6ea6a4a782268dc3a666>.

194 Premier of Victoria, “New Health-Based Response to Public Drunkenness,” 22 August 2019, <https://www.premier.vic.gov.au/new-health-based-response-public-drunkenness>.

195 Jill Hennessy, “Summary Offences Amendment (Decriminalisation of Public Drunkenness) Bill 2020 Second Reading Speech,” 9 December 2020, https://hansard.parliament.vic.gov.au/search/?LDMS=Y&IW_DATABASE=*%26IW_FIELD_ADVANCE_PHRASE=be+now+read+a+second+time%26IW_FIELD_IN_SpeechTitle=Summary+Offences+Amendment+Decriminalisation+of+Public+Drunkenness+Bill+2020%26IW_FIELD_IN_HOUSENAME=ASSEMBLY%26IW_FIELD_IN_ACTIVITYTYPE=Second+reading%26IW_FIELD_IN_SittingYear=2020%26IW_FIELD_IN_SittingMonth=December%26IW_FIELD_IN_SittingDay=9.

196 Premier of Victoria, “Historic Laws Passed to Decriminalise Public Drunkenness,” 19 February 2021, <https://www.premier.vic.gov.au/historic-laws-passed-decriminalise-public-drunkenness>.

5	Brainstorm alternatives	No	It does not appear that the policy or any alternatives were costed or subject to publicly available cost-benefit analyses. The terms of reference for the Expert Reference Group note that a Working Group would “undertake preliminary modelling of the cost and resources requirements of the proposed reforms to inform consultation” for the Group, however no details of this are available. The report notes that “proceedings and papers of the Expert Reference Group are confidential”. ¹⁹⁷
6	Design pathway	No	The reforms in the Bill will not come into effect until November 2022, “allowing time for a health-based response to public drunkenness to be designed and implemented”, ¹⁹⁸ indicating that a comprehensive plan had not been agreed upon prior to the Bill being introduced to Parliament.
7	Consult further	Yes	After the policy was announced, an Expert Reference Group was formed and undertook community consultations, representative forums, meetings with key experts, government briefings, consultations with health services, a data and evidence review, meetings with other key stakeholders, and meetings amongst the Reference Group itself which occasionally included the participation of other stakeholders and experts. ¹⁹⁹
8	Publish proposals	Yes	A proposed ‘health-based model’ was outlined by the Expert Reference Group and published prior to the Bill being introduced to Parliament. It appears that there is ongoing consultation; as noted above the Government will “design, trial and refine the public health model and develop local solutions that are safe and effective.”
9	Introduce legislation	Yes	The relevant Bill was introduced to Parliament on 8 December 2020 and passed both houses on 19 February 2021.

197 Expert Reference Group, “Seeing the Clear Light of Day: Expert Reference Group on Decriminalising Public Drunkenness Report to the Victorian Attorney-General,” August 2020, <https://files.justice.vic.gov.au/2021-06/Seeing%20the%20Clear%20Light%20of%20Day%20ERG%20report.pdf>, pp. 108-109.

198 Annie Wright, “Summary Offences Amendment (Decriminalisation of Public Drunkenness) Bill 2020 Bill Brief,” Research Note, Department of Parliamentary Services, <https://www.parliament.vic.gov.au/publications/research-papers/send/36-research-papers/13982-summary-offences-amendment-decriminalisation-of-public-drunkenness-bill-2020>, p. 2.

199 Ibid, p. 15.

10	Communicate decision	Yes	Two press releases communicate the key features of the policy, one published when it was first announced ²⁰⁰ and the other published after the Bill passed Parliament. ²⁰¹
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200 Premier of Victoria, "New Health-Based Response to Public Drunkenness," 22 August 2019, <https://www.premier.vic.gov.au/new-health-based-response-public-drunkenness>.

201 Premier of Victoria, "Historic Laws Passed to Decriminalise Public Drunkenness," 19 February 2021, <https://www.premier.vic.gov.au/historic-laws-passed-decriminalise-public-drunkenness>.

Constitution Amendment (Fracking Ban) Bill 2020

The *Constitution Amendment (Fracking Ban) Bill 2020* amends the Victorian *Constitution Act 1975* to entrench an existing legislative ban on hydraulic fracturing and coal seam gas exploration and mining. These activities are already prohibited under the *Mineral Resources (Sustainable Activities) Act 1990* and the *Petroleum Act 1998* as a result of amendments made to these acts under the current Victorian Government through the *Resources Legislation Amendment (Fracking Ban) Act 2017*. As noted by the Minister for Resources, Jaclyn Symes, “No other government in the world has gone as far as enshrining a coal seam gas and fracking ban in their constitution”.²⁰²

In his second reading speech in the Legislative Assembly, Tim Pallas noted that

The Bill will amend the Constitution Act by introducing a new Part, making it more difficult for a future Parliament to repeal, alter, or vary the existing legislated bans.

The Bill proposes to entrench the existing legislated bans by amending the Constitution Act to provide that the new Part may only be repealed, altered or varied if the third reading of a repealing Act is passed by a special majority of all members of the Legislative Assembly and Legislative Council. A special majority is three-fifths of each House of Parliament.

