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and the Pandemic**

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## AUSTRALIAN PARLIAMENTS AND THE PANDEMIC

Harry Hobbs\* and George Williams\*\*

### *Abstract*

*Parliaments play a crucial role during a pandemic in supporting their community to safely navigate the public health emergency. Parliaments must meet regularly, be provided with sufficient time to debate key measures and issues, exercise legislative oversight, and scrutinise government administration and policy. We examine whether Australian Parliaments met these standards during the covid-19 pandemic. We find that Australian Parliaments often performed poorly.*

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## I. INTRODUCTION

In December 2019, a highly transmissible novel coronavirus was detected in Wuhan, China. Attempts to contain SARS-CoV-2 (later named Covid-19) within the city failed and the virus quickly spread across the globe. The following month, on 30 January 2020, the World Health Organization (WHO) declared the outbreak a 'Public Health Emergency of International Concern'.<sup>1</sup> Less than two months later, with more than 118,000 cases detected in 114 countries, the WHO declared Covid-19 a global pandemic.<sup>2</sup> In Australia, the first confirmed case of Covid-19 was identified on 25 January 2020.<sup>3</sup>

Australian governments responded in previously 'unimaginable'<sup>4</sup> ways to what former Prime Minister Scott Morrison described as the 'unprecedented'<sup>5</sup> challenges posed by the pandemic. Singing and dancing was prohibited,<sup>6</sup> weddings were cancelled,<sup>7</sup> cafes were restricted to take-away only,<sup>8</sup> and state and territory borders were closed.<sup>9</sup> Families were prevented from seeing their loved ones in aged care homes,<sup>10</sup> whole communities were confined to their local government area,<sup>11</sup> and people were banned from meeting two or more friends for a walk outside.<sup>12</sup> Such measures were backed by strong enforcement, including the possibility of fines and even jail time.<sup>13</sup>

These and similar extraordinary rules were not implemented by Parliament but by members of the executive. With the stroke of a pen, Commonwealth and State and Territory Health Ministers and Chief Health Officers imposed significant restrictions on funerals, closed playgrounds, confined people to their home,<sup>14</sup> and even prevented Australians overseas from returning home.<sup>15</sup> Orders were often lengthy, vague, and ambiguous.<sup>16</sup> They were frequently announced late at night and may have changed by the morning.<sup>17</sup> They were also voluminous. By 22 May 2020, State and Territory governments had enacted 547 statutory instruments relating to Covid-19, and the Commonwealth alone had enacted another 172 related measures.<sup>18</sup>

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<sup>1</sup> This declaration imposes a legal duty on states to notify and provide all relevant public health information to WHO: World Health Organization, International Health Regulations (2005) art 6-10, adopted under *Constitution of the World Health Organization* (1948) arts 21(a) and 22. Australia has incorporated these requirements under the *National Health Security Act 2007* (Cth) s 19.

<sup>2</sup> WHO Director-General's Opening Remarks at the Media Briefing on Covid-19 (11 March 2020).

<sup>3</sup> Greg Hunt, 'First Confirmed Case of Novel Coronavirus in Australia' (Media Release, 25 January 2020).

<sup>4</sup> Tom Ginsburg and Mila Versteeg, 'The Bound Executive: Emergency Powers During the Pandemic' (2021) 19(5) *International Journal of Constitutional Law* 1498, 1499.

<sup>5</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 23 March 2020, 2772 (Scott Morrison, Prime Minister).

<sup>6</sup> See for example, *Public Health (COVID-19 General) Order (No 2) Amendment (No 6) Order 2022* (10 January 2022) [NSW].

<sup>7</sup> See for example, *Direction Under s 16 of the Public Health Act 1997* (26 March 2020) [Tas] Schedule 1, cl 5.

<sup>8</sup> See for example *Non-Essential Business (and Other Gatherings) Closure Direction 2020* (23 March 2020) [SA].

<sup>9</sup> See for example *Quarantine (Closing the Border) Directions* (5 April 2020) [WA]. The border closure was ruled constitutional in *Palmer v Western Australia* (2021) 272 CLR 505.

<sup>10</sup> See for example, *Aged Care Direction* [Qld] (17 April 2020)

<sup>11</sup> See for example, *Public Health (COVID-19 Northern Beaches) Order 2020* (19 December 2020) [NSW].

<sup>12</sup> See for example, *Stay at Home Directions* (30 March 2020) [Vic] cl 11.

<sup>13</sup> See for example, *Public Health Act 2010* (NSW) s 10.

<sup>14</sup> See for example, *Stay at Home Directions* (30 March 2020) [Vic]; *Direction Under s 16 of the Public Health Act 1997* (26 March 2020) [Tas].

<sup>15</sup> See for example, *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—High Risk Country Travel Pause) Determination 2021* (Cth) (30 April 2021).

<sup>16</sup> New South Wales Ombudsman, *The COVID-19 Pandemic: Second Report – A Special Report under Section 31 of the Ombudsman Act 1974* (7 September 2022) 62-67.

<sup>17</sup> For example, the NSW *Public Health (COVID-19 Temporary Movement and Gathering Restrictions) Amendment (No 11) Order 2021* commenced on 21 July 2021 and was in force until 9:47am on 21 July 2021.

<sup>18</sup> Meg Web, 'COVID-19 Committees: A National Comparison Background Briefing Paper' (22 May 2020) 8.

The measures introduced by Australian governments imposed restrictions that curtailed many basic liberties and had a severe economic impact. While most Australians accepted the need for extreme responses to protect public health, significant concerns were often raised over whether governments struck the right balance. People questioned whether state borders were closed for an unduly long period of time, or if governments could have used their discretion on compassionate grounds more readily.<sup>19</sup> Others wondered if night-time curfews were necessary to prevent the spread of the pandemic.<sup>20</sup> As in other parts of the world, some Australians took to the streets in sometimes violent protests over contentious government decisions on matters such as vaccine mandates.<sup>21</sup>

Covid-19 'posed a grave challenge to governance systems everywhere'.<sup>22</sup> Responding to this challenge required changes to the ordinary operation of Australian governance. The executive is uniquely positioned to provide quick, decisive, and flexible responses to protect public health and safety in periods of crisis, and so it understandably took the lead in responding to Covid-19. However, the actions taken by the executive raised questions about the role of Parliament during this time. Australia is a representative democracy governed under a system of responsible government in which the executive answers to the people through their representatives in Parliament. This meant that, during the pandemic, Parliament might be expected to come to the fore as a highly visible and deliberative forum for community debate. Parliamentary processes offered the opportunity to scrutinise government measures and to build public trust that appropriate measures were soundly based and that governments were not taking advantage of their extraordinary powers to the detriment of the community. After all, as Cecil Carr noted during WWII, 'if hard cases make bad laws, emergency makes worse'.<sup>23</sup>

Instead, at the height of the crisis, sittings of Australian parliaments were often severely truncated and the number of members attending was 'substantially reduced'.<sup>24</sup> When parliaments were recalled, it was to formally enact emergency legislation hastily drafted by the executive; once that task was complete, assemblies adjourned. While parliamentary committees were established to monitor and inquire into governments' use of emergency powers, and changes to standing orders to respond to the pandemic were made, in other areas parliaments proved slow to innovate. The Commonwealth Parliament eventually facilitated virtual sittings for Members unable to travel to Canberra, but steadfastly refused to amend the standing orders to allow those Members to vote.<sup>25</sup> In these circumstances, the capacity of parliaments to serve as forums of civic representation, public decision-making and undertake scrutiny of the executive was considerably diminished.

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<sup>19</sup> See for example, 'Border Closures are Understandable but They Need to Be Handled Better', *The Age* (online, 6 January 2021) <<https://www.theage.com.au/politics/federal/border-closures-are-understandable-but-they-need-to-be-handled-better-20210106-p56s61.html>>; Rebecca Turner, 'Should Australian States Ditch Coronavirus Border Restrictions? Even Medical Experts Can't Agree on That', *ABC News* (online, 23 May 2020) <<https://www.abc.net.au/news/2020-05-23/coronavirus-how-is-there-different-health-advice-border-closures/12276062>>.

<sup>20</sup> See for example, Gina Kolata, 'Do Curfews Slow the Coronavirus?', *New York Times* (online, 23 January 2021) <<https://www.nytimes.com/2021/01/23/health/coronavirus-curfews.html>>.

<sup>21</sup> Rachel Treisman, 'Anti-Vaccine Protesters Clash with Police in Melbourne, Australia, For the 2<sup>nd</sup> Day', *National Public Radio* (21 September 2021) <<https://www.npr.org/2021/09/21/1039301977/anti-vaccine-protesters-clash-with-police-in-melbourne-for-the-second-straight-d>>. On the connection between vaccine protest, pseudolaw and sovereign citizens, see: Harry Hobbs, Stephen Young and Joe McIntyre, 'Sovereign Citizens and Pseudolaw Argumentation in Australia and Aotearoa New Zealand' (on file with authors).

<sup>22</sup> Tom Ginsburg, 'Foreword to Special Issue on Legislatures in the Time of Covid-19' (2020) 8(1-2) *The Theory and Practice of Legislation* 1, 1.

<sup>23</sup> Cecil Carr, 'Crisis Legislation in Britain' (1940) 40 *Columbia Law Review* 1309, 1309.

<sup>24</sup> Joint Statement by the Presiding Officers on Building Operations at the Australian Parliament House (Media Release, Parliament of Australia, 26 July 2021) <[https://www.aph.gov.au/News\\_and\\_Events/Joint\\_statements\\_by\\_the\\_Presiding\\_Officers/Building\\_operations\\_at\\_the\\_Australian\\_Parliament\\_House\\_26\\_July\\_2021](https://www.aph.gov.au/News_and_Events/Joint_statements_by_the_Presiding_Officers/Building_operations_at_the_Australian_Parliament_House_26_July_2021)>.

<sup>25</sup> Commonwealth, House of Representatives, *Agreement for Members to Contribute Remotely to Parliamentary Proceedings* (20 August 2020); Senate Standing Committee on Procedure, Parliament of Australia, *Routine of Business: Remote Participation in Senate Proceedings* (21 August 2020).

In this article, we examine and assess how Australian Parliaments responded to the pandemic. In doing so, we note that many of the deficiencies we identify in the operation of Parliament during the pandemic are not new but reflect far deeper, longer term problems of parliamentary control by the executive. Indeed, many of the issues explored below were not caused by Covid-19. Rather, they were brought into sharper focus by the pressures of the public health emergency. For that reason, our findings are not only applicable to a future pandemic or health emergency. They have broader implications for the role of Parliament within our democracy.

We divide our paper into two substantive parts. Part II assesses the core functions of Parliament to enable us to identify four key roles that Parliament should undertake during a public health emergency. Parliament should meet regularly, be provided with sufficient time for debate on key measures and issues, and exercise both legislative and executive oversight. In Part III, we assess the Commonwealth and other Australian parliaments against these functions.

## II. THE ROLE OF PARLIAMENT IN A PANDEMIC

It is often said that Parliament's primary function is to make and change law. The very name of these institutions – legislatures – speaks to this purpose; their essential task as Locke and Montesquieu explained is law-making,<sup>26</sup> or law giving.<sup>27</sup> Many members of these institutions agree. A 2012 survey of 155 parliamentarians from 15 national legislatures found that more respondents thought legislation to be one of the two most important functions of parliament than any other role.<sup>28</sup> But as political scientists have long remarked, 'a large part of the time of these bodies is not devoted to law-making at all'.<sup>29</sup> In fact, 'most of the world's legislatures do not legislate very much'.<sup>30</sup> Any role that Parliament may have in law-making 'is not now, nor has it ever been, the dominant one',<sup>31</sup> for law and policy is largely developed within the executive. If lawmaking is not the sole or primary function of modern parliaments, what is it that legislatures do?

In *The English Constitution*, British constitutional theorist Walter Bagehot sought to answer this question. Bagehot outlined five basic functions of the House of Commons. For Bagehot, Parliament held an 'elective', 'expressive', 'teaching', 'informing' and 'legislative' function.<sup>32</sup> The most important role of the House is its elective function. The executive must maintain the confidence of the House, which elects – and dismisses – the Prime Minister and the government. The next three functions might be described as 'representative'<sup>33</sup> and 'communicative' functions.<sup>34</sup> Parliament's role is to 'express the mind of the British people on all matters which come before it',<sup>35</sup> implicitly alter the society for the better through education, and to inform the country of grievances and complaints. Essentially, Parliament is to serve as a forum for debate and deliberation on the issues of the day. Law-making, 'of conceiving, shaping, amending, rejecting and accepting' bills,<sup>36</sup> is the fifth function of the Parliament.

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<sup>26</sup> John Locke, *Second Treatise of Government* (Hackett Publishing, first published 1689, 1980 ed) 78 (Ch XIII [150]).

<sup>27</sup> Baron de Montesquieu, *The Spirit of the Laws* (1748), bk. XI.

<sup>28</sup> Ken Coghill et al, 'The Functions of Parliament: Reality Challenges Tradition' (2012) 27(2) *Australasian Parliamentary Review* 55, 60.

<sup>29</sup> Kenneth Wheare, *Legislatures* (Oxford University Press, 1963) 1

<sup>30</sup> Robert Packenham, 'Legislatures and Political Development' in Allan Kornberg and Lloyd Musolf (eds), *Legislatures in Developmental Perspective* (Duke University Press, 1970) 521, 546.

<sup>31</sup> CES Franks, *The Parliament of Canada* (University of Toronto Press, 1987) 5

<sup>32</sup> Walter Bagehot, *The English Constitution* (2<sup>nd</sup> ed, 1873) 118-120.

<sup>33</sup> Allan Kornberg, 'Parliament in Canadian Society' in Allan Kornberg and Lloyd Musolf (eds), *Legislatures in Developmental Perspective* (Duke University Press, 1970) 55, 84; Philip Laundry, *Parliaments in the Modern World* (Dartmouth, 1989) 11; Robert Hazell, 'The Challenges Facing our Parliaments: How Can We Improve their Performance?' (2001) 16(2) *Australasian Parliamentary Review* 5, 23-24.

<sup>34</sup> Bernard Crick, 'Parliament in the British Political System' in Allan Kornberg and Lloyd Musolf (eds), *Legislatures in Developmental Perspective* (Duke University Press, 1970) 33, 34.

<sup>35</sup> Bagehot (n 32) 119.

<sup>36</sup> Crick (n 34) 51

While Bagehot acknowledges that 'it would be preposterous to deny the great importance' of this function, it is of less significance than the former roles performed by the parliament,<sup>37</sup> because, in substance, key decisions and direction about lawmaking comes from the executive.