The Bill will also make it more difficult for a future Parliament to repeal, alter or vary the existing legislative bans, including attempts to: reduce the current penalty for breaching the bans; narrow the class of persons liable to a penalty for breaching the bans; or reduce the geographical area to which the bans apply.²⁰³

The Bill is extraordinary in that it proposed to entrench a policy position of the current Government into the Victorian Constitution. This led to criticism from a number of stakeholders. One such was John Pesutto, a Senior Fellow at the School of Government at Melbourne University, and a proponent of fracking bans, who noted that,

a constitution should not evolve into what is effectively a party platform, even if a particular policy is one which attracts bipartisan support. The idea of a written constitution is to set out a basic set of values and framework for government.²⁰⁴

202 Jaclyn Symes, “Enshrining Victoria’s ban on fracking forever,” Victoria State Government, 5 March 2021, <https://www.premier.vic.gov.au/sites/default/files/2021-03/210305%20-%20Enshrining%20Victoria%E2%80%99s%20Ban%20On%20Fracking%20Forever.pdf>.

203 Tim Pallas, “Second Reading Speech,” Legislative Assembly Hansard, 18 March 2020, https://hansard.parliament.vic.gov.au/search/?LDMS=Y&IW_DATABASE=*&IW_FIELD_ADVANCE_PHRASE=be+now+read+a+second+time&IW_FIELD_IN_SpeechTitle=Constitution+Amendment+Fracking+Ban+Bill+2020&IW_FIELD_IN_HOUSENAME=ASSEMBLY&IW_FIELD_IN_ACTIVITYTYPE=Second+reading&IW_FIELD_IN_SittingYear=2020&IW_FIELD_IN_SittingMonth=March&IW_FIELD_IN_SittingDay=18.

204 John Pesutto, “Victoria’s constitution should not be used to prop up fracking ban,” *The Age*, 20 April 2020, <https://www.theage.com.au/national/victoria/victoria-s-constitution-should-not-be-used-to-prop-up-fracking-ban-20200417-p54ko8.html>.

Pesutto continued that

The great risk, however, with bills like the one before the Victorian Parliament in this instance, is that it will fuel a process which will diminish the Constitution as a document that is supposed to consecrate the constituent elements of our democracy and establish a standing relationship between state and citizen.

And encouraged the Victorian parliament to

Leave the constitution as a document that sits above politics as far as possible and let the current bans on fracking and coal seam activities reside in the legislation that established them. The existing prohibitions are no more or less enforceable because they're subject to constitutional change provisions.

Annika Smethurst, the State Political Editor of *The Age* newspaper raised similar concerns, arguing that the Bill would "essentially allow the Andrews government to govern from the grave" and "weaken our democracy." Smethurst continued that the Government has "taken advantage" of Victoria's flexible Constitution "for party political purposes". "We are not in a situation where future democratically elected governments with a working majority chosen by the people of this state will be bound by an Andrews government election policy," Smethurst added.²⁰⁵

The Institute of Public Affairs also highlighted its own criticisms of the Bill in a letter to all members of the Legislative Council. The IPA noted that constraining a future Parliament is a violation of parliamentary sovereignty and is unconstitutional, that entrenching policy decisions in constitutional documents is autocratic and illiberal, and that the prohibition of gas exploration is economically and socially destructive.²⁰⁶

	Criteria	Conclusion	Comment
1	Establish need	No	The Government offered no explanation as to why the policy was needed.
2	Set objectives	No	There is no statement of objectives in terms of public interest.
3	Identify options	No	It does not appear that alternate options were considered because none were necessary.
4	Consider mechanisms	No	The Bill does not make fracking any more or less illegal because it is already banned through legislation. The purpose of the Bill is not to achieve any policy outcome.
5	Brainstorm alternatives	No	There is no published analysis of the benefits and costs of the Bill or alternate policy proposals.

205 Annika Smethurst, "Constitutional meddling means Andrews could govern from the grave," *The Age*, 5 March 2021, <https://www.theage.com.au/politics/victoria/constitutional-meddling-means-andrews-could-govern-from-the-grave-20210304-p577uc.html>.

206 Morgan Begg, "Letter to Members of the Legislative Council of Victoria," 26 February 2021, <https://ipa.org.au/wp-content/uploads/2021/02/210226-Fracking-Ban-Letter-1.pdf>.

6	Design pathway	No	There is no project management plan.
7	Consult further	No	It does not appear that any consultation was undertaken either before or after the Bill was introduced into Parliament.
8	Publish proposals	No	No public input or feedback was sought. No policy options were canvassed, and no position paper was published.
9	Introduce legislation	Yes	The relevant Bill was introduced into Parliament on 17 March 2020 and passed both houses on 4 March 2021.
10	Communicate decision	Yes	A media release was published on the Premier's website outlining the changes the day after the Bill passed the parliament. ²⁰⁷
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²⁰⁷ Daniel Andrews, "Enshrining Victoria's Ban on Fracking Forever," Premier of Victoria, 5 March 2021, <https://www.premier.vic.gov.au/enshrining-victorias-ban-fracking-forever>.

Queensland

Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019

The *Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019* makes several key amendments to the *Criminal Code Act 1899* in an effort to better protect children from sexual abuse and increase reporting of incidents and allegations of such abuse. As detailed in the explanatory notes, the Bill seeks to improve the responsiveness of the criminal justice system to child sexual offending and the victims of child sexual offences by amending a range of legislation to:

- Implement recommendations of the Report of the Royal Commission into Institutional Responses to Child Sexual Abuse.
- Implement recommendations of the Queensland Sentencing Advisory Council's report on the classification of child exploitation material for sentencing purposes.
- Create new criminal offences covering:
 - The possession, production and supply of anatomically correct, life-like child replicas used for sexual gratification.
 - Any adult who does not report to the police if there are reasonable grounds that a child is being, or has been, the victim of sexual abuse, unless there is a reasonable excuse for not doing so.
 - The failure to protect a child from a sexual offence as long as they are an accountable person.
 - The production, supply and possession of child abuse objects.²⁰⁸

As explained by the Attorney-General and Minister for Justice, the other reforms in the Bill are:

- Ensuring that the new failure to report offence applies to information gained during, or in connection with, a religious confession.
- Facilitating increased admissibility of evidence of other allegations or convictions of child sexual abuse against the accused persons.
- Excluding good character as a mitigating factor in sentencing an offender where that good character facilitated the child sexual offending.

The emerging allegations of child sexual abuse in institutional contexts had been a point of discussion across Australia for a number of years prior to the establishment of the Royal Commission. It focused on the reforming of the Australian criminal justice system by providing a series of recommendations aimed at implementing more effective responses for victims of child sexual abuse across a series of reports. The

208 "Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019" <https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-2019-038>, p. 11.

Criminal Justice Report released in August 2017 contained 85 recommendations aimed at providing a fairer justice system to support and respond to victims of child sexual abuse.²⁰⁹

Following the outcomes and recommendations of the Royal Commission, the Bill was a product of “extensive consultation and consideration” including an opportunity for public submissions which elicited over 50 responses, submitted by interested organisations, stakeholders and individuals. According to the Attorney-General, “the sickening offence of child sexual abuse damages individuals and families has a ripple effect throughout communities,” and by implementing this new legislation the Government is “seeking justice for the victims of child sexual abuse and holding perpetrators to account”. The Attorney-General continued that,

This legislation creates new offences for failing to report and failing to protect a child from institutional child sexual abuse, an extension of the offence of grooming, and reforms to sentencing, evidence law and jury directions.²¹⁰

The Bill passed the Parliament with support from the Liberal National Opposition. MP Laura Gerber said in Parliament that the “LNP will always support more laws and stronger penalties aimed at child sex offenders to send a message that these types of crimes will not be tolerated – will never be tolerated – in our community”.²¹¹ Police Minister Mark Ryan argued that the legislation will protect the most vulnerable and that the “requirement and quite frankly, the moral obligation to report concerning behaviours towards children applies to everyone in the community.”²¹²

In passing the Bill, Queensland joined the majority of Australian jurisdictions (the ACT, Victoria, South Australia and Tasmania) which all have laws criminalising the failure to report belief of a child being sexually abused, targeted at abuse that occurs in an institutional context.

Concerns regarding unintended consequences of the Bill were raised by the Queensland Law Society. While the Society supported the overall policy objective of the Bill, they warned that it had the “potential effect of over-riding client legal privilege”. Under the Bill, legal practitioners would be subject to obligations in section 229BC (failure to protect child from child sexual offence), and the Society called for legal practitioners be excluded from this obligation. The Society also argued that excluding good character as a mitigating factor during sentencing, “[undermines] the relevance of rehabilitation as a sentencing principle”, and that “the proposal goes beyond the

209 “Royal Commission into Institutional Responses to Child Sexual Abuse; Criminal Justice Report”, https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/final_report_-_criminal_justice_report_-_executive_summary_and_parts_i_to_ii.pdf p. 114.

210 Attorney-General and Minister for Justice for Queensland, “Landmark reforms seek justice for child sex abuse victims,” Media Release, 27 November 2019, <https://statements.qld.gov.au/statements/88951>.

211 Laura Gerber MP, “Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill Speech in Parliament, 13 August 2020, <https://www.lauragerber.com.au/criminal-code-child-sexual-offences-reform-and-other-legislation-amendment-bill/>.

212 Allyson Horn, “Queensland passes law to jail priests for not reporting confessions of child sexual abuse,” ABC News, 8 September 2020, <https://www.abc.net.au/news/2020-09-08/queensland-law-jail-priests-not-reporting-child-sex-confessions/12642144>.

recommendation of the Royal Commission into Institutional Responses to Child Sexual Abuse”.²¹³

Catholic leaders raised similar concerns as they will now be “compelled to break the seal of confession”, therefore corrupting the sanctity of confession.²¹⁴ In a formal submission, Brisbane’s Catholic Archbishop Mark Coleridge argued that while the Church was unequivocally committed to the protection of children, breaking the confessional seal would “not make a difference to the safety of young people”.²¹⁵

	Criteria	Conclusion	Comment
1	Establish need	Yes	The Government announced the reforms in response to the Royal Commissions’ findings and formal recommendations to increase the effectiveness of responses to victims of child sexual abuse.
2	Set objectives	Yes	The stated objectives were to improve the responsiveness of the criminal justice system in cases of potential child sexual offences.
3	Identify options	No	Although there was significant consultation with the public during the drafting of the Bill, it does not appear that other policy options were considered.
4	Consider mechanisms	No	No alternate implementation or enforcement mechanism appears to have been considered.
5	Brainstorm alternatives	No	It does not appear that the amendments or any alternatives were costed or subject to publicly available cost-benefit analyses. While the estimated cost of implementation was discussed in the explanatory notes, they are not outlined in detail.
6	Design pathway	Yes	Although no specific pathway was outlined for the design, implementation, or review of the changes found in the Bill, the policy affects existing criminal laws which are regularly monitored.

213 Queensland Law Society, Letter to Committee Secretary “Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019, 7 January 2020, <https://documents.parliament.qld.gov.au/committees/LACSC/2019/CriminalCodeChild2019/submissions/025.pdf>.

214 Allyson Horn, “Queensland passes law to jail priests for not reporting confessions of child sexual abuse,” ABC News, 8 September 2020, <https://www.abc.net.au/news/2020-09-08/queensland-law-jail-priests-not-reporting-child-sex-confessions/12642144>.