The Commonwealth Parliament articulates its functions in similar terms. The Australian Parliamentary Education Office outlines four main functions carried out by the Parliament in Canberra. Those functions are to: (1) make laws for Australia; (2) represent the people of Australia; (3) examine the work of the government; and (4) provide a place where government is formed.<sup>38</sup> We can describe these as a *legislative*, *representative*, *accountability*, and an *elective* function. What these functions entail can be spelled out in more detail. Under its *elective* function, Parliament makes and unmakes governments. The *legislative* function sees Parliament initiate, debate, pass, amend and repeal laws, including laws on government spending. The *representative* role of Parliament is clear: Parliament represents the people and their interests in an open and public forum, including by hearing petitions, and ventilating grievances and other matters of concern. Finally, in exercising its *accountability* function Parliament holds the executive to account by seeking information on, appraising and critiquing, government administration, law and policy through committees, parliamentary debate (especially question time), and by examining delegated legislation.

These core functions are vital. They ensure that government acts for and is controlled by the people as represented by their members in parliament. But how does the role of Parliament change during a crisis? In *Pape v Federal Commissioner of Taxation*, Gummow, Crennan and Bell JJ noted that in times of national emergency 'the Executive Government is the arm of government capable of and empowered to respond'.<sup>39</sup> However, while the role of Parliament must necessarily adapt during a crisis, this does not mean that it should be placed 'in cold storage'.<sup>40</sup> Even when threatened by the exigencies of total war or major civil strife, it has long been recognised that national assemblies must continue to meet and exercise certain core roles.

The nature of the crisis will affect the role that Parliament plays. National security crises catalysed by a terrorist attack or invasion by hostile power differ materially from public health emergencies such as pandemics.<sup>41</sup> The former events are 'typically fast-moving' and require a 'uniform response' that is developed in secret 'to keep it from the enemy'. The concentration of information in the national-level executive branch and the need for a clear decision-maker means other institutions, including the parliament, may need to defer to the executive. In contrast, pandemics are 'slow building', require little or no need for secrecy and may not require a uniform response.<sup>42</sup> Indeed, as Amartya Sen explains, the nature of public health crises like pandemics mean that they can only be addressed through 'participatory governance and alert public discussion', rather than top-down directions imposed without broad consultation.<sup>43</sup> Sen continues:

Listening is central in the government's task of preventing social calamity — hearing what the problems are, where exactly they have hit, and how they affect the victims. Rather than muzzling the media and threatening dissenters with punitive measures (and remaining politically unchallenged), governance can be greatly helped by informed public discussion. Overcoming a pandemic may look like fighting a war, but the real need is far from that.<sup>44</sup>

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<sup>37</sup> Bagehot (n 32) 120.

<sup>38</sup> Parliamentary Education Office, 'What's the function of parliament?' <<https://peo.gov.au/understand-our-parliament/your-questions-on-notice/questions/whats-the-function-of-parliament/>> (14 June 2022).

<sup>39</sup> *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, [233] (Gummow, Crennan and Bell JJ).

<sup>40</sup> Leonard Woolf, 'Democracy at Bay' (1940) *Political Quarterly* 335, 336.

<sup>41</sup> Ginsburg and Versteeg (n 4) 1510.

<sup>42</sup> *Ibid* 1510-1512.

<sup>43</sup> Amartya Sen, 'Listening as Governance', *Culture of Peace News Network* (online, 21 June 2020) <<https://cpnn-world.org/new/?p=20650>>.

<sup>44</sup> *Ibid*.

In the initial stages of the emergency, many parliaments recognised this insight and understood their primary responsibilities as supporting an effective response to the pandemic by representing the diverse interests of their constituents and holding the government to account. On this view, representative and accountability functions emerged as particularly salient.

This is not to deny the importance of the elective and legislative functions. Of course, legislation would need to be enacted and the government's support may need to be tested. However, given the overriding sense that 'we are all in this together',<sup>45</sup> parliaments largely deferred to government proposals to suspend parliament or pass economic support measures. Amendments might be proposed, but the legislation would be supported. For example, on 23 March 2020 Opposition Leader Anthony Albanese explained that under his leadership the Labor opposition would act 'in a responsible and constructive manner'. This would involve putting forward 'suggestions' and 'views to try and improve the [emergency] legislation'.<sup>46</sup> Reminding the government that those views 'do represent, by the way, the largest political party in this parliament', Albanese noted that they should 'be taken into account'.<sup>47</sup> Nevertheless, while admitting the legislation 'is not perfect', Albanese was clear that 'this is not a time to prevent measures which, however imperfect, are necessary to be implemented'.<sup>48</sup>

If the two primary roles of Parliament during a pandemic is to exercise representative and accountability functions, how should it fulfil its responsibilities? What sort of activities should it engage in? We outline four activities below against which Parliament can be assessed in light of its core functions and how these might be exercised during a pandemic.

*Parliament should meet regularly.* In Westminster systems, Parliament is 'the source of the legitimacy and authority of a government'.<sup>49</sup> It is therefore essential that Parliament continue to sit regularly and thereby demonstrate that the executive maintains its confidence. It is also crucial for the government to ensure its policies and administration is supported by the people. Even when accepting the need to adjourn due to rapidly growing case numbers, parliamentarians were clear that 'it is imperative and important that the House continue to sit',<sup>50</sup> for 'during this period, during a time of crisis, is when the Australian public needs us to sit'.<sup>51</sup> While governments continued to update the nation via regular press conferences and media releases, the visibility, publicity, and transparency inherent in the act of speaking through parliament is itself important.<sup>52</sup>

*Parliament should be provided with sufficient time to debate key measures and issues.* Regular meetings are important as a symbol of continuity during a time of uncertainty and of the significance of Parliament as a public institution that represents the people. But it is not enough for Parliament to simply meet and vote on government proposals. Parliament must be provided with sufficient time to consider and debate key measures and issues. In ordinary times, Parliament is a forum for the diverse interests of citizens to be heard, ventilated, and potentially incorporated into the design of policy and

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<sup>45</sup> New Zealand, *Parliamentary Debates*, House of Representatives, 25 March 2020, 17280 (Simon Bridges, Leader of the Opposition); Commonwealth, *Parliamentary Debates*, House of Representatives, 8 April 2020, 2911 (Scott Morrison, Prime Minister); United Kingdom, *Parliamentary Debates*, House of Commons, 16 March 2020, col 725 (Stephen Kinnock).

<sup>46</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 23 March 2020, 2775. See also Canada, *Parliamentary Debates*, House of Commons, 24 March 2020, 2069 (Andrew Scheer, Leader of the Opposition); New Zealand, *Parliamentary Debates*, House of Representatives, 25 March 2020, 17280 (Simon Bridges); United Kingdom, *Parliamentary Debates*, House of Commons, 25 March 2020, col 414 (John McDonnell).

<sup>47</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 23 March 2020, 2776.

<sup>48</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 23 March 2020, 2775. See also Tasmania, *Parliamentary Debates*, House of Assembly, 26 March 2020, 2 (David O'Byrne)

<sup>49</sup> Franks (n 31) 11.

<sup>50</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 17 March 2020, 605 (Jarrod Bleijie).

<sup>51</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 23 March 2020, 2894 (Tony Bourke, Manager of Opposition Business).

<sup>52</sup> Elena Griglio, 'Parliamentary Oversight Under the Covid-19 Emergency: Striving Against Executive Dominance' (2020) 8(1-2) *The Theory and Practice of Legislation* 49, 62.

administration.<sup>53</sup> This role is especially important during times of crisis or emergency. To fulfil its representative function, the legislature must not merely sit but must be provided with 'an opportunity for people representing the different corners of Australia'<sup>54</sup> to articulate their views and seek to have their grievances redressed.<sup>55</sup>

Parliamentary debates are important not only because they are forums through which the views of the people can be expressed, but also for their legitimating function. The act of meeting, considering, and debating proposals for extraordinary powers can act as a safety valve to reduce tension, provide reassurance, and enhance 'satisfaction with or acquiescence in the policies and programs' of the government.<sup>56</sup> Clearly, during a pandemic or national emergency, changes to the standing orders to expedite the passage of legislation may be necessary. In these cases, however, debate should not be curtailed unnecessarily. Through debate, discussion and challenge, Parliament should be able to assist and support the executive during a public health emergency by testing their legislation and policy and offering amendments to improve upon key measures.<sup>57</sup>

*Parliament should maintain legislative oversight, including of delegated legislation.* Our constitutional system recognises 'the necessity of draconian powers in moments of national crisis',<sup>58</sup> but hastily drafted and hurriedly enacted legislation is likely to cause unintended and unexpected problems. The same is true for regulations or orders made and re-made by a Minister acting alone or a health officer. Even when Parliament is unable to sit, it has 'unique institutional features that allow it to serve as a deliberative forum for scrutinising emergency policies and providing feedback to the executive'.<sup>59</sup> In a crisis, parliament must continue to exercise legislative oversight by examining and critiquing proposed laws and delegated legislation. As the Leader of the New Zealand House of Representatives noted, 'scrutiny during this unprecedented time, when the Government is placed in the position of exercising such extraordinary powers, has never been more important'.<sup>60</sup>

*Parliament should scrutinise government administration and policy.* Public health emergencies may require changes to parliamentary process and procedure. It is important that government act quickly to slow the spread of highly transmissible viruses and provide necessary economic support to protect the community. This does not mean, however, that parliament should abandon its critical responsibility to scrutinise government administration and policy. As Woodrow Wilson explained, 'it is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees'.<sup>61</sup> Responsible government does not only mean the executive sits within the legislature; it also means 'the government is expected to be a trustworthy steward of the nation's affairs'.<sup>62</sup> It is all the more pressing during a time of national emergency that the parliament ensure government meets this standard.

### III. ASSESSING AUSTRALIAN PARLIAMENTS

Australians were generally supportive of the actions taken by their governments in responding to the pandemic. A 2022 Lowy Institute Poll reveals that 80 per cent of Australians believe Australia 'handled

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<sup>53</sup> Erica Rayment and Jason VandenBeukel, 'Pandemic Parliaments: Canadian Legislatures in a Time of Crisis' (2020) *Canadian Journal of Political Science* 1, 1.

<sup>54</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 23 March 2020, 2894 (Tony Bourke, Manager of Opposition Business)

<sup>55</sup> Coghill et al (n 28) 62.

<sup>56</sup> Pakenham (n 30) 530.

<sup>57</sup> Nick Barber, *The Principles of Constitutionalism* (Oxford University Press, 2018) 58.

<sup>58</sup> *A v Secretary of State for the Home Department* [2005] 2 WLR 87, [88] (Lord Hoffmann).

<sup>59</sup> Jan Petrov, 'The COVID-19 Emergency in the Age of Executive Aggrandizement: What Role for Legislative and Judicial Checks?' (2020) 8(1-2) *The Theory and Practice of Legislation* 71, 73

<sup>60</sup> New Zealand, *Parliamentary Debates*, House of Representatives, 25 March 2020, 17317 (Chris Hipkins).

<sup>61</sup> Woodrow Wilson, *Congressional Government: A Study in American Politics* (Riverside Press, 1885) 193.

<sup>62</sup> Franks (n 31) 11.



the pandemic well'.<sup>63</sup> But how did Australian parliaments fare? Did they meet their core representative and accountability responsibilities? In this part, we assess Australian parliaments against the four functions we have identified. We examine whether our representative institutions met regularly, were provided with sufficient time to debate key measures and issues, maintained legislative oversight, and scrutinised government administration and policy.

#### A. Meeting Regularly

Regular meetings of Parliament are important for several reasons. Fundamentally, the government's mandate rests on the legislature's support. In times of anxiety and crisis that support may waver, and the government is under an obligation to demonstrate it continues to maintain the confidence of the people through their representatives. Regular meetings also play a legitimating function. Simply by assembling and deliberating, even where outcomes are largely preordained, parliaments can reduce societal tension and enhance support amongst the populace.<sup>64</sup> While journalists can critique and challenge government decision-making announced in press conferences, it is in Parliament where elected members can and should 'press the government for the answers [citizens] deserve'.<sup>65</sup>

The pandemic severely affected the capacity of most Australian parliaments to meet their core function of regular sittings. Almost all Australian parliaments sat for fewer days in 2020 and 2021 than their recent historical average pre-covid. In the most populated south-eastern jurisdictions where case numbers were higher and transmissibility risks were greater, Covid-19 resulted in a larger number of sitting days being lost than in other jurisdictions. For example, in non-election years between 2015 and 2019, the New South Wales Legislative Assembly sat for an average of 54 days each year. In 2020, the Legislative Assembly sat for 41 days—an almost 25 per cent drop. The New South Wales Legislative Council suffered a similar fate. Over the same period, the Council sat for an average of 48 days each year; in 2020, it sat for only 37 days.

The New South Wales Parliament lost the greatest number of days in 2020. However, as Tables 1 and 2 illustrate, the NSW experience was far from unique. The Commonwealth and Victorian Parliaments lost more than 20 days across both Houses of Parliament. The ACT Legislative Assembly and Tasmanian Legislative Council lost around 7 days. The Northern Territory Legislative Assembly also sat for a significantly fewer number of days in 2020. While the Northern Territory did not experience a spike of Covid-19 cases, the increased vulnerability of its population resulted in a cautious approach.

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<sup>63</sup> Lowy Institute Poll 2022, 'Covid-19 Pandemic: Global Responses to Covid-19' <<https://poll.lowyinstitute.org/charts/global-responses-to-covid-19/>> (29 August 2022).

<sup>64</sup> Packenham (n 30) 536; Paul Schuler and Edmund Malesky, 'Authoritarian Legislatures' in Shane Martin, Thomas Saalfeld and Kaare Strøm (eds), *The Oxford Handbook of Legislative Studies* (Oxford University Press, 2014) 676.