215 Lincoln Rothall, “Brisbane Archbishop Mark Coleridge rejects proposed Queensland laws to report child abusers who confess,” ABC News, 16 January 2020, <https://www.abc.net.au/news/2020-01-16/child-sex-abuse-catholic-church-confession-mark-coleridge/11872452>.

7	Consult further	Yes	The Government states that consultation occurred with “key legal and non-legal stakeholders” on multiple occasions before and after the Bill was introduced. ²¹⁶ A proposed draft of the Bill was also published providing opportunities for feedback and public engagement prior to it being introduced to Parliament.
8	Publish proposals	Yes	A draft Bill was publicly released for consultation ²¹⁷ and “feedback was sought on proposed reforms” ²¹⁸ in August, prior to being introduced to Parliament.
9	Introduce legislation	Yes	The relevant Bill was introduced to Parliament on 27 November 2019 and was passed without amendment on 8 September 2020.
10	Communicate decision	Yes	A fact sheet about the Bill was published online alongside the draft. ²¹⁹ A media release was issued when the Bill was introduced to Parliament. ²²⁰
		7/10	

216 <https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-2019-038>.

217 *Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019* Draft, August 2019, https://www.justice.qld.gov.au/__data/assets/pdf_file/0007/623608/b19-0038-v06c.pdf.

218 Department of Justice and Attorney-General Queensland Government, “Proposed reforms to child sexual offences,” August 2019, <https://www.justice.qld.gov.au/community-engagement/community-consultation/community-consultation-activities/past-activities/proposed-reforms-to-child-sexual-offences>.

219 Ibid.

220 Attorney-General and Minister for Justice Yvette D’Ath, “Landmark reforms seek justice for child sex abuse victims,” Media Release, 27 November 2019, <https://statements.qld.gov.au/statements/88951>.

Criminal Code and Other Legislation (Wage Theft) Amendment Bill 2020

The *Criminal Code and Other Legislation (Wage Theft) Amendment Bill 2020* was designed to combat the issue of 'wage theft' in Queensland. The Bill was drafted in response to the findings and recommendations of a 2018 report by the Queensland Parliamentary Education, Employment and Small Business Committee. The Bill amends the *Criminal Code Act 1899* and the *Industrial Relations Act 2016*²²¹ to define and criminalise 'wage theft' which is the illegal underpayment of workers and implement a 'simple, quick and low-cost wage recovery process for workers'²²².

The achievements of the policy objectives are explained in the Explanatory Memorandum issued in conjunction with the Bill as:

- enabling the prosecution of wage theft as stealing under the *Criminal Code Act 1899*;
- increasing the maximum penalties in the *Criminal Code Act 1899* for the offences of stealing and fraud relating to wage theft; and
- facilitating the Industrial Magistrates Court's jurisdiction for wage recovery matters, including the small claims wage recovery procedure for matters of not more than \$20,000 under section 548 of the *Fair Work Act 2009*.²²³

On 17 May 2018 the parliament passed a motion for an inquiry into wage theft in Queensland. The committee was to consider, among other things:

- The incidence and different forms of wage theft.
- The impacts of wage theft on workers and the economy.
- The reason for its occurrence and its prevalence in particular industries.
- The effectiveness of the current legislation, and any amendments and improvements that should be made.²²⁴

The final report of the inquiry was tabled on 16 November 2018.

Alleged wage theft has become a prominent issue in Australia in recent years, with various media outlets and politicians bringing it to the forefront of public debate. The Industrial Relations Minister, Grace Grace highlighted several prominent examples in parliament:

Twenty million dollars at Coles, \$9 million at Target, \$4 million at Bunnings, up to \$300 million at Woolworths, \$32 million at Super Retail Group, over \$100 million at \$7-Eleven, \$7.8 million courtesy of George Calombaris – and these are just the high profile cases.²²⁵

221 Megan Kavanagh & Rebecca Campbell, "Australia: Wage theft criminalised in Queensland", Mondaq, 6 August 2020, <https://www.mondaq.com/australia/white-collar-crime-anti-corruption-fraud/972232/wage-theft-criminalised-in-queensland>.

222 "Criminal Code and Other Legislation (Wage Theft) Amendment Bill 2020 Explanatory Notes", <https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-2019-087>, p. 1.

223 Ibid, p. 2.

224 "Queensland Introduces Bill to Criminalise Wage Theft", *Time Base Australian Legislation*, 21 July 2020, <https://www.timebase.com.au/news/2020/AT05079-article.html>.

225 Lydia Lynch, "Bosses who rip off workers will go to jail as Queensland passes laws," *Brisbane Times*, 9 September 2020, <https://www.brisbanetimes.com.au/politics/queensland/bosses-who-rip-off-workers-will-go-to-jail-as-queensland-passes-laws-20200908-p55tja.html>.

Alongside these highly publicised cases exposed in media articles, the parliamentary inquiry highlighted examples of alleged underpayment of wages in small and medium-sized businesses. One Sunshine Coast barista, for example, testified that she was “being underpaid [at a small café] by \$5 an hour, with no holiday pay and no weekend pay.”²²⁶

The Committee estimated that in Queensland “over 437,000 workers are not receiving their full wages, totalling a \$1.22 billion loss annually”.²²⁷ According to the Australian Bureau of Statistics, there are currently 2.65 million employed people in Queensland, indicating that the Committee’s estimate would see about 16.5% of the state’s workers affected.²²⁸ The inquiry included wide consultation with groups such as employer organisations, industry groups, law firms, community organisations, unions and academics. The final report set out a total of 17 recommendations to “combat wage theft”²²⁹ with two recommendations requiring legislative amendments to be actioned by the Government. The two recommendations are to implement a simple, quick and low-cost recovery process for workers affected and to criminalise wage theft.²³⁰

There was a high level of support for the Bill in the Parliament and it was passed without opposition. United Workers Union spokesperson for Property Services Damien Davie commended the Bill, arguing that it would “ensure wage thieves are being criminally prosecuted” and that “the individuals who are responsible [are] held accountable”.²³¹

While the Bill was broadly welcomed, the Liberal National Party expressed concerns, which mirrored their reaction to the Committee’s recommendations in 2018,²³² that the changes could “undermine the federal industrial relations system”. Additionally, employment groups expressed concerns that the laws were “complex” and some “opposed the introduction of criminal sanctions”.²³³

The Bill came after similar laws were implemented in Victoria in 2020 and which attracted a range of criticism and concern. Researchers from the University of Melbourne expressed their opposition to the Victorian laws, arguing that they could “actively harm” the efforts of the Fair Work Ombudsman to recover entitlements for

226 Ibid.

227 “Criminal Code and Other Legislation (Wage Theft) Amendment Bill 2020 Explanatory Notes” <https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-2019-087>, p. 1.

228 Australian Bureau of Statistics, “Employment and Unemployment: Labour Force Australia, States and Territories”, August 2021, <https://www.abs.gov.au/statistics/labour/employment-and-unemployment/labour-force-australia/latest-release#states-and-territories>.

229 “Criminal Code and Other Legislation (Wage Theft) Amendment Bill 2020 Explanatory Notes”, <https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-2019-087>, p. 1.

230 56th Parliament Education, Employment and Small Business Committee, “A fair day’s pay for a fair day’s work? Exposing the true cost of wage theft in Queensland”, November 2018, <https://documents.parliament.qld.gov.au/TableOffice/TabledPapers/2018/5618T1921.pdf>, p. x.

231 United Workers Union, “Media Release – United Workers Union welcomes the State Government’s bill to criminalise wage theft”, July 15 2020, <https://unitedworkers.org.au/united-workers-union-welcomes-queensland-wage-theft-bill/>.

232 Laura Gartry, “Wage theft stripping almost \$2.5 billion from Queensland economy each year, report finds,” ABC News, 16 November 2018, <https://www.abc.net.au/news/2018-11-16/wage-theft-report/10505412>.

233 Lydia Lynch, “Bosses who rip off workers will go to jail as Queensland passes laws,” *Brisbane Times*, 9 September 2020, <https://www.brisbanetimes.com.au/politics/queensland/bosses-who-rip-off-workers-will-go-to-jail-as-queensland-passes-laws-20200908-p55tja.html>.

workers and would “undermine the civil regulators objective, which has the potential to result in less effective regulation.” The researchers continued that:

Further, it is unclear whether the criminalisation of wage theft has the capacity to lead to increased specific and general deterrence in a manner different to what civil penalties can achieve. As such, criminalisation at a state level as a compliance strategy is ill-advised.²³⁴

Victorian Chamber of Commerce CEO Paul Guerra said that “the introduction of the new legislation will complicate the situation for business owners in Victoria” as “there is [already] a system in place, which has been catching companies that have been [accused of wage theft]”. Guerra noted that this is a federal system and “that’s the system that the state government signed up to back in the 90s and that’s where it should stay.”²³⁵

Additionally, the Institute of Public Affairs has raised concerns that such ‘wage theft’ laws are unnecessary because the problem they seek to address is already illegal. In 2018, for example, Kurt Wallace noted that the “eagerness to create new laws instead of enforcing the existing laws is concerning, especially when they would duplicate and possibly conflict with laws administered by the Fair Work Commission.” Wallace continued:

... the award system small businesses have to grapple with is fantastically complex, which makes errors virtually inevitable. While employees should be able to get back any underpayments, there should be no in-built assumption that every breach is ‘theft’. Threatening jail time and massive fines will further deter employers from taking on the casual or part-time employees...²³⁶

	Criteria	Conclusion	Comment
1	Establish need	Yes	While ‘wage-theft’ is already illegal, the Government outlined that the problem is widespread enough that a new policy is required in an attempt to address underpayment of workers.
2	Set objectives	Yes	The stated objective of the Bill is to “combat wage theft” in Queensland by implementing Committee recommendations to introduce legislative amendments.
3	Identify options	No	It does not appear that policy options other than ‘criminalising wage theft’ were considered, analysed, or costed.

234 Anna Patty, “Criminalisation of wage theft likely to backfire, say experts,” *The Sydney Morning Herald*, 3 January 2019, <https://www.smh.com.au/business/workplace/criminalisation-of-wage-theft-likely-to-backfire-say-experts-20181212-p50lto.html>.

235 Oliver Gordon, “Victoria introduces anti-wage theft laws that could see companies fined more than \$1 million,” *ABC News*, 1 July 2021, <https://www.abc.net.au/news/2021-07-01/victoria-introduces-anti-wage-left-laws-jailtime-fines/100258354>.

236 Kurt Wallace, “Daniel Andrews: A Threat to a Twenty-First Century Economy,” Institute of Public Affairs, 23 November 2018, <https://ipa.org.au/publications-ipa/daniel-andrews-a-threat-to-a-twenty-first-century-economy>.