<sup>65</sup> Canada, *Parliamentary Debates*, House of Commons, 13 March 2020, 2061 (Mark Strahl)

**Table 1: Parliamentary Sitting Days 2015-2022 – Lower House**

	Cth	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Total
2015	75	45	51	33	60	48	45	39	28	424
2016	51	54	51	43	57	51	45	24	27	403
2017	64	54	51	34	43	47	45	39	31	408
2018	65	54	40	37	60	49	36	39	31	411
2019	45	39	44	40	72	53	45	39	31	408
2020 – covid	58	41	38	31	65	47	42	17	18	357
2021 – covid	67	42	48	40	55	52	36	34	28	402
2022	40	45	39	40	49	33	42	35	31	354
Ave Non-Election Year pre covid	68	54	49.25	40	62.25	49.75	45	39	30.25	437.5
Ave Election Year, pre covid	48	42	40	33.5	43	49	36	24	27	342.5
Days lost 2020	10	13	11.25	2.5*	+2.75	2.75	3	7*	9*	42.75
Days lost 2021	1	12	1.25	0	+12*	+2.25	0	5	2.25	11.75

Notes: Gray shade indicates election held that year, sitting days does not include budget estimates, \* indicates total days lost is assessed against election year average.<sup>66</sup>

**Table 2: Parliamentary Sitting Days 2015-2022 – Upper House**

	Cth	NSW	Vic	WA	SA	Tas	Total
2015	59	41	51	60	50	47	308
2016	42	48	51	57	53	43	294
2017	56	48	60	43	47	42	296
2018	58	48	47	63	49	34	299
2019	42	35	51	69	53	42	292
2020 – covid	46	37	42	65	47	37	274
2021 – covid	52	47	50	65	52	29	295
2022	31	45	40	55	36	49	256
Ave Non-Election Year, pre covid	57.67	48	53.25	62.25	50.75	43.5	315.42
Ave Election Year, pre covid	42	38	47	43	49	34	253
Days lost 2020	11.67	11	11.25	+2.25	3.75	6.5	46.42
Days lost 2021	5.67	1	3.25	+22*	+1.25	5*	+5.3

Notes: Gray shade indicates election held that year, does not include budget estimates \* indicates total days lost is assessed against election year average.

The success of efforts at containing the spread of the virus meant that not all Parliaments were affected to the same degree. South Australia avoided significant community transmission throughout 2020. Even so, the state Parliament sat for 6.5 fewer days than their historical average in that year. The data is a little complicated in Queensland given the state election was held during 2020, but it appears that the Parliament also lost only around 2.5 days. The Tasmanian House of Assembly lost a similar number of days.

<sup>66</sup> Note that the holding of an election typically reduces the number of sitting days in a year due to the need for a campaigning period.

One parliament sat for more days than might be expected from its recent historical average. By mid-April 2020, Western Australia had eliminated community transmission of Covid-19 and the state did not report more than a handful of cases until December 2021.<sup>67</sup> Following the initial 'panicky days' of March and April 2020,<sup>68</sup> the Western Australian Parliament increased their number of sitting days. Paul Watson, the Speaker of the Western Australia Legislative Assembly reported his 'quiet pride' that the WA Parliament 'was the only Parliament in Australia, which not only kept to its original 2020 sitting schedule in the initial stages of the pandemic, but actually added sitting days into its schedule'.<sup>69</sup>

The Western Australia Parliament's success did not make up for the total days lost across all parliaments. In 2020, Australian Parliaments sat for almost 90 days fewer than they did than their average between 2015-2019. Every Australian Parliament performed better in 2021, but several still sat for significantly fewer days. In particular, the New South Wales Legislative Assembly sat for 12 fewer days than its historical average between 2015 and 2019. No other House lost as many days.

Parliamentary sitting calendars reveal that during the pandemic governments often went about their business without Parliament sitting. In some cases, governments actively sought to exercise their powers free of parliamentary control. They did this by using their numbers in Parliament to suspend the legislature for significant lengths of time and by not prioritising the use of technology to facilitate sittings.

#### 1. *Governments suspended parliament to evade accountability*

The tables above demonstrate the impact of Covid-19 on parliament's capacity to fulfil its function of meeting regularly, but they do not paint the full picture. First, Tables 1 and 2 may underestimate (or overestimate) the total number of sittings days lost. Consider the Commonwealth Parliament as an example. The House of Representatives lost 10 days from its 2015-2019 non-election year average.<sup>70</sup> This assumes that the original sitting calendar had scheduled around 68 days for 2020. However, under the initial sitting calendar, the House was expected to sit for 72 days in 2020.<sup>71</sup> This means that the Parliament in fact lost 14 days from its original schedule.

Second, Tables 1 and 2 do not indicate how parliaments responded to the pandemic as it first emerged and provoked considerable uncertainty. Tables 3 and 4, below, outline the number of sitting days for each parliament over 2020 and 2021 by month. It is apparent that in the jurisdictions most affected by Covid-19, parliaments met very infrequently – if at all – at the height of the crisis (late March 2020 – May 2020). The NSW, Victorian and NT Parliaments met just once over a two-month period in April and May. The Queensland, Tasmanian and ACT Parliaments met four times or fewer in that same period. The Commonwealth Parliament met only five times.<sup>72</sup> However, even these stark figures do not reveal the extent of parliaments failure to fulfil its core function as the full scale of the pandemic initially took shape.

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<sup>67</sup> Heather McNeill, 'A Timeline of WA's COVID-19 Response: Was Our Success Luck, Good Management, or a Bit of Both?', *WA Today* (online, 28 August 2020) <<https://www.watoday.com.au/national/western-australia/a-timeline-of-wa-s-covid-19-response-was-our-success-luck-good-management-or-a-bit-of-both-20200827-p55q03.html>>.

<sup>68</sup> Procedure and Privileges Committee, Parliament of Western Australia, *The Legislative Assembly's Response to the COVID-19 Pandemic* (November 2020) 20.

<sup>69</sup> *Ibid* v.

<sup>70</sup> Note that between 1901 and 2018, the House sat on average for 67 days each year: D.R. Elder and P.E. Fowler (eds), *House of Representatives Practice* (Department of the House of Representatives, 7<sup>th</sup> ed, 2018) 238.

<sup>71</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 4 February 2020.

<sup>72</sup> Since 1994 the House of Representatives usually sits in three periods: February-April, May-June and August-December: Elder and Fowler (n 70) 238.

**Table 3: Parliamentary Sitting Days 2020 – Lower House**

	Emergency Declared	Number of Days Sitting											Total
		Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	
<b>Cth</b>	18 Mar	11	5	1	3	7	0	5	3	11	5	7	58 (15)
<b>NSW</b>	24 Mar	6	4	0	1	6	3	3	6	6	6	0	41 (9)
<b>Vic</b>	16 Mar	6	6	1	0	6	0	0	4	6	6	3	38 (9)
<b>Qld</b>	29 Jan	6	2	1	3	3	3	3	3	0	3	4	31 (0)
<b>WA</b>	15 Mar	6	7	5	9	6	0	6	9	7	9	1	65 (9)
<b>SA</b>	22 Mar	5	5	5	3	7	5	0	6	3	5	3	47 (8)
<b>Tas</b>	17 Mar	0	9	1	3	4	0	6	6	3	6	4	42 (3)
<b>ACT</b>	16 Mar	6	0	1	2	2	3	3	0	0	0	0	17 (6)
<b>NT</b>	18 Mar	6	1	1	0	3	0	0	0	3	3	1	18 (3)

Notes: Grey shade indicates month of election, number in brackets indicates sitting days prior to the declaration of a public health emergency.

**Table 4: Parliamentary Sitting Days 2021 – Lower House**

	Number of Days Sitting												Total
	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	
<b>Cth</b>	0	11	8	0	7	10	0	13	2	8	6	2	67
<b>NSW</b>	0	6	6	0	6	6	0	0	0	6	12	0	42
<b>Vic</b>	0	6	6	0	6	6	0	3	6	9	4	2	48
<b>Qld</b>	0	3	6	3	6	4	0	1	5	6	4	2	40
<b>WA</b>	0	0	0	1	9	9	0	9	9	9	9	0	55
<b>SA</b>	0	6	8	1	9	6	1	3	6	6	4	2	52
<b>Tas</b>	0	0	9	0	0	4	2	3	6	6	6	0	36
<b>ACT</b>	0	3	2	4	3	5	0	3	1	3	7	2	34
<b>NT</b>	0	6	3	0	6	1	0	3	3	3	1	2	28

Notes: Grey shade indicates month of election

The Commonwealth Parliament failed to meet regularly at a critical time when many Australians were suffering considerable alarm and anxiety. Parliament met on Monday 2 March 2020 for a regular sitting. It adjourned on Thursday 5 March for a scheduled mid-session break. Following the Governor-General's 18 March declaration that a human biosecurity emergency existed, Parliament was recalled for a one-day session on 23 March. To ensure appropriate social distancing while maintaining quorum, only 92 members of the House attended the session (a reduction from 151).<sup>73</sup> The standing orders were suspended to facilitate the expedited passage of the government's coronavirus response package and supply bills.<sup>74</sup> In the early evening, after the successful passage of these bills, the government presented a revised parliamentary sittings calendar that proposed to eliminate 18 sitting days in May and June, effectively adjourning the parliament until 11 August—a twenty-week break. Christian Porter, the Leader of the House, acknowledged that 'there's likely to be a division with respect to the sitting calendar', but justified the government's proposal on two grounds. First, that the House had already agreed that day to 'necessary measures on supply' to 'ensure the proper functioning of government services', and second, that 'some risk attaches to the operation of parliament, particularly during what

<sup>73</sup> House of Representatives Standing Committee on Procedure, Parliament of Australia, *The House Must Go On: Report of the Inquiry into the Practices and Procedures Put in Place by the House in Response to the COVID-19 Pandemic* (December 2020) 7.

<sup>74</sup> Coronavirus Economic Response Package Omnibus Bill 2020; Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) Bill 2020; Australian Business Growth Fund (Coronavirus Economic Response Package) Bill 2020; Assistance for Severely Affected Regions (Special Appropriation) (Coronavirus Economic Response Package) Bill 2020; Structured Finance Support (Coronavirus Economic Response Package) Bill 2020; Appropriation (Coronavirus Economic Response Package) Bill (No. 1) 2019-2020; Appropriation (Coronavirus Economic Response Package) Bill (No. 2) 2019-2020; Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Bill 2020.

is anticipated to be the peak point in the transmission of the coronavirus'.<sup>75</sup> As Stephen Mills notes, the government's proposal conceived the role of parliament in the pandemic as effectively limited to providing the government 'with supply and appropriation'.<sup>76</sup>

The Labor Party opposed the proposed sitting calendar, arguing that it was premature to eliminate sittings several months in advance. Sittings should be scheduled and later cancelled if it proved impossible to hold safely. Tony Bourke, the Manager of Opposition Business, declared that 'the presumption should be that we will meet if it is possible for us to sit, because, during this period, during a time of crisis, is when the Australian public needs us to sit'.<sup>77</sup> Bourke drew on the representative and accountability functions of parliament, explaining:

To have decisions of [great] magnitude being made without the parliament convening and without there being a question time and an opportunity for people representing the different corners of Australia to hold the government to account is an unwise course for us to take.<sup>78</sup>

Shadow Treasurer Jim Chalmers agreed, noting that the parliament would need to 'scrutinise the measures which were only announced yesterday and legislated today, the idea that the government has just perfectly nailed every aspect of this \$66 billion in new spending is absurd'.<sup>79</sup>

Relying on its numbers in the House, the government's proposed sitting calendar was adopted.<sup>80</sup> Nonetheless, the government was forced to change its plans, not because of vocal criticism of the failure of Parliament to sit, but because of the need to introduce further measures to support the economy. The House was recalled for a one-day session on 8 April and was again recalled on 12 May. At the end of that session, the House agreed to sit on 13 and 14 May. The House then agreed to sit again in June and early August, though this latter session was cancelled because of an increase in community transmission.<sup>81</sup> The House finally returned on 23 August 2020 after a nine-week break.

Uncertainty was a defining characteristic of the early days of the pandemic. It is unsurprising that in March 2020, Parliaments across Australia were quick to adjourn. However, there were different approaches that parliaments could take. Several adopted a flexible, albeit ambiguous approach, resolving to meet again at 'a day and hour to be fixed' by the Speaker of the Assembly or the President of the Council in accordance with standing orders.<sup>82</sup> This option would allow the parliament to return, when necessary, but did not provide any indication when that might be. In most cases, governments generally worked with opposition members to secure agreement in advance on proposed changes to the standing orders. A cooperative approach allowed parliament to sit with reduced numbers to manage social distancing and expedite the passage of critical measures responding to the pandemic. It also contributed to the sense that all Australians needed to work together to get through this difficult period.

Not all governments informed the opposition that they intended to adjourn parliament. Consider the exchange in the Victorian Legislative Assembly between Jacinta Allan the Leader of the House and Kim Wells, the Shadow Special Minister of State on 19 March:

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<sup>75</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 23 March 2020, 2893.

<sup>76</sup> Stephen Mills, 'Parliament in a Time of Virus: Representative Democracy as a "Non-Essential Service"' (2020) 34(2) *Australasian Parliamentary Review* 7, 16

<sup>77</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 23 March 2020, 2894.

<sup>78</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 23 March 2020, 2894.

<sup>79</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 23 March 2020, 2896.

<sup>80</sup> Commonwealth, *Votes and Proceedings*, House of Representatives, 23 March 2020, 825 [13].

<sup>81</sup> Stephanie Borys and Jade Macmillan, 'Coronavirus Crisis Forces Fortnight Sitting of Federal Parliament to be Cancelled', *ABC News* (online, 18 July 2020) <<https://www.abc.net.au/news/2020-07-18/parliament-sitting-week-cancelled-coronavirus/12469312>>.

<sup>82</sup> See, for example, Victoria, *Parliamentary Debates*, Legislative Assembly, 19 March 2020, 1079; Northern Territory, *Minutes of Proceedings*, Legislative Assembly, 24 March 2020, 761.

**Ms ALLAN:** I move:

That the house, at its rising, adjourns until a day and hour to be fixed by the Speaker, who will notify members accordingly.

**Mr WELLS:** I am sorry, Speaker, but we have not discussed this.

...

**Mr WELLS:** This is the first that we have heard that we are now going to put the return of Parliament into the hands of the government. The opposition has not been informed about this decision. ... for us not to be informed is an outrage. It is an absolute outrage. Now I would have thought, with the thousand times that the Leader of the House and I have had discussions over the last week, that we would have at least discussed this important matter. We will be opposing this and we will want to be voting against this.

An attempt by the Opposition to schedule a sitting day in advance rather than leave it 'open ended' were voted down.<sup>83</sup>

Several parliaments did schedule a sitting day in advance. However, the considerable period adopted raises questions about the government's motivations. For example, the Tasmanian House of Assembly and Legislative Council sat on 26 March 2020 and agreed to adjourn until 18 August and 25 August respectively—a break of 145 and 152 days.<sup>84</sup> The New South Wales Parliament performed even worse. On 24 March 2020 the Parliament adjourned, agreeing to return on 15 September—a break of 175 days.<sup>85</sup> While both parliaments returned prior to these dates, the considerable initial suspension suggests that governments were motivated by a desire to avoid accountability rather than manage the risks of community transmission. Indeed, the fact that arrangements were changed to ensure parliament's early return indicates that regular meetings were both necessary and feasible.