4	Consider mechanisms	No	It does not appear that alternate mechanisms were considered. The Government's parliamentary inquiry outlines the views of the various participating groups, as mentioned above, who were consulted, but there is no indication that the government has considered different mechanisms for implementing the policy.
5	Brainstorm alternatives	No	There is no publicly available analysis of the costs and benefits of this or any alternate policy options.
6	Design pathway	No	It does not appear that a project management plan was laid out by the government.
7	Consult further	Yes	Consultation was undertaken throughout the design and implementation of the Bill resulting in amendments being made before it passed the Parliament.
8	Publish proposals	Yes	While the Government did not publish an exposure draft or discussion paper outlining their proposals and seeking public feedback before the Bill was introduced to Parliament, there was a limited consultation phase when the Bill was considered by the Education, Employment and Small Business Committee.
9	Introduce legislation	Yes	Legislation was introduced to Parliament on 15 July 2020 and passed with amendments on 9 September 2020. ²³⁷
10	Communicate decision	Yes	The relevant Minister issued a media release when the Bill was introduced to Parliament ²³⁸ and when it was passed. ²³⁹
		6/10	

237 Criminal Code and Other Legislation (Wage Theft Amendment Act 2020" Accessible at: <https://www.legislation.qld.gov.au/view/html/asmade/act-2020-034/lh>.

238 Grace Grace Minister for Education and Minister for Industrial Relations, "New Legislation to make wage theft a crime," Media Release, 15 July 2020, <https://statements.qld.gov.au/statements/90198>.

239 Grace Grace Minister for Education and Minister for Industrial Relations, "Wage theft now a crime in Queensland," Media Release, 9 September 2020, <https://statements.qld.gov.au/statements/90702>.

Queensland Future Fund Bill 2020

The *Queensland Future Fund Bill 2020*, establishes the Queensland Future Fund, an investment fund to be used to assist in paying interest on public debt and reducing the state government's debt over time. The stated objectives of the Bill are to:

- Establish a Queensland Future Fund under an Act of Parliament, replicating, as far as possible, the legislative model set up by the *NSW Generations Funds Act 2018*.
- Establish the first Queensland Future Fund, the Debt Retirement Fund, to quarantine funding to reduce the debt of the State.
- Provide for the establishment and ongoing administration of Queensland Future Funds.
- Provide an additional guarantee of the State's defined benefit liabilities.²⁴⁰

The Fund was initially given a \$5 billion allocation of funds to be managed by the Queensland Investment Corporation. Of the initial investment, \$2 billion would come from the government's existing debt retirement plan, and the other \$3 billion from the surplus in the state's Defined Benefit fund (which covers the superannuation entitlements of public servants).²⁴¹ This was later revised, with \$1 billion to come from the Defined Benefit fund, \$2 billion from the existing debt retirement plan, and a further \$2.7 billion (bringing the total initial investment to \$5.7 billion) from the government's equity stake in Virgin Australia and the proceeds from the sale of the Titles Registry Office.²⁴²

The creation of these types of funds are designed to reduce future government liabilities and began in 2006 under the Howard Government with oversight from Treasurer Peter Costello under the *Future Fund Act 2006*. In recent years, states have begun modelling their own investment funds based on the *Future Fund Act 2006*. In 2018, the New South Wales government established the NSW Generations Fund with this aim in mind. Unlike the Commonwealth Future Fund, which was created when Commonwealth debt was close to zero and the initial funds were contributed from budget surpluses and the revenue from privatisation, however, these state-based investment funds are being created at a time when state debt is already at record levels and state budgets are in deficit. Ahead of the government introducing the Bill (and before the lockdown-induced expansion of government debt across the country), Queensland had the highest levels of debt in the country.²⁴³

Queensland's Auditor-General, Brendan Worrall, has argued that the government should not siphon too much money from the Defined Benefits fund, noting that market disruption over 2020 combined with an ever-growing superannuation liability has created a more precarious situation:

240 "Queensland Future Fund Bill 2020 Explanatory Notes," <https://documents.parliament.qld.gov.au/tableOffice/TabledPapers/2020/5620T1135.pdf>.

241 Jackie Trad, "Palaszczuk Government to establish Queensland Future Fund," Media Release, 12 December 2019, <https://statements.qld.gov.au/statements/89057>.

242 Mark Ludlow, "Qld warned over dwindling investments set for Future Fund," *Australian Financial Review*, 18 March 2021, <https://www.afr.com/politics/qld-warned-over-dwindling-investments-set-for-future-fund-20210318-p57bzj>.

243 Mark Ludlow, "Queensland debt blows out by \$1b in six months," *Australian Financial Review*, 12 December 2020, <https://www.afr.com/politics/queensland-debt-blows-out-by-1b-in-six-months-20191212-p53ja0>.

The increase in the government's superannuation liability, and the decrease in the value of investments held, means the extent to which the liability is supported, on an accounting basis, declined by almost \$4 billion on the previous year.²⁴⁴

The Auditor-General also called for the greater transparency of assets to be included in the Future Fund and has recommended that legislation be amended to require a separate financial report to be prepared for the Fund, as is the case under the NSW equivalent.²⁴⁵

It is highly concerning that of the nine organisations consulted in drafting the Bill, only two are independent of the Government: the credit rating agencies Standard & Poor's and Moody's and Fitch. Additionally, while the Bill was subject to an inquiry by the Economics and Governance Committee, this inquiry attracted only two stakeholder submissions.²⁴⁶

	Criteria	Conclusion	Comment
1	Establish need	Yes	Government debt has been rising rapidly in Queensland and there were concerns about the state's credit rating. It is concerning that there appears to have been no genuine attempt at proper engagement and consultation of stakeholders or the broader public.
2	Set objectives	Yes	The objective of the Bill is to create a Fund which can assist to cover interest payments and pay down state debt.
3	Identify options	No	It does not appear that the Government considered alternate policy options to achieve their stated objectives.
4	Consider mechanisms	Yes	One alternate mechanism was considered: to establish separate departmental accounts, rather than one Fund. ²⁴⁷
5	Brainstorm alternatives	No	No other policy options were considered or costed.
6	Design pathway	No	It does not appear that a comprehensive plan was established to implement or review the Fund (as noted by the Auditor-General), and notably the establishment of the Fund itself has been delayed.

244 Mark Ludlow, "Qld warned over dwindling investments set for Future Fund," Australian Financial Review, 18 March 2021, <https://www.afr.com/politics/qld-warned-over-dwindling-investments-set-for-future-fund-20210318-p57bzj>.

245 Ibid.

246 Economics and Governance Committee, "Queensland Future Fund Bill 2020," Report No. 44, August 2020, <https://documents.parliament.qld.gov.au/tableOffice/TabledPapers/2020/5620T1225.pdf>.

247 "Queensland Future Fund Bill 2020 Explanatory Notes," <https://documents.parliament.qld.gov.au/tableOffice/TabledPapers/2020/5620T1135.pdf>.

7	Consult further	No	There appears to have been no proper consultation with the public or stakeholders outside of a small group of government departments, public-sector bodies, and two credit ratings agencies.
8	Publish proposals	No	The policy was first announced in the <i>2019-20 Mid-Year Fiscal and Economic Review</i> , just before the Bill was introduced to Parliament. There were no exposure drafts, discussion papers, or detailed outlines of the policy published prior to the Bill being introduced.
9	Introduce legislation	Yes	The relevant Bill was introduced to Parliament on 14 July 2020 and passed on 17 August 2020.
10	Communicate decision	Yes	A media release issued when the Fund was announced explains what it is and how it will work. ²⁴⁸
		5/10	

²⁴⁸ Jackie Trad, "Palaszczuk Government to establish Queensland Future Fund," Media Release, 12 December 2019, <https://statements.qld.gov.au/statements/89057>.

Forest Wind Farm Development Bill 2020

The *Forest Wind Farm Development Bill 2020* was introduced to “facilitate a pathway to tenure for the development of the Forest Wind Project by Forest Wind Holdings Pty Limited.”²⁴⁹ The Bill seeks to establish a new legislative framework to allow the Government to build a large-scale wind farm on plantation license areas, that if successful will contain “up to 226 turbines”.²⁵⁰ It amends the *Forestry Act 1959*, the *Land Act 1994* and the *Planning Act 2016* by exempting the project from specific provisions to allow the development to coexist with the existing plantation license. To Bill intends to reach its stated objectives by:

- Exempting the development from or modifying the application of certain sections of the *Forestry Act* and *Land Act*.
- Limiting the development to the project area within the Toolara, Tuan and Neerdie State forests.
- Providing a pathway for the proponent of a development agreement to obtain tenure to access, occupy, develop and manage the land for the purpose of developing and operating the project, including conditions precedent to tenure.
- Providing that compensation is not otherwise payable by or on behalf of the State in relation to the enactment or operation of the proposed Bill.
- Requiring the plantation licensee’s compliance with its remediation responsibilities in the project area, as a condition of its tenure.²⁵¹

The Bill coincided with other significant renewable energy announcements by the Government to assist in achieving their goal to “generate 50 per cent renewable energy by 2030,”²⁵² a topic of conversation highly debated in Australia for some time. As claimed by Minister for State Development, Tourism and Innovation Kate Jones in a media release announcing the proposed Bill,

Forest Wind has the potential to be one of the largest grid-connected wind farms in the Southern Hemisphere and could help propel us towards [the] target of 50 per cent renewables by 2030.²⁵³

This new wind-farm project could “supply one in four Queensland homes” with electricity,²⁵⁴ which the Government claims will increase Queensland’s installed power generation capacity by approximately 9%.²⁵⁵ Great emphasis was placed

249 *Forest Wind Farm Development Bill 2020*, <https://www.legislation.qld.gov.au/view/pdf/bill.first/bill-2019-006>.

250 Tom Morton, James Goodman, Katja Müller and Riikka Heikkinen, “Forest Wind and Australia’s renewables revolution: how big clean energy projects risk leaving local communities behind,” *The Conversation*, 24 August 2020, <https://theconversation.com/forest-wind-and-australias-renewables-revolution-how-big-clean-energy-projects-risk-leaving-local-communities-behind-144675>.

251 “Forest Wind Farm Development Bill 2020 Explanatory Notes,” <https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-2019-006>, p. 2-3.

252 Ibid.

253 Minister for State Development, Tourism and Innovation Kate Jones, “Wind farm bill blowing Queensland closer to a clean energy future,” Media Release, 21 May 2020, <https://statements.qld.gov.au/statements/89882>.