This did not prevent governments attempting to act without Parliament. New South Wales is a particularly egregious example. On 31 March 2020, Brad Hazzard, the NSW Minister for Health and Medical Research imposed a public lockdown, prohibiting persons from leaving their place of residence without one of 16 lawful excuses.<sup>86</sup> Failure to comply attracted a maximum penalty of 6 months imprisonment or a fine of up to \$11,000, or both. On 15 May 2020 the lockdown was lifted, though strict limits on public gatherings and premises remained.<sup>87</sup> During the 45-day period in which NSW residents were confined to their homes, the NSW Lower House met only once, on 12 May 2020. In contrast, the Health Minister was acutely active. Among other instruments issued during this period, Hazzard issued an order prohibiting intentional spitting or coughing at public officers,<sup>88</sup> subsequently extended that order to protect all workers,<sup>89</sup> and added two additional lawful excuses allowing a person to leave their residence: to provide care and support to another person,<sup>90</sup> and to inspect, lease or purchase real estate.<sup>91</sup> Without parliament convening, the justification for these measures was not properly tested.

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<sup>83</sup> See, for example, Victoria, *Parliamentary Debates*, Legislative Council, 19 March 2020, 1191; Victoria, *Parliamentary Debates*, Legislative Assembly, 19 March 2020, 1079

<sup>84</sup> Tasmania, *Parliamentary Debates*, House of Assembly, 26 March 2020, 1; Tasmania, *Votes and Proceedings*, Legislative Council, 26 March 2020, 2 [7].

<sup>85</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 March 2020, 2245-6; New South Wales, *Parliamentary Debates*, Legislative Council, 24 March 2020, 2028-2031.

<sup>86</sup> *Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020* (30 March 2020).

<sup>87</sup> *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 2) 2020* (14 May 2020).

<sup>88</sup> *Public Health (COVID-19 Spitting and Coughing) Order 2020* (9 April 2020).

<sup>89</sup> *Public Health (COVID-19 Spitting and Coughing) Amendment Order 2020* (19 April 2020).

<sup>90</sup> *Public Health (COVID-19 Restrictions on Gathering and Movement) Amendment Order (No 2) 2020* (30 April 2020).

<sup>91</sup> *Public Health (COVID-19 Restrictions on Gathering and Movement) Amendment (Real Estate) Order 2020* (7 May 2020).



The situation was even more alarming in 2021. Following a rise in case numbers, NSW Premier Gladys Berejiklian announced a two-week lockdown of greater Sydney on 26 June 2021. People living in Sydney, the Central Coast, the Blue Mountains, and Wollongong were permitted to leave their homes only for an essential reason. These included shopping for food, medical care, compassionate needs, exercise and essential work or education.<sup>92</sup> Case numbers continued to rise. The lockdown was extended several times and more significant restrictions were placed on residents within the State. Residents in local government areas of concern (all in the western suburbs of Sydney) were placed under curfews and were required to wear a mask at all times outside the house.<sup>93</sup> They also faced more overt police enforcement.<sup>94</sup> It was not until 11 October that lockdown rules were eased for fully vaccinated people. The following day, the NSW Parliament sat for its first meeting since 24 June. This means that for the entire 107-day lockdown, the NSW Parliament did not sit.

On 14 September 2021, members of the NSW Legislative Council attempted to reconvene Parliament. However, the government thwarted this by relying on Standing Order 34, which provides that the House will not meet until a Minister is present. Conveniently, no government minister turned up and the President said he had 'no choice' but to end the sitting.<sup>95</sup> Opposition member Penny Sharpe was incensed:

Democracy is an essential service for the people of New South Wales. As we stand here today, our State continues to face one of the most significant health crises we have faced in recent history. ...

As we pass the 12-week mark of lockdown, cases are set to peak and there is immense pressure on hospitals. Now more than ever the community needs answers from the Government about the way ahead. What the people of New South Wales need right now is hope, transparency and accountability from their Government. It is shameful that the Berejiklian Government would come into this Chamber and misuse the rules of the House to stop the majority of elected members from lawfully sitting.<sup>96</sup>

This aborted attempt at democracy is the closest the state came to a functioning Parliament during lockdown. The absence of Parliament enabled ministers to control their messaging to an unprecedented degree. Question Time was replaced by a well scripted daily press conference leaving parliamentarians unable to test the justification for public health orders or to demand documents on the modelling behind lockdowns. Opposition members in all jurisdictions expressed significant unease. NSW MP Paul Scully explained:

The idea that there is sufficient examination of issues that affect small business, that affect workers without financial support, that affect the rollout of vaccines across NSW can be adequately covered by the press gallery alone at the 11:00am briefing every day is preposterous.<sup>97</sup>

Former government MP Gareth Ward noted:

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<sup>92</sup> *Public Health (COVID-19 Greater Sydney) Order (No 2) 2021* (26 June 2021).

<sup>93</sup> *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021* (8 August 2021).

<sup>94</sup> Tom Barnes and Niamh Crosbie, *COVID-19's Lasting Impacts on Workers: How Government Mismanaged Changed Working Lives in Western Sydney* (Australian Catholic University and United Workers Union, October 2022) 6.

<sup>95</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 14 September 2021 (Matthew Ryan Mason-Cox, President of the Legislative Council) 5942.

<sup>96</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 14 September 2021 (Penny Sharpe) 5942.

<sup>97</sup> Kelly Fuller, 'MPs Slam NSW Government as Return of Parliament Put Off Until "Possible" October', *ABC News* (online, 30 August 2021) <<https://www.abc.net.au/news/2021-08-30/nsw-parliament-sitting-delayed-again/100419516>>.

Dan Murphy's is open but parliament isn't? We send nurses, doctors, ambos, police, teachers, transport workers, retail workers back to work — but politicians are too precious? No matter the time or crisis, democracy and oversight isn't an optional extra.<sup>98</sup>

## 2. *Parliaments did not stop meeting during earlier crises*

The failure of the Commonwealth, NSW, and Victorian Parliaments to sit regularly compares unfavourably with the experience of parliaments during historical crises. Famously, the UK Parliament continued to sit throughout WWII, including during the Battle of Britain.<sup>99</sup> When the House of Commons Chamber was destroyed by a German bomb in May 1941, the members continued to meet—choosing instead to sit in the House of Lords Chamber (after obtaining the permission of King George VI).<sup>100</sup> Prime Minister Winston Churchill explained that it was necessary to ensure 'the work of our Parliamentary institutions will not be interrupted by enemy action'.<sup>101</sup> Even the Ukrainian Parliament has continued to operate, albeit under distinct procedures, despite the Russian invasion. On 3 March 2022 it convened for a 'rapid-fire' 17-minute session while Russian forces were 'barely 20km' from the capital Kyiv.<sup>102</sup>

Pandemics present different challenges to war. As large collective bodies comprised of relatively older people that tend to be in close contact with more people than ordinary citizens, parliaments may be particularly vulnerable to the transmission of a highly contagious virus.<sup>103</sup> Older buildings raise still more challenges; remarking on the UK Parliament, a reporter noted, 'few places are less suited to social distancing than a 19th century, wood-paneled debating chamber where lawmakers routinely squeeze onto overcrowded benches to secure a seat'.<sup>104</sup> Nevertheless, while pandemics may be rare they do occur and parliaments have had to manage the difficulties they provoke while fulfilling their responsibility to meet and represent their constituents.

Plagues periodically ravaged England in the medieval and later periods but parliamentarians worked to ensure any disruption 'was kept to a minimum'.<sup>105</sup> For instance, in 1467 a virulent plague swept London. Several members of the Commons caught the virus and died, forcing parliament to adjourn on 1 July. On 6 November, it reassembled in Reading, outside London. Two centuries later, another outbreak of plague caused the death of around 25 per cent of the population of the capital in just 18 months. Parliament moved north and sat at Oxford.<sup>106</sup>

Australian parliaments were relatively slow to act during the Spanish flu pandemic at the end of WWI. In March 1918, the first case of the flu was documented in the United States and the virus quickly spread around the world. Between 1918 and 1920, around 500 million people, nearly one-third of the total world population, caught the virus. Considered one of the deadliest pandemics in history, between 17

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<sup>98</sup> Ibid

<sup>99</sup> W Ivor Jennings, 'Parliament in Wartime III' (1940) *The Political Quarterly* 351, 358.

<sup>100</sup> Mark D'Arcy, 'World War Two: How MPs Survived the Bombs and Kept Working', *BBC News* (online, 24 June 2021) <<https://www.bbc.com/news/uk-politics-57594624>>.

<sup>101</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 13 May 1941, col 1086.

<sup>102</sup> Sarah Whitmore, 'Finding Grace Under Pressure? Ukraine's Parliament at War', *Hansard Society* (online, 13 May 2022) <<https://www.hansardsociety.org.uk/blog/finding-grace-under-pressure-ukraines-parliament-at-war>>.

<sup>103</sup> Ittai Bar-Siman-Tov, 'Covid-19 Meets Politics: The Novel Coronavirus as a Novel Challenge for Legislatures' (2020) 8(1-2) *The Theory and Practice of Legislation* 11, 18-20; Jan Petrov, 'The COVID-19 Emergency in the Age of Executive Aggrandizement: What Role for Legislative and Judicial Checks?' (2020) 8(1-2) *The Theory and Practice of Legislation* 71, 76.

<sup>104</sup> Stephen Castle, 'For the Foreseeable Future, U.K. Parliament May Meet in Cyberspace', *The New York Times* (online, 15 April 2020) <<https://www.nytimes.com/2020/04/15/world/europe/uk-parliament-cyberspace.html>>.

<sup>105</sup> Simon Payling, 'Plague, Prorogation and the Suspension of Courts in Fifteenth-Century England', *The History of Parliament* (online, 9 July 2020) <<https://thehistoryofparliament.wordpress.com/2020/07/09/plague-prorogations-and-the-suspension-of-the-courts-in-fifteenth-century-england/>>.

<sup>106</sup> Andrew Clark, *The Life and Times of Anthony Wood* (Clarendon Press, 1893) 60.



and 50 million people, and possibly as many as 100 million, died.<sup>107</sup> In late January 1919, the virus was first identified in Australia. Over the remainder of the year, up to 40 per cent of Australians were infected, and between 12,000 and 15,000 people died.<sup>108</sup> The Parliament did not sit during the height of the crisis. In fact, the Commonwealth Parliament did not sit that year until 25 June 1919. When it did meet, the pandemic was not its central concern. William Watt, acting as Prime Minister while Billy Hughes was in Europe, focused his attention on demobilisation rather than the pandemic, noting simply that the 'epidemic has caused regrettable loss of life and widespread distress', before blaming the state governments for violating quarantine agreements.<sup>109</sup> The NSW Parliament was even slower. It did not sit until 19 August 1919.

The House of Representatives sat for 58 days in 2020 and 67 days in 2021. In 1919, it sat for 51 days, seven fewer days than in 2020. Does this mean that the Parliament sat more regularly than during the Spanish flu pandemic? Not necessarily. As noted above, in 2020 the House sat for 15 days prior to the declaration of a public health emergency on 18 March. This means it sat for 43 days once the nature of the crisis was clear. Despite not sitting until June 1919, the House sat for 51 days across the remainder of the year. The NSW Parliament sat for 60 days in 1919—it only sat for 41 and 42 days in 2020 and 2021.

### 3. *Parliaments were slow to adopt available technology*

The failure to sit as often as during the Spanish flu pandemic in 1919 is concerning. Unlike the earlier pandemic, advances in technology meant that alternative options to ensure parliaments were able to continue to meet in relative safety were available. The Commonwealth Parliament recognised as such almost immediately. On 23 March 2020, the House adopted a resolution stating, in part:

the House may meet in a manner and form not otherwise provided in the standing orders with the agreement of the Leader of the House and the Manager of Opposition Business, with the manner in which Members may be present (including for the purposes of achieving a quorum) to be determined by the Speaker.<sup>110</sup>

The motivation behind the change was to retain 'flexibility'.<sup>111</sup> While the Parliament agreed 'the best that we can do is for us to physically meet here', in uncertain times it was important to make certain that 'when the Australian people need the parliament to meet, the parliament can meet'.<sup>112</sup> Adam Bandt, the Leader of the Australian Greens, suggested that it would be sensible to 'explore ways of meeting online or via teleconferencing...because that would ensure that the parliament is able to continue to meet in times and ways that might be unusual'.<sup>113</sup> However, it was not until 20 August that it was finally agreed that members 'unable to physically attend Parliament due to reasons related to the COVID-19 pandemic' would be allowed to contribute remotely (for the 24 August to 3 September sittings).<sup>114</sup> Those participating remotely were not permitted to vote, be counted for a quorum, move motions,

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<sup>107</sup> Jeffrey Taubenberger and David Morens, '1918 Influenza: The Mother of All Pandemics' (2006) 12(1) *Emerging Infections Diseases* 15, 15; Peter Spreeuwenberg, Madelon Kroneman and John Paget, 'Reassessing the Global Mortality Burden of the 1918 Influenza Pandemic' (2018) 187(12) *American Journal of Epidemiology* 2561, 2561; Niall Johnson and Juergen Mueller, 'Updating the Accounts: Global Mortality of the 1918-1920 "Spanish" Influenza Pandemic' (2002) 76(1) *Bulletin of the History of Medicine* 105.

<sup>108</sup> Peter Curson and Kevin McCracken, 'An Australian Perspective of the 1918-1919 Influenza Pandemic' (2006) 17(8) *New South Wales Public Health Bulletin* 103.

<sup>109</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 25 June 1919, 10039.

<sup>110</sup> Commonwealth, House of Representatives, 'Special Provisions for Human Biosecurity Emergency Period' (Resolution adopted 23 March 2020); Commonwealth, *Senate Journals*, Senate, 23 March 2020, 1562.

<sup>111</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 23 March 2020, 2901 (Christian Porter).

<sup>112</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 23 March 2020, 2902 (Tony Burke)

<sup>113</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 23 March 2020, 2902.

<sup>114</sup> Commonwealth, House of Representatives, *Agreement for Members to Contribute Remotely to Parliamentary Proceedings* (20 August 2020); Commonwealth, *Senate Journals*, Senate, 24 August 2020, 2064-2065.

propose or support a proposal to discuss a matter of public importance or call a division.<sup>115</sup> While parliamentarians agreed 'the circumstances of the pandemic warrant a significant evolution of existing rules', they considered that attendance in the House or the Senate should remain a priority given the Constitution requires the Parliament meet at the seat of government.<sup>116</sup>

Two points are worth noting. First, the prohibition on remote participants from voting may violate the Constitution. Section 23 and 40 of the Constitution provides that questions arising in the Senate and the House of Representatives are determined by a majority of votes. These sections provide that each elected representative has one vote. The Senate Standing Committee on Procedure blithely noted that 'the exercise of this right has always required the presence of the senator in the chamber',<sup>117</sup> but these rules were adopted prior to the development of technology that can facilitate attendance during an emergency. Parliament's failure to adapt during the pandemic is of significant concern.