254 Ibid.

255 “\$2 Billion Wind Farm Approved – Tuan State Forest, Maryborough,” *YourNeighbourhood*, <http://www.yourneighbourhood.com.au/wind-farm-tuanstate-forestmaryborough/>.

on the economic benefits of the project with Minister Kate Jones ensuring the project will “create jobs in [the] regions” that will stimulate both local and the broader state economies.²⁵⁶ Additionally, the Government estimates that the project will create “up to 440 jobs in the construction phase and 50 operational jobs”.²⁵⁷

Despite this, community members have expressed their concerns regarding the lack of communication and consultation surrounding the location of the proposed wind farm. Local residents spoke to a parliamentary committee in June 2020, claiming “[the project] was kept a secret from 2016 until the public announcement in December 2019” expressing concerns about its visual impact and proximity to bird migration corridors.²⁵⁸ Project Director James Pennay claims the site “offered a strong wind profile and noise buffer” and all potential community impacts on landscape, ecology and acoustics had been carefully mitigated during planning stages.²⁵⁹ He continued that

Countries such as Ireland, Scotland and Sweden all produce 10 per cent of their electricity from wind farms inside pine plantations. This is a well-trodden path internationally, and we are really pleased to have the opportunity to do what other countries are doing overseas, in Queensland.²⁶⁰

That being said, while Greens MP Michael Berkman welcomed the investment into renewable energy and potential future jobs, he expressed concerns reflecting those of local residents that “the community [had] enough concerns about this that the government should have shown its workings better and engaged better with the community”.²⁶¹ During his speech in Parliament, he further argued that,

A project this big, one that requires our parliament to change the law just so it can go ahead, is worthy of much better community consultation, a much better look at alternative sites – if they exist – and a much better look at the environmental impacts.²⁶²

The Bill was passed on 12 August 2020, after several amendments and concerns were addressed during two days of parliamentary debate.

256 Minister for State Development, Tourism and Innovation Kate Jones, “Wind farm bill blowing Queensland closer to a clean energy future,” Media Release, 21 May 2020, <https://statements.qld.gov.au/statements/89882>.

257 “Forest Wind Farm Development Bill 2020 Explanatory Notes,” <https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-2019-006> p. 1.

258 Tom Morton, James Goodman, Katja Müller and Riikka Heikkinen, “Forest Wind and Australia’s renewables revolution: how big clean energy projects risk leaving local communities behind,” *The Conversation*, 24 August 2020, <https://theconversation.com/forest-wind-and-australias-renewables-revolution-how-big-clean-energy-projects-risk-leaving-local-communities-behind-144675>.

259 Nicole Hegarty, “Wind farm in Australia’s largest forest plantation to power one in four Queensland homes,” ABC News, 28 October 2020, <https://www.abc.net.au/news/2020-10-28/forest-wind-wind-farm-in-pine-plantation-on-queensland-wide-bay/12814744>.

260 Ibid.

261 Michael Berman MP, “Speech on Forest Wind Farm Development Bill 2020”, Third Reading, Transcript: https://www.michaelberkman.com.au/speech_on_forest_wind_farm_bill_20200812.

262 Ibid.

	Criteria	Conclusion	Comment
1	Establish need	Yes	The relevant Minister outlined that the new legislation is vital to “facilitate a pathway to tenure for the development” of the Forest Wind Project, however Government failed to provide data or evidence which suggested that this proposal is appropriate or in the public’s interest. Additionally, a range of concerns over community consultation were raised.
2	Set objectives	Yes	The Government has clearly articulated their objective is to establish a legislative framework allowing the project to coexist with the current plantation license and to “otherwise be undertaken in the State forests through exempting the project from certain provisions in the <i>Forestry Act 1959</i> and the <i>Land Act 1994</i> ”. ²⁶³
3	Identify options	Yes	Alternative tenure options under the current legislative framework were included in the explanatory notes of the Bill.
4	Consider mechanisms	Yes	The Explanatory Notes issued with the Bill outline alternate methods of implementing the policy.
5	Brainstorm alternatives	Yes	Alternative policy options were considered, however Bill was determined to be the only viable option for achieving all of the intended policy outcomes.
6	Design pathway	No	No specific pathway was outlined to ensure the objectives of the Bill are achieved with a passage in the explanatory notes stating, “the project may not be delivered in full or proceed at all due to commercial factors”.
7	Consult further	Yes	The Government stated that consultation with relevant State Government agencies occurred and that there will be ongoing opportunities for “current, and any future stakeholders to communicate their concerns to relevant proponents”. ²⁶⁴

263 Forest Wind, “Development Process”, Accessible at: <https://www.forestwind.com.au/development-process-1>.

264 “Forest Wind Farm Development Bill 2020 Explanatory Notes,” <https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-2019-006> p. 7.

8	Publish proposals	Yes	Drafts of the relevant Bill were provided to Forest Wind Holdings Pty Limited and HQPlantations Pty Ltd on three separate occasions for consultation. The Bill was also considered by the State Development, Tourism, Innovation and Manufacturing Committee which held public hearings and invited stakeholder submissions.
9	Introduce legislation	Yes	The Bill was introduced into Parliament on 20 May 2020 and was passed with amendments on 12 August 2020. ²⁶⁵
10	Communicate decision	No	The relevant minister issued a media release when the Bill was introduced to Parliament ²⁶⁶ and when it passed. ²⁶⁷ However, the media release read more as a promotion of the Government's policies, rather than a proper explanation of the consequential changes found in the Bill.
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²⁶⁵ *Forest Wind Farm Development Act 2020*, Legislative History, <https://www.legislation.qld.gov.au/view/html/asmade/act-2020-028/lh>.

²⁶⁶ Minister for State Development, Tourism and Innovation Kate Jones, "Wind farm bill blowing Queensland closer to a clean energy future," Media Release, 21 May 2020, <https://statements.qld.gov.au/statements/89882>.

²⁶⁷ Minister for State Development, Tourism and Innovation Kate Jones, "New legislation brings Wide Bay wind farm project one step closer," Media Release, 13 August 2020, <https://statements.qld.gov.au/statements/90415/>.