Second, the Australian Parliament's unnecessary and unreasonable delay in introducing remote participation severely damaged its representative role. It took the Commonwealth Parliament 150 days to implement remote participation. In contrast, the UK House of Commons agreed to allow remote sitting on 21 April 2020,<sup>118</sup> and held the first hybrid session of Parliament the following day. The model left much to be desired, but it indicated the extent to which the Commons took seriously its responsibility to meet. The Commons comprises 650 members. Social distancing meant that around 50 members would be able to attend in person, but only 120 members were permitted to attend remotely. Participation was initially limited to providing statements and asking ministerial questions in the first two-hours of a sitting,<sup>119</sup> but on 11 May, the Commons allowed virtual voting for the first time.<sup>120</sup> Nevertheless, the next day the government shut down the hybrid sessions on the basis that it could not provide 'a proper level of scrutiny' for proposed laws.<sup>121</sup> The justification was correctly labelled 'misleading'.<sup>122</sup> Remote participation increases the number of members who could attend a parliamentary sitting and ensured that the government's proposals could be interrogated by a greater number of the peoples representatives. Indeed, analysis by the House of Lords Library revealed that remote participation led to 'almost 1,000 more contributions ... than during a comparative period at the beginning of the year'.<sup>123</sup> In any event, many parliaments managed to undertake hybrid sittings. A study of legislatures in 159 countries with a population of over 1,000,000 found that 13 states used videoconferencing and/or remote voting in lieu of physical presence between 23 March and 6 April.<sup>124</sup> Many others soon followed.

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<sup>115</sup> Note that the Western Australian Legislative Assembly Procedure and Privileges Committee recommended that remote voting be permitted in WA: Procedure and Privileges Committee (n 68) Recommendation 5.

<sup>116</sup> Senate Standing Committee on Procedure (n 25) [1.9].

<sup>117</sup> Ibid [1.23].

<sup>118</sup> United Kingdom, *Votes and Proceedings*, House of Commons, 21 April 2020, 1-2 [2]-[3].

<sup>119</sup> United Kingdom, *Votes and Proceedings*, House of Commons, 21 April 2020, 1-2 [2]-[3]; Andrew Sparrow, '“Hybrid” Virtual Parliament Plans to be Put to MPs Next Week', *Guardian* (online, 14 April 2020) <<https://www.theguardian.com/politics/2020/apr/13/hybrid-virtual-parliament-plans-to-be-put-to-mps-next-week>>.

<sup>120</sup> Harry Yorke, 'MPs Hold First Ever “Virtual” Vote as Jacob Rees-Mogg Suggests Parliament will Return from June', *The Telegraph* (online, 12 May 2020) <<https://www.telegraph.co.uk/politics/2020/05/12/mps-hold-first-ever-virtual-vote-jacob-rees-mogg-suggests-parliament/>>.

<sup>121</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 20 May 2020, 575 (Jacob Rees-Mogg).

<sup>122</sup> Josiah Mortimer, 'Why the Government's Rationale for Closing the “Virtual Parliament” Doesn't Add Up', *Electoral Reform Society* (online, 21 May 2020) <<https://www.electoral-reform.org.uk/why-the-governments-rationale-for-closing-the-virtual-parliament-doesnt-add-up/>>.

<sup>123</sup> Thomas Brown, 'House of Lords: Virtual Sittings, Participation and Covid-19' (House of Lords Library, 15 June 2020) <<https://lordslibrary.parliament.uk/house-of-lords-virtual-sittings-participation-and-covid-19/>>.

<sup>124</sup> Ittai Bar-Siman-Tov et al, 'Measuring Legislative Activity During the Covid-19 Pandemic: Introducing the ParlAct and ParlTech Indexes' (2021) 1(1) *International Journal of Parliamentary Studies* 109. The states were: Bolivia, Brazil, Chile, Ecuador, Indonesia, Latvia, Mongolia, Poland, Venezuela, Romania, Saudi Arabia, Uruguay and Uzbekistan.

*Assessment.* Every Australian Parliament – except the Western Australian Parliament – failed to satisfy this function. Relying on their numbers in the lower house, governments pushed for lengthy adjournments. While significant uncertainty over the scope and nature of the crisis existed, there was no need for parliament to adjourn for months. This became obvious when parliaments were recalled to pass new measures to respond to the pandemic. Concerns over meeting in person were legitimate. However, parliaments overseas adapted to the new normal far more readily than Australian parliaments by utilising technology to facilitate hybrid and remote sittings. Even when the Commonwealth Parliament finally adopted this technology, unnecessary, undemocratic, and unconstitutional limitations restricting the rights of Members to contribute were imposed.

### B. *Debate on Key Measures and Issues*

In parliamentary systems of government, proposed laws are ordinarily developed within the executive and introduced into parliament by cabinet ministers. As a large representative body collectively embodying the will of the people, parliamentary debate aims to ensure that the diverse interests of citizens have been considered and that the bill will effectively fulfil its aims without causing unforeseen problems. Parliamentary procedure facilitates this careful process by breaking down the process of law-making into several major stages, increasing the opportunity for debate and study. This can take considerable time. For example, Standing Orders in the WA Legislative Assembly require three weeks elapse before a Bill is dealt with following its introduction.<sup>125</sup> Debate itself can take time too. A Canadian study found that between 2015 and 2019, the average bill was debated for 11.9 days in the House of Commons and 15 days in the Senate before passing.<sup>126</sup>

The slow and deliberative legislative process is unsuitable when urgent measures are required. At the onset of the pandemic, Australian parliaments accepted that standing orders needed to be suspended to facilitate the expedited debate and passage of key measures. In the Federal Parliament, business for the 23 March 2020 and 8 April 2020 sittings was restricted to urgent matters relating to Covid-19. However, while opportunities for debate were more limited than usual, the government's bills were not simply introduced into parliament to be ratified. Members and Senators were able to discuss each bill and propose amendments. The Coronavirus Economic Response Package Omnibus Bill 2020 was even amended in the Senate.<sup>127</sup> Debate was brief, but its existence was a recognition that 'genuine, constructive engagement from Members of all parties', drawing from issues experienced by their constituents could help 'plug the gaps'<sup>128</sup> in and improve the government's immediate response. The approach in Australia compares favourably to that of Canada and New Zealand.

The Canadian Parliament was sitting as case numbers grew exponentially in early March. Late in the evening of 12 March 2020, a group of senior MPs and Senators agreed to finalise key outstanding issues, implement a response package to the pandemic and adjourn Parliament for five weeks.<sup>129</sup> The next morning 'an omnibus motion with 16 clauses' was put before Parliament.<sup>130</sup> Among other elements, the motion cancelled scheduled committee meetings, and deemed that the United States, Mexico and Canada Free Trade Agreement had passed its remaining legislative stages. Most significantly, the motion also enacted Bill C-12, an entirely new bill that had not been introduced into Parliament:

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<sup>125</sup> Western Australia Legislative Assembly, *Standing Orders* 168(1).

<sup>126</sup> The Samara Centre for Democracy, *House Inspection: A Retrospective of the 42<sup>nd</sup> Parliament* (2020) 8.

<sup>127</sup> Senate Journals, 23 March 2020 – p 1553.

<sup>128</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 25 March 2020, col 414 (John McDonnell).

<sup>129</sup> Peter Mazereeuw, "'Decisive Action was Required": How MPs and Senators Hammered Out Deal to Close Parliament Late into the Night', *The Hill Times* (online, 18 March 2020) <<https://www.hilltimes.com/2020/03/18/decisive-action-was-required-how-mps-and-senators-hammered-out-deal-to-close-parliament-late-into-the-night/239860>>.

<sup>130</sup> Paul Thomas, 'Parliament under Pressure: Evaluating Parliament's Performance in Response to COVID-19' *The Samara Centre for Democracy* (online, 2 April 2020) <<https://www.samaracanada.com/democracy-monitor/parliament-under-pressure>>.

(f) a bill in the name of the Minister of Finance, entitled An Act to amend the Financial Administration Act (special warrant), be deemed to have been introduced and read a first time, deemed read a second time and referred to a committee of the whole on division, deemed considered in committee of the whole, deemed reported without amendment, deemed concurred in at report stage on division, deemed read a third time and passed on division;<sup>131</sup>

No debate was conducted, and the motion was adopted via unanimous consent, a procedure which allows legislation to be passed in a single step.<sup>132</sup> The Commons adopted a bill 'that it had not actually seen, and whose contents were therefore unknown to the Members of the House'.<sup>133</sup> The entire proceeding lasted just 25 minutes. It was then passed by the Senate the same day.<sup>134</sup>

The Act granted the Canadian government extraordinary spending powers. Ordinarily, the government can only spend money if the Parliament has appropriated funding through legislation. However, where parliament has been dissolved prior to an election, the government may issue special warrants authorising unexpected spending that is urgently required.<sup>135</sup> The Act allowed the government to use special warrants until 23 June 2020, even though Parliament had not been dissolved.<sup>136</sup> It simply required government notify the House of Commons when it acted through this procedure and tasked the Auditor-General with reviewing special warrants.

A similar process was adopted in New Zealand. On 25 March the New Zealand Parliament was recalled for an emergency session. There is no quorum requirement for the NZ Parliament and social distancing restrictions meant the vast majority of the parliament's 120 Members did not attend.<sup>137</sup> Two pieces of emergency legislation were passed with minimal debate. No amendments were proposed or made. The entire sitting lasted just 3 hours and 31-minutes.<sup>138</sup>

More general opportunities for debate were also provided for in Australia. In the Commonwealth House of Representatives Question Time continued to be held, providing a chance for those present to question the government. Over the first two covid-affected sittings on 8 March and 23 April 2020, 46 questions were asked, 45 of which related to covid-19. In the WA and NSW Legislative Assembly's Question Time was truncated. In WA, questions were divided according along proportional lines; the Labor and Liberal parties were limited to two questions and two supplemental questions, while the National Party were provided one question and one supplemental question.<sup>139</sup> In NSW, the Labor opposition were given four questions, and the crossbench one.<sup>140</sup>

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<sup>131</sup> Canada, *Parliamentary Debates*, House of Commons, 13 March 2020, 2063.

<sup>132</sup> Marc Bosc and André Gagnon (eds), *House of Commons Procedure and Practice* (3<sup>rd</sup> ed, 2017)

<sup>133</sup> Scott Reid, 'Why I am in the House Today' (online, 24 March 2020) <<https://scottreid.ca/why-i-am-in-the-house-today/>>.

<sup>134</sup> Note that a similar process, with slightly more time for debate, was undertaken for the passage of additional economic support measures on 24 and 25 March, and 11 April: Paul Thomas, 'Parliament under Pressure: Evaluating Parliament's Performance in Response to COVID-19' *The Samara Centre for Democracy* (online, 2 April 2020) <<https://www.samaracanada.com/democracy-monitor/parliament-under-pressure/>>; Paul Thomas, 'Westminster Parliaments: Comparing Four Approaches to Emergency Lawmaking and Scrutiny', *The Samara Centre for Democracy* (online, 21 April 2020) <<https://www.samaracanada.com/democracy-monitor/westminster-parliaments/>>.

<sup>135</sup> *Financial Administration Act*, RSC 1985, c. F-11, s 30.

<sup>136</sup> *An Act to Amend the Financial Administration Act (Special Warrant)* s 1.

<sup>137</sup> In response to a query by the authors the Parliamentary Information Service records that 13 Members in the House spoke on 25 March 2020, and 22 Members were present at the outset of the sitting. We thank the Parliamentary Information Service for this information.

<sup>138</sup> New Zealand, *Parliamentary Debates*, House of Representatives, 25 March 2020.

<sup>139</sup> Procedure and Privileges Committee (n 68) 21.

<sup>140</sup> Department of the Legislative Assembly, *Annual Report 2019-20* (2021) 11.

The reduction in Question Time was mirrored in the time ordinarily provided for private members business. In ordinary periods, the House spends most of its time on government business, but some time is reserved for private members to raise matters or seek to have their own issues debated. For instance, over the last few years around 25-30 per cent of the House's time is spent on private members business or other opportunities for private members.<sup>141</sup> In the House of Representatives, time is reserved each sitting Monday for committee and private Members' business in the Federation Chamber and in the House.<sup>142</sup> If the House is not scheduled to meet on a Monday, special arrangements are sometimes made to provide time on another day. During public health emergencies and other crises, it is expected that opportunity for private members will be limited.

In the House of Representatives, no time was provided for private Members business on the 23 March or 8 April sittings. However, as Table 5 illustrates, more opportunities were afforded to private Members in May and June.<sup>143</sup> Nonetheless, unsurprisingly, as Table 6 illustrates, these opportunities were reduced compared to previous years, though there have been fluctuations. In a submission to the House of Representatives Standing Committee on Procedure, Andrew Wilkie, the Independent Member for Denison, remarked that foregoing private members business to allow the government to pass legislation during a pandemic 'must be an exception rather than becoming the rule'.<sup>144</sup> Wilkie is correct, but it seems the Parliament took a sensible approach in this regard, restoring opportunities as the situation became clearer.

**Table 5: Opportunities for Private Members in Commonwealth House of Representatives**

	23 March 2020	8 April 2020	12-14 May 2020	10-18 June 2020
<b>Number of sitting days</b>	1	1	3	7
<b>Hours of Sitting</b>				
<i>House of Representatives Chamber</i>	9 hrs 29 mins	6 hrs 30 mins	26 hrs 0 mins	64 hrs 30 mins
<i>Federation Chamber</i>	0 hrs 0 mins	0 hrs 0 mins	4 hrs 51 mins	21 hrs 53 mins
<b>Business conducted in the House</b>				
<i>Government business</i>	7 hrs 26 mins	4 hrs 55 mins	14 hrs 3 mins	34 hrs 15 mins
<i>Private Members' business</i>	0 hrs 0 mins	0 hrs 0 mins	0 hrs 0 mins	9 hrs 51 mins
<i>Other opportunities for private Members</i>	0 hrs 0 mins	0 hrs 0 mins	6 hrs 8 mins	16 hrs 21 mins
<i>Questions without notice</i>	1 hr 18 mins	1 hr 11 mins	3 hrs 14 mins	8 hrs 39 mins
<i>Matter of public importance</i>	0 hrs 0 mins	0 hrs 0 mins	3 hrs 2 mins	6 hrs 6 mins
<i>Business of the House</i>	0 hrs 45 mins	0 hrs 24 mins	4 hrs 24 mins	11 hrs 11 mins
<b>% Private Members business</b>	0	0	0	11%
<b>% Other opportunities for private Members</b>	0	0	20%	19%
<b>Private Members' motions moved and debate</b>	0	0	0	16

Source: House of Representatives Statistical Digest

<sup>141</sup> Elder and Fowler (n 70) 882, Appendix 23.

<sup>142</sup> Ibid 574.

<sup>143</sup> House of Representatives Standing Committee on Procedure (n 73) 3 [1.13]; Parliament of Australia, House of Representatives Statistical Digest 10-18 June (No 11).

<sup>144</sup> House of Representatives Standing Committee on Procedure (n 73) 21-22.

**Table 6: Opportunities for Private Members in Commonwealth House of Representatives**

	2018	2019	2020	2021
<b>Number of sitting days</b>	65	45	58	67
<b>Hours of Sitting</b>				
<i>House of Representatives Chamber</i>	576 hrs 23 mins	402 hrs 52 mins	514 hrs 42 mins	602 hrs 4 mins
<i>Federation Chamber</i>	230 hrs 20 mins	147 hrs 23 mins	178 hrs 43 mins	167 hrs 9 mins
<b>Business conducted in the House</b>				
<i>Government business</i>	379 hrs 40 mins	222 hrs 53 mins	324 hrs 59 mins	357 hrs 21 mins
<i>Private Members' business</i>	183 hrs 6 mins	75 hrs 26 mins	65 hrs 5 mins	81 hrs 41 mins
<i>Other opportunities for private Members</i>	57 hrs 8 mins	104 hrs 8 mins	110 hrs 33 mins	126 hrs 56 mins
<i>Questions without notice</i>	71 hrs 59 mins	48 hrs 38 mins	66 hrs 16 mins	78 hrs 16 mins
<i>Matter of public importance</i>	48 hrs 52 mins	32 hrs 32 mins	44 hrs 31 mins	53 hrs 10 mins
<i>Business of the House</i>	66 hrs 9 mins	66 hrs 58 mins	82 hrs 1 min	71 hrs 49 mins
<b>% Private Members business</b>	23%	14%	9%	11%
<b>% Other opportunities for private Members</b>	7%	19%	16%	17%
<b>Private Members' motions moved and debate</b>	112	87	96	117

Source: House of Representatives Statistical Digest

Time may have been provided for debate on key measures and issues, but social distancing requirements and the need to reduce the risk of transmission meant that not all Members of Parliament could attend sessions; many were paired. Pairing is an 'unofficial arrangement between members, organised by party whips',<sup>145</sup> whereby a Member from one side of the House promises to be absent for any votes when a Member from the other side is absent. It is a mechanism that maintains the relative voting strength of the parties when a parliamentarian is unable to attend a sitting due to illness, personal emergency or because they are on official duties outside Canberra or overseas. While there 'is no rule or order of the House requiring a Member to observe a pair, there is a considerable moral and political obligation on his or her part to adhere to such an agreement'.<sup>146</sup>

Reflecting the fact that parliamentarians must represent their constituents, pairing is generally kept to a minimum. For instance, in the final regular sitting week before the declaration of a public health emergency, no more than two parliamentarians were on leave and three were paired on any day.<sup>147</sup> The situation changed dramatically on 23 March 2020. The table below illustrates the change.<sup>148</sup>

<sup>145</sup> Elder and Fowler (n 70) 283.

<sup>146</sup> Ibid 284.

<sup>147</sup> See Commonwealth, *Votes and Proceedings*, House of Representatives, 2 March, 783; Commonwealth, *Votes and Proceedings*, House of Representatives, 3 March, 796; Commonwealth, *Votes and Proceedings*, House of Representatives, 4 March, 810; Commonwealth, *Votes and Proceedings*, House of Representatives, 5 March, 823.

<sup>148</sup> House of Representatives Standing Committee on Procedure (n 73) 7.



**Table 7: Commonwealth House of Representatives Pairing Arrangements**

Sitting	Members present at some stage during the sitting (151)	Pairs arranged for divisions
23 March	92 – 61 per cent	30
8 April	59 – 39 per cent	47
12 – 14 May	130 – 86 per cent	38-41
10 – 18 June	143 – 95 per cent	40 in the first week, 20 in the second week
August – September	109 in person – 72 per cent 23 via video link – 15 per cent	Up to 36

The Standing Orders prevented a greater number of pairs at the 23 March session. Standing orders can only be suspended by an absolute majority of Members. In a 151 seat Parliament, 76 Members voting must approve the suspension. The parliament was concerned that as the pandemic continued it may not be possible to obtain an absolute majority. Therefore, on 23 March Standing Order 47(c)(ii) was amended to permit the suspension of standing orders by a majority of Members present if agreed by the Leader of the House and the Manager of Opposition Business.<sup>149</sup> This resolution allowed the Parliament to sit on 8 April with fewer than 40 per cent of its ordinary total.

The pairing arrangements were important. They preserved the government's narrow majority while facilitating the meeting of parliament in uncertain times. However, as Stephen Mills explains, 'these achievements came at a cost to the essential, representative, character of the Parliament'.<sup>150</sup> At the 23 March sitting, for instance, roughly 6 million Australians lacked representation in the House of Representatives. Women were particularly underrepresented. Less than 20 per cent (18 of 92) of the Members who attended were women.<sup>151</sup> Only 4 of the 14 Western Australian representatives, and no Tasmanian MPs, attended. Neither did the two Indigenous Members of the House. Further, 'given most ministers did attend, the backbench as a whole was relatively underrepresented'.<sup>152</sup>

The extensive use of pairs should be avoided. Alternative options to facilitate the presence of Members in Parliament should be prioritised to ensure adequate representation of all Australians. Given this, it is difficult to understand why it took so long for Parliament to authorise the use of hybrid sittings. Yet, the problems caused by this delay were amplified by the restrictions placed on remote participation. As noted above, Members participating via video link were unable to vote or move motions. Those who participated remotely were thus inhibited in their essential functions. While the Australian Parliamentary Library found that 125 (53.6 per cent) of parliamentarians (MPs and Senators) participated via video link at some time, rates differed across the country. For example, 100 per cent of NT parliamentarians participated remotely, while more than 50 per cent of parliamentarians in Tasmania (82 per cent), Victoria (62 per cent), NSW (54 per cent) and South Australia (52 per cent) used videoconferencing.<sup>153</sup> Consequently, citizens in the NT and Tasmania were more limited in their capacity to have their interests considered and voices heard in Parliament.

*Assessment.* When Australian Parliaments were sitting, they performed reasonably well on this measure. While time for debate on key measures, opportunities to raise private members business, and to ask questions of the executive was understandably truncated in the immediate stages of the pandemic, time was provided. This compares favourably to the situation in Canada and New Zealand where emergency legislation was rushed through with little to no opportunity to deliberate. That said, the failure to adopt

<sup>149</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 23 March 2020, 2903.

<sup>150</sup> Mills (n 76) 15.

<sup>151</sup> Ibid. See Commonwealth, *Parliamentary Debates*, House of Representatives, 23 March 2020, 2860-2861 (ALP: 7), (Coalition 8), Independents 3

<sup>152</sup> Mills (n 76) 15.

<sup>153</sup> Stephanie Gill, 'Can You Hear Me? Remote Participation in the Commonwealth Parliament' (Australian Parliamentary Library, 19 July 2022) <[https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_departments/Parliamentary\\_Library/FlagPost/2022/July/Remote-participation](https://www.aph.gov.au/About_Parliament/Parliamentary_departments/Parliamentary_Library/FlagPost/2022/July/Remote-participation)>.

technology to facilitate the attendance of Members and Senators led to a significant increase in pairing arrangements. At a critical time for the nation, when citizens might have reasonably expected their interests to be made present in the legislature, pairing meant that some six million Australians were unrepresented.

### C. Legislative Oversight

Covid-19 challenged the capacity of Australian Parliaments to exercise their representative functions. Legislatures failed to sit regularly and, at least in the initial stage of the pandemic, provided limited time and space for debate on the extraordinary measures and issues adopted to respond to the virus. The pandemic also exposed longstanding deficiencies in mechanisms of legislative oversight.<sup>154</sup> Legislation that empowered the executive to impose unprecedented restrictions on the community did not leave scope for Parliament to test or challenge the determinations made by ministers or chief health officers. Similarly, while parliamentary committees were particularly active in scrutinising legislation and legislative instruments, most secondary legislation was immune from disallowance. Parliament did not only cede its authority but largely abrogated its responsibility to maintain legislative oversight and exercise effective scrutiny.

This problem is evident across a number of Australian jurisdictions. It is well illustrated by the *Biosecurity Act 2015* (Cth), which provides a comprehensive framework for the management of biosecurity risks in Australia.<sup>155</sup> When the Act was passed by Parliament in 2015 it raised barely a murmur of concern. In the second Reading Speech, Agriculture Minister Barnaby Joyce told Parliament, 'It is expected that the human health provisions in the bill will be seldom used'.<sup>156</sup> The possibility of a public health emergency seemed remote, and little scrutiny was applied to the Health Minister's capabilities in the event of a pandemic. It was only when threat of Covid-19 became apparent in early 2020 that the severe powers in the legislation attracted public attention. However, by then, the regime was in place and ready to be activated.

On 21 January 2020, the Director of Human Biosecurity made a determination adding 'human coronavirus with pandemic potential' as a 'listed human disease'.<sup>157</sup> The determination is a precondition for the declaration of a human biosecurity emergency.<sup>158</sup> On 18 March 2020, with cases rising rapidly, the Governor-General declared that a human biosecurity emergency existed under the *Biosecurity Act*.<sup>159</sup> The *Biosecurity Act* prevents Parliament from disallowing the Governor General's declaration of a human biosecurity emergency. This means that Parliament is unable to scrutinise and overturn such a decision.

A human biosecurity emergency period extends for a maximum of 3 months.<sup>160</sup> However, Parliament also authorised the Governor General to make successive declarations of emergency without limiting how many times this can occur. Under s 476(1) of the Act, the Governor-General may extend the period if the Minister is satisfied the listed human disease is continuing to pose a severe and immediate threat or continuing to cause harm on a nationally significant scale, and the extension is necessary to prevent

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<sup>154</sup> Peta Stephenson, Ian Freckelton and Belinda Bennett, 'Public Health Emergencies in Australia' in Belinda Bennett and Ian Freckelton (eds), *Pandemics, Public Health Emergencies and Government Powers: Perspectives on Australian Law* (Federation Press, 2021) 69, 82-83. See further Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Parliamentary Scrutiny of Delegated Legislation* (3 June 2019).

<sup>155</sup> For doubts over the constitutional validity of the *Biosecurity Act 2015* (Cth) see Stephanie Brenker, 'An Executive Grab for Power During COVID-19?', *AusPubLaw* (online, 13 May 2020) <<https://www.auspublaw.org/blog/2020/05/an-executive-grab-for-power-during-covid-19>>.

<sup>156</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 27 November 2014, 13427.

<sup>157</sup> *Biosecurity (Listed Human Diseases) Amendment Determination 2020* (21 January 2020)

<sup>158</sup> *Biosecurity Act 2015* (Cth) s 475(1)(a).

<sup>159</sup> *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020* (18 March 2020).

<sup>160</sup> *Biosecurity Act 2015* (Cth) s 475(4)(b).



or control the disease. Given the risks associated with covid-19, the period of emergency was extended repeatedly over the following months.<sup>161</sup>

Once a human biosecurity emergency exists, the Health Minister is personally invested with the broadest possible authority. The minister assumes 'God-like powers',<sup>162</sup> supplanting even the Prime Minister. The law permits the Health Minister to determine 'any requirement' and make 'any direction' they believe is necessary to prevent or control the entry, emergence, establishment or spread of the disease into any part of Australia or any other country.<sup>163</sup> This includes imposing restrictions on persons, goods or conveyances to prevent movement, including entering or leaving specified places.<sup>164</sup> The Act also empowers biosecurity officers to impose control orders on individuals who have been exposed to or shows signs or symptoms of a listed human disease.<sup>165</sup> Control orders may require a person to remain in a particular place,<sup>166</sup> undergo decontamination or examination,<sup>167</sup> and receive a vaccination or medication.<sup>168</sup> The consequences of disobeying the Health Minister are severe. A person who refuses a direction, perhaps that they remain in their home or undergo a medical procedure, can be jailed for up to 5 years or fined \$66,000.<sup>169</sup> No defences are provided for conscientious objection or on religious grounds.

Delegated legislation is not unusual. In fact, it constitutes 'about half the law of the Commonwealth by volume'.<sup>170</sup> Parliament cannot debate and amend legislative instruments, but exercises oversight through the power of disallowance. Legislative instruments must be tabled in each House of Parliament within six sitting days after they are registered and enter into force.<sup>171</sup> Any member of the House of Representatives or the Senate may give notice to disallow an instrument within 15 sitting days after the instrument was tabled in the relevant House.<sup>172</sup> However, this procedure can be modified and, in some cases, delegated legislation is exempt from disallowance. This too is not unusual, though it is controversial. As the Senate Standing Committee on Regulations and Ordinances noted in a June 2019 report, non-disallowable instruments negate the 'vital role' the Parliament plays in 'preserving the principle of the separation of powers by ensuring there is appropriate control over the executive branch of government'.<sup>173</sup>

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<sup>161</sup> *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension) Instrument 2020* (14 May 2020); *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 2) Instrument 2020* (3 September 2020); *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 3) Instrument 2020* (10 December 2020); *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 1) Instrument 2021* (2 March 2021); *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 2) Instrument 2021* (10 June 2021); *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 3) Instrument 2021* (2 September 2021); *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 4) Instrument 2021* (10 December 2021); *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 1) Instrument 2022* (11 February 2022).

<sup>162</sup> Andrew Probyn, 'Scott Morrison's Power Grab was Set up by a Handful of Senior Coalition MPs—but None of them knew what would come next', *ABC News* (online, 23 August 2022) <<https://www.abc.net.au/news/2022-08-23/behind-the-scenes-of-scott-morrison-s-power-grab/101358232>>.

<sup>163</sup> *Biosecurity Act 2015* (Cth) s 477(1), 478(1)

<sup>164</sup> *Biosecurity Act 2015* (Cth) s 477(3), 478(2).

<sup>165</sup> *Biosecurity Act 2015* (Cth) s 60.

<sup>166</sup> *Biosecurity Act 2015* (Cth) s 68,

<sup>167</sup> *Biosecurity Act 2015* (Cth) ss 89, 90.

<sup>168</sup> *Biosecurity Act 2015* (Cth) ss 92, 93.

<sup>169</sup> *Biosecurity Act 2015* (Cth) s 479.

<sup>170</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight* (Final Report, 16 March 2021) 5.

<sup>171</sup> *Legislation Act 2003* (Cth) s 38.

<sup>172</sup> *Legislation Act 2003* (Cth) s 42.

<sup>173</sup> Senate Standing Committee on Regulations and Ordinances (n 154) 121 [8.30]. Note that Parliament can amend legislation to make non-disallowable instruments disallowable.

Many of the public health orders issued to respond to covid-19 pandemic were exempt from disallowance. Under the *Biosecurity Act*, Parliament is prevented from disallowing any determination (though not direction) made by the Minister. Most remarkably, the Health Minister can make determinations that override other laws.<sup>174</sup> The government relied on these powers to issue voluminous orders. Between 18 March 2020 and 17 April 2022, the Commonwealth alone made 727 legislative instruments in response to covid-19.<sup>175</sup> In December 2020, the Senate Standing Committee for the Scrutiny of Delegated Legislation noted that of the 249 legislative instruments made in response to covid-19 around 20 per cent 'were exempt from disallowance by the Parliament and scrutiny by the committee':<sup>176</sup>

These exemptions have prevented parliamentarians from scrutinising and, if necessary, vetoing, travel bans on Australian citizens, the declaration and extension of the human biosecurity emergency period, and restrictions on people entering and exiting certain areas within Australia.<sup>177</sup>

Of course, Parliament can only disallow legislative instruments when it is sitting. The failure to sit regularly limited the capacity of Parliament to exercise oversight over disallowable legislative instruments.

The prevalence of non-disallowable legislative instruments has attracted increasing concern.<sup>178</sup> The pandemic demonstrates how impactful these directions can be. Public health orders required people to close their businesses, delay elective surgeries, and cancel major life events such as weddings. Severe restrictions were placed on peoples' ability to meet and gather friends and family. Curfews were imposed, state borders closed,<sup>179</sup> and people were restricted from leaving their local government areas and homes except for specific reasons. Public health orders could also have life or death implications. In April 2021, the Health Minister banned Australians from returning home if they had been in India over the prior 14 days.<sup>180</sup> This stranded 9000 citizens who faced the choice of navigating the pandemic in India with covid-19 rampant or returning to Australia and the possibility of a five-year jail term. The fact that these powers are so extensive and concentrated in a single individual, without the possibility of effective parliamentary oversight, does not sit well with how Australian democracy should operate.

State and Territory public health regimes empowered the executive with similarly broad and elastic authority.<sup>181</sup> For instance, under the *Public Health Act 2010* (NSW), if the Health Minister 'considers on reasonable grounds that a situation has arisen that is, or is likely to be, a risk to public health', he or she 'may take such action and may by order give such directions as the Minister considers necessary to deal with the risk and its possible consequences'.<sup>182</sup> This includes the power to declare any part of the State a public health risk area and segregate or isolate inhabitants and prevent access to the area.<sup>183</sup> In

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<sup>174</sup> *Biosecurity Act 2015* (Cth) s 477(2), (5).

<sup>175</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia 'Scrutiny of COVID-19 Instruments', *Parliament of Australia* <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Scrutiny\\_of\\_Delegated\\_Legislation/Scrutiny\\_of\\_COVID-19\\_instruments](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Scrutiny_of_COVID-19_instruments)> (6 November 2022).

<sup>176</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, 'Senate Committee Calls on Parliament and Government to Remove Barriers to Oversight of Emergency-Related Delegated Legislation' (Media Release, 2 December 2020).

<sup>177</sup> *Ibid.*

<sup>178</sup> See, for example, Senate Standing Committee for the Scrutiny of Delegated Legislation (n 170).

<sup>179</sup> See, for e.g., *Quarantine (Closing the Border) Directions* (WA).

<sup>180</sup> *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—High Risk Country Travel Pause) Determination 2021* (Cth) (30 April 2021).

<sup>181</sup> David Carter, 'The Use of Coercive Public Health and Human Biosecurity Law in Australia: An Empirical Analysis' (2020) 43(1) *UNSW Law Journal* 117, 129.

<sup>182</sup> *Public Health Act 2010* (NSW) s 7(1)-(2).

<sup>183</sup> *Public Health Act 2010* (NSW) s 7(3).

Victoria, on the advice of the Chief Health Officer and after consultation with the Emergency Management Commissioner, the Health Minister may declare a state of emergency.<sup>184</sup> During the period in which the declaration is in force, the Chief Health Officer can exercise significant powers to eliminate or reduce the serious risk to public health.<sup>185</sup> These Acts empowered state executives to impose severe restrictions, enforced by strong fines.

Parliament may have foregone the capacity to disallow many legislative instruments that imposed severe restrictions on residents, but parliamentary committees continued to meet providing a degree of legislative oversight. At the Commonwealth level, three committees were particularly active. The Standing Committee for the Scrutiny of Delegated Legislation met regularly and published all covid-19 related delegated instruments online to promote public scrutiny and transparency.<sup>186</sup> The Parliamentary Joint Committee on Human Rights also met regularly outside of sittings to scrutinise legislation relating to the covid-19 response. To support public scrutiny, it compiled a list of all bills and instruments registered in 2020 (432) and 2021 (231) relating to the pandemic.<sup>187</sup> The Senate also established a new Select Committee on COVID-19 to inquire into the government's response to the covid-19 pandemic and related matters.<sup>188</sup> The Select Committee was especially active, holding 56 public hearings between 8 April 2020 and 2 February 2022, receiving 557 public submissions and producing four reports. However, 'such was the speed with which the executive acted' that these committees could only 'conduct ex post reviews rather than provide real-time scrutiny'.<sup>189</sup>

A different approach could have been taken. During World War II, for example, the *National Security Act 1939* (Cth) granted the federal government sweeping powers to secure public safety and the defence of the nation. However, Parliament retained the power to disallow these regulations.<sup>190</sup> This meant that the peoples' elected representatives scrutinised the conduct of the war. On occasion, Parliament disallowed regulations despite the government arguing they were needed to prosecute the war. Parliament's role was safeguarded during the crisis.

New Zealand also offers an alternative approach. The emergency *COVID-19 Public Health Response Act 2020* (NZ) empowered the Health Minister and Director General of Health to make a similar range of orders as their Australian counterparts. However, the New Zealand model provides that such orders are subject to disallowance. It provides further that Covid-19 orders are automatically revoked if not approved by the Parliament within a prescribed period.<sup>191</sup> A similar approach was taken in Sweden, where regulations 'had to be approved by Parliament before they could take effect'.<sup>192</sup> New Zealand also established an Epidemic Response Committee on 25 March 2020, chaired by the Opposition Leader and with a majority of non-government members.<sup>193</sup> The Committee was empowered with special

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<sup>184</sup> *Public Health and Wellbeing Act 2008* (Vic) s 198.

<sup>185</sup> *Public Health and Wellbeing Act 2008* (Vic) s 198.

<sup>186</sup> Senate Standing Committee on Delegated Legislation, Parliament of Australia, 'Scrutiny of COVID-19 Instruments' <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Scrutiny\\_of\\_Delegated\\_Legislation/Scrutiny\\_of\\_COVID-19\\_instruments](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Scrutiny_of_COVID-19_instruments)> (6 November 2022).

<sup>187</sup> Parliamentary Joint Committee on Human Rights, Parliament of Australia, 'COVID-19 Legislative Scrutiny' <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/COVID19\\_Legislative\\_Scrutiny](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/COVID19_Legislative_Scrutiny)> (6 November 2020).

<sup>188</sup> Senate, 'COVID-19 Select Committee Appointment' (Senate Journal No 48, Parliament of Australia, 8 April 2020) 1580.

<sup>189</sup> Eric Windholz, 'Governing in a Pandemic: From Parliamentary Sovereignty to Autocratic Technocracy' (2020) 8(1-2) *The Theory and Practice of Legislation* 93, 100.

<sup>190</sup> *National Security Act 1939* (Cth) s 17(2).

<sup>191</sup> *COVID-19 Public Health Response Act 2020* (NZ) s 16.

<sup>192</sup> Ginsburg and Versteeg (n 4) 1528.

<sup>193</sup> Victoria also passed legislation to establish a parliamentary Pandemic Declaration Accountability and Oversight Committee, that was not dominated by government members. See *Public Health and Wellbeing Amendment (Pandemic Management) Act 2021* (Vic) s 19E(5), 19F. See further, William Partlett, 'Three Ways to Restore Victoria's Original Integrity Institution' (Democratic Audit of Australia, Working Paper No. 77, December 2022).

authority, including the 'power to send for persons, papers and records' which had been removed from select committees in 1999.<sup>194</sup> The Shadow Leader of the House explained its significance:

These are quite uncharted times. This select committee fills a void that would normally be occupied by question time or, perhaps, written questions or something else. It will, in my opinion, be a little stronger than both of those provisions, but with a great deal of cooperation, that's been talked about by everybody across the House today, it should work in the best interests of all New Zealanders.<sup>195</sup>

The Committee held hearings three days a week, questioned ministers and officials and considered bills and petitions. In the immediate stages of the pandemic, it was seen as 'usefully providing information on developments as well as holding the executive to account'.<sup>196</sup> Indeed, hearings 'were significantly, longer, more conversational, and judged to be genuinely informative'.<sup>197</sup> However, when Parliament returned, its support waned, and the committee was disestablished on 26 May 2020.

*Assessment.* Parliament failed to exercise appropriate legislative oversight during the Covid-19 pandemic. In a situation where Parliaments were adjourned for lengthy periods and a considerable percentage of delegated legislation was exempt from disallowance, the only real opportunity for Parliament to scrutinise legislation was through committees.<sup>198</sup> While parliamentary committees were particularly active, their capacity to scrutinise legislation and delegated instruments was limited. Committees imposed a degree of transparency and thereby supported calls by 'media and public interest advocacy groups'<sup>199</sup> to amend or revoke instruments but were not a sufficient substitute to the full gamut of legislative oversight. Parliament should have reasserted its 'constitutionally-established role'<sup>200</sup> by amending the *Biosecurity Act* to permit it to scrutinise and overturn declarations of emergency and public health directions by the Health Minister. This would have taken a lead from other national emergencies that have not involved such extreme and unchecked powers.

#### *D. Executive Oversight*

Executive overreach may occur 'even in the most well-intentioned and compassionate of governments'.<sup>201</sup> During periods of emergency the need to scrutinise government administration and policy is all the more important. In national crises, citizens look to government to take charge. In their haste to protect the community, the executive may take extreme and sometimes disproportionate action.<sup>202</sup> This is not necessarily because of any ill intent. In the early stages of the pandemic,

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<sup>194</sup> David Wilson, 'How the New Zealand Parliament Responded' in Study of Parliament Group, *Parliaments and the Pandemic* (January 2021) 187, 188.

<sup>195</sup> New Zealand, *Parliamentary Debates*, House of Representatives, 25 March 2020, 17318 (Gerry Brownlee).

<sup>196</sup> Wilson (n 194) 188.

<sup>197</sup> Gabor Hellyer, 'Assessing Parliament's Response to the Covid-19 Pandemic' (2021) 17(1) *Policy Quarterly* 20, 23; See also Standing Orders Committee, Parliament of New Zealand, *Review of Standing Orders 2020* (July 2020) 24.

<sup>198</sup> Sarah Moulds, 'Scrutinising COVID-19 Laws: An Early Glimpse into the Scrutiny Work of Federal Parliamentary Committees' (2020) 45(3) *Alternative Law Journal* 180, 181. Though note the idea of 'off-stage' legislative accountability: Vanessa MacDonnell, 'Ensuring Executive and Legislative Accountability in a Pandemic' in Colleen Flood et al, *Vulnerable: The Law, Policy and Ethics of COVID-19* (University of Ottawa Press, 2020) 141, 151.

<sup>199</sup> Paula O'Brien and Eliza Waters, 'COVID-19: Public Health Emergency Powers and Accountability Mechanisms in Australia' (2021) 28 *Journal of Law and Medicine* 346, 358.

<sup>200</sup> Standing Committee for the Scrutiny of Delegated Legislation, 'Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight' (Final Report, 16 March 2021) xv, xvi.

<sup>201</sup> Jeffrey Jowell, 'The Rule of Law Today' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (Oxford University Press, 6<sup>th</sup> ed, 2007) 25.

<sup>202</sup> George Williams 'A Decade of Australian Anti-Terror Laws' (2011) 35 *Melbourne University Law Review* 1136, 1170.

governments were under extreme pressure to take action to protect their communities against a poorly understood virus, with no vaccine and overwhelmed health sectors.<sup>203</sup>

Sometimes this led to unusual actions. For example, concerned that the *Biosecurity Act* conferred Health Minister Greg Hunt with extraordinary powers, Prime Minister Scott Morrison appointed himself in secret as a second Health Minister.<sup>204</sup> Although flawed and 'unnecessary',<sup>205</sup> this decision made some sense in providing an opportunity for greater oversight of the Minister's tremendous powers. As we noted above, it would have been preferable for Parliament to amend the *Biosecurity Act* to ensure appropriate supervision. Morrison's subsequent secret appointment to four other ministries that had 'little if any connection to the pandemic' was less defensible and suggests that accountability was not his primary motivation.<sup>206</sup> In this section we assess whether and how the Australian Parliament exercised appropriate executive oversight during the pandemic. We focus on two key areas: the National Cabinet and the National COVID-19 Coordination Commission (NCC).

Early in the pandemic, governments recognised the need for a coordinated and consistent response. On 13 March 2020, the Council of Australian Governments (COAG) agreed to form a National Cabinet to facilitate cooperation and coordination across the federation.<sup>207</sup> The National Cabinet comprised the Prime Minister, State Premiers and Territory Chief Ministers and held its first meeting on 15 March 2020. A few weeks later, on 29 May 2020, the Prime Minister announced that a new National Federation Reform Council, which consisted of the National Cabinet, the Council on Federal Financial Relations, and a representative from the Australian Local Government Association, would replace COAG.<sup>208</sup>

National Cabinet was similar in form to COAG but differed in its 'functioning and institutional status'.<sup>209</sup> COAG was formed in 1992 to promote cooperative federalism.<sup>210</sup> Over the years, however, the Council became a vehicle for 'cooperative centralism'.<sup>211</sup> COAG was driven by the agenda of the Commonwealth, with the federal government choosing whether to meet and what issues to prioritise.<sup>212</sup> It was also hampered by a vast bureaucratic support network and committee apparatus. As a slow and cumbersome intergovernmental forum, COAG was, Scott Morrison described, the place 'where good ideas went to die'.<sup>213</sup> In contrast, owing to the challenge of the pandemic, National Cabinet appeared quick and agile in adopting a 'crisis leadership role'.<sup>214</sup> It met regularly, often multiple times a week, and did so over zoom, avoiding travel delays. Recognising that the pandemic may affect different areas of the country in different ways, the National Cabinet sought to agree on 'a broad framework' and let

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<sup>203</sup> O'Brien and Waters (n 199) 347.

<sup>204</sup> Damien Cave, 'The Secret Powers of an Australian Prime Minister, Now Revealed', *New York Times* (online, 16 August 2022) <<https://www.nytimes.com/2022/08/16/world/australia/scott-morrison-minister.html>>.

<sup>205</sup> Virginia Bell, *Report of the Inquiry into the Appointment of the Former Prime Minister to Administer Multiple Departments* (25 November 2022) 2.

<sup>206</sup> Ibid. Solicitor-General, *In the Matter of the Validity of the Appointment of Mr Morrison to Administer the Department of Industry, Science, Energy and Resources* (Opinion, SG No. 12 of 2022).

<sup>207</sup> Tom Burton, 'National Cabinet Creates a New Federal Model', *Australian Financial Review* (online, 18 March 2020) <<https://www.afr.com/politics/federal/national-cabinet-creates-a-new-federal-model-20200318-p54bar>>.

<sup>208</sup> Australian Government Department of Prime Minister and Cabinet, 'COAG Becomes National Cabinet' (2 June 2020) <<https://www.pmc.gov.au/news-centre/government/coag-becomes-national-cabinet>>.

<sup>209</sup> Anne Twomey, 'Federal and State Powers to Deal with Pandemics—Cooperation, Conflict and Confusion' in Belinda Bennett and Ian Freckelton (eds), *Pandemics, Public Health Emergencies and Government Powers: Perspectives on Australian Law* (Federation Press, 2021) 52, 59.

<sup>210</sup> Paul Kildea and Andrew Lynch, 'Entrenching "Cooperative Federalism": Is It Time to Formalise COAG's Place in the Australian Federation?' (2011) 39 *Federal Law Review* 103.

<sup>211</sup> Geoff Anderson, 'The Council of Australian Governments: A New Institution of Governance for Australia's Conditional Federalism' (2008) 31(2) *UNSW Law Journal* 493, 496.

<sup>212</sup> Kildea and Lynch (n 210) 113-115.

<sup>213</sup> Prime Minister Scott Morrison, 'Press Conference, Parliament House, 29 May 2020.

<sup>214</sup> Jennifer Menzies, 'Explainer: What is the National Cabinet and Is It Democratic?', *Guardian Australia* (online, 31 March 2020) <<https://www.theguardian.com/world/2020/mar/31/explainer-what-is-the-national-cabinet-and-is-it-democratic>>.



'the states and territories ... implement the solutions'.<sup>215</sup> In bringing together leaders from both sides of politics and providing a forum for Australian governments to make decisive collective decisions relating to the pandemic response, the National Cabinet received wide praise.<sup>216</sup> However, concerns were raised immediately over its terminology and purported status as a committee of the Commonwealth government's Cabinet.

The National Cabinet was formally established as a Policy Committee of the Commonwealth Government's Cabinet. The government adopted this approach to attract conventions of collective responsibility and confidentiality.<sup>217</sup> These conventions flow from the system of responsible government which underpins Australia's constitutional system and promotes robust discussion within Cabinet.<sup>218</sup> They require members publicly support all Cabinet decisions, even if they did not support the decision or were not present. They also exempt Cabinet documents from freedom of information requests and prohibit members from disclosing the nature or content of any deliberations.<sup>219</sup> However, as many people have noted, this arrangement 'was fundamentally flawed'.<sup>220</sup>

The National Cabinet was not a 'Cabinet' in the traditional sense because its members were not responsible to the same legislature. State premiers were responsible to their own Parliament and jurisdiction and made decisions on that basis, at times provoking public consternation and criticism from the Prime Minister. Inevitably, this led to a 'breakdown in the National Cabinet as a consensus body'.<sup>221</sup> Nevertheless, the government continued to assert that cabinet confidentiality would apply to prevent deliberations and documents from being disclosed. This meant that important documents previously published by the Australian Health Protection Principal Committee concerning the impact of Covid-19 suddenly became confidential. The decision 'diminished public knowledge and buttressed the ability of dangerous fools to spread misinformation about Australia's public health response during the pandemic'.<sup>222</sup>

The government went to great lengths to impose secrecy on National Cabinet decisions. In July 2020, Independent Senator Rex Patrick made a FOI request seeking access to meeting notes and minutes from the May 2020 meeting. When these were denied, he lodged a claim with the Administrative Appeals Tribunal. In August 2021, the AAT ruled that the National Cabinet was not a committee of the Commonwealth Government Cabinet. Justice White explained that 'the mere use of the name "national cabinet" does not, of itself, have the effect of making a group of persons using the name a "committee of the Cabinet". Nor does the mere labelling of a committee as a "Cabinet committee" have that effect'.<sup>223</sup> Indeed, such a submission suggests that 'any committee may be a "committee of the cabinet" for the purposes of the FOI Act merely because the prime minister of the day has purported to establish it as such. This premise is unsound'.<sup>224</sup> National Cabinet minutes were not an official record of Cabinet and exempt from disclosure.

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<sup>215</sup> Jarrod Ball, 'Why You Shouldn't Write Off National Cabinet', *Australian Financial Review* (online, 24 August 2021).

<sup>216</sup> Cheryl Saunders, 'A New Federalism? The Role and Future of the National Cabinet' (University of Melbourne School of Government, *Governing During Crises*, Policy Brief No. 2, 1 July 2020); Twomey (n 209) 59; Tamara Tulich, Ben Reilly and Sarah Murray, 'The National Cabinet: Presidentialised Politics, Power-sharing and a Deficit in Transparency', *AusPubLaw* (online, 23 October 2020) <<https://www.auspublaw.org/blog/2020/10/the-national-cabinet-presidentialised-politics-power-sharing-and-a-deficit-in-transparency>>.

<sup>217</sup> Senate Select Committee on COVID-19, 'First Interim Report' (December 2020) 108 [7.4].

<sup>218</sup> Department of the Prime Minister and Cabinet, *Cabinet Handbook* (Australian Government, 13<sup>th</sup> ed, 2019) ss 20, 25-30.

<sup>219</sup> See also *Freedom of Information Act 1982* (Cth) ss 31A, 31B and 34.

<sup>220</sup> Twomey (n 209) 60; Tulich, Reilly and Murray (n 216).

<sup>221</sup> Senate Select Committee on COVID-19 (n 217) 109 [7.13].

<sup>222</sup> Senate Finance and Public Administration Legislation Committee, *COAG Legislation Amendment Bill 2021 [Provisions]* (October 2021) 40 [1.10] (Dissenting Report – Labor Senators).

<sup>223</sup> *Patrick v Secretary, Department of Prime Minister and Cabinet (Freedom of Information)* [2020] AATA 2719 [41].

<sup>224</sup> *Ibid* [68].

The Department of Prime Minister Cabinet (PM&C) released the requested documents, but the federal government refused to accept the outcome. The Department declined to provide access to other requests for documents.<sup>225</sup> In September 2021, the government introduced legislation into Parliament to overturn the ruling. The COAG Legislation Amendment Bill 2021 would amend the *FOI Act* to expressly include the National Cabinet and any of its subcommittees, providing a blanket exemption from freedom of information law. The government-majority Senate Finance and Public Administration Legislation Committee recommended the Bill be passed over the objections of Labor, the Greens and Senator Patrick.<sup>226</sup> The bill lapsed at the dissolution of the 46<sup>th</sup> Parliament, but the new Labor government has continued to prevent the release of National Cabinet documents.<sup>227</sup>

The new Federal government's decision illustrates the need for Parliament to reassert its role to scrutinise and monitor the executive. In at least one area, however, the Parliament was successful in holding the government to account for its attempt to maintain secrecy. On 25 March 2020, the Prime Minister announced the formation of the National COVID-19 Coordination Commission (NCC). Composed of leaders from the profit and not-for-profit sectors, the NCC was an advisory body based in PM&C. Morrison explained that its role was to 'solve problems' by coordinating 'advice to the Australian Government on actions to anticipate and mitigate the economic and social effects of the global coronavirus pandemic'.<sup>228</sup> Neville Power, former CEO of Fortescue Metals Group, was named the inaugural chair. The Commission was also advised by several working groups on manufacturing, charity and philanthropy, and industrial relations. In July 2020, the NCC was renamed the National COVID-19 Commission Advisory Board to clarify that the commission's responsibility was to advise the Cabinet and attempt to ensure its deliberations and reports would remain confidential. This change also illustrated the Commission's evolution from a body designed to secure medical equipment supply chains to one responsible for advising on the 'longer-term economic recovery'.<sup>229</sup>

The NCC attracted significant criticism from inside and outside Parliament.<sup>230</sup> Despite being a publicly funded commission with a significant role developing strategies to respond to the pandemic, the Commission operated with a disdain for transparency. It had no legislative basis, operated for several weeks without any terms of reference, initially declined to reveal the compensation package its members received, and refused FOI and parliamentary committee requests for key documents.<sup>231</sup> Even the CEO acknowledged that the delivery of advice to Cabinet was 'opaque'.<sup>232</sup> In any event, as the Australia

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<sup>225</sup> Commonwealth, *Parliamentary Debates*, Senate, 23 November 2021, 6514-6516 (Senator Patrick); Patricia Drum, 'The Debate over National Cabinet', *Law Society Journal* (online, 29 November 2021) <<https://lsj.com.au/articles/the-debate-over-national-cabinet/>>.

<sup>226</sup> Senate Finance and Public Administration Legislation Committee, *COAG Legislation Amendment Bill 2021 [Provisions]* (October 2021) 37 [3.85].

<sup>227</sup> Paul Karp, 'Anthony Albanese Backflips on National Cabinet Secrecy and Refuses to Say Why', *Guardian Australia* (online, 17 June 2022) <<https://www.theguardian.com/australia-news/2022/jun/17/anthony-albanese-backflips-on-national-cabinet-secrecy-and-refuses-to-say-why>>.

<sup>228</sup> Prime Minister Scott Morrison, 'National COVID-19 Coordination Commission' (Media Release, 25 March 2020).

<sup>229</sup> Elizabeth Hicks, 'Private Actors and Crisis: Scrutinising the National Covid-19 Commission Advisory Board' (University of Melbourne School of Government, *Governing During Crises*, Policy Brief No. 4, 5 August 2020) 3.

<sup>230</sup> Stephen Long, 'Government's Coronavirus Response Slammed for "Alarming Lack of Oversight" by Retired Judge', *ABC News* (online, 3 June 2020) <<https://www.abc.net.au/news/2020-06-03/coronavirus-commission-concerns-former-judge-royal-commissioner/12284458>>.

<sup>231</sup> Senate Select Committee on COVID-19 (n 217) 115-118 [7.41]-[7.56]; Christopher Knaus, 'Australian PM's Department Refuses to Release Covid-19 Commission Documents', *Guardian Australia* (online, 30 July 2020) <<https://www.theguardian.com/australia-news/2020/jul/30/australian-pms-department-refuses-to-release-covid-19-commission-documents>>.

<sup>232</sup> Evidence to the Senate Select Committee on Covid-19, Parliament of Australia, Canberra, 13 May 2020, 20 (Peter Harris, CEO National COVID-19 Coordination Commission).

Institute remarked, the 'rationale for a recovery planning body operating outside of normal democratic and public policy processes remains incredibly unclear'.<sup>233</sup>

The development of the Commission also raised concerns. The idea originated in the Prime Minister's Office. PM&C was not informed of the proposal until six days prior to its announcement and was not asked to provide advice on its desirability or necessity. There was also no independent process for appointing Commissioners who were personally selected by the Prime Minister. This unusual process raised concerns over conflicts of interest. These concerns were intensified when all but one of the NCC commissioners declined to release their declarations of interests, and it was confirmed that members of the working groups attached to the NCC were not obliged to sign declarations.<sup>234</sup> In May, a leaked draft report from the manufacturing taskforce recommended the government underwrite a major expansion of the domestic gas industry.<sup>235</sup> According to a damning Senate Select Committee, five members of the taskforce had 'direct financial or commercial interests in the development' of the proposed infrastructure.<sup>236</sup> Parliamentary pressure may have worked. In May 2021, the Prime Minister quietly disbanded the NCC.<sup>237</sup>

*Assessment.* In circumstances where parliament is suspended for significant periods of time, heightened scrutiny of the executive is vital. Unfortunately, the Australian Parliament was largely unable to hold government administration and policy to account during the pandemic. At times, parliamentary committees and key individual parliamentarians were able to pressure the executive to explain and justify their actions. However, even when parliamentarians secured significant victories, such as Senator Patrick's success in the AAT exposing the government's 'hubris',<sup>238</sup> parliament was unable to reverse government policy. The executive continued to maintain the fiction that National Cabinet was a subcommittee of the Commonwealth Cabinet. The fact that the incoming Labor government has retained this approach demonstrates the need for Parliament to reassert its constitutional authority.

#### IV. CONCLUSION

In times of national crisis or emergency, the legislative branch of government is often perceived as unable to respond effectively or unsuited to doing so. When timely and decisive action is required, the executive must take charge in order 'to get things done'.<sup>239</sup> Yet, this does not mean that Parliament should abandon its constitutional and democratic responsibilities. In fact, the necessity that parliament carries out its core functions is even more apparent when the executive is exercising extraordinary powers. With those powers must come sharp scrutiny and vigilance, which Parliament is best placed to provide.

The Covid-19 pandemic placed considerable pressure on government systems across the globe. In this paper, we explored how Australian parliaments responded to the pandemic by assessing their performance against four key functions. We asked whether parliaments met regularly, were provided with sufficient time to debate key measures and issues, exercised legislative oversight, and applied

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<sup>233</sup> Richie Merzian, 'More Questions than Answers from NCCC at COVID19 Oversight Committee Hearing' (Australia Institute, Media Release, 13 May 2020) <<https://australiainstitute.org.au/post/more-questions-than-answers-from-nccc-at-covid19-oversight-committee-hearing/>>.

<sup>234</sup> Senate Select Committee on COVID-19 (n 217) 117 [7.50]; Hicks (n 229) 5.

<sup>235</sup> Adam Morton, 'Leaked Covid-19 Commission Report Calls for Australian Taxpayers to Underwrite Gas Industry Expansion', *Guardian Australia* (online, 21 May 2020) <<https://www.theguardian.com/environment/2020/may/21/leaked-covid-19-commission-report-calls-for-australian-taxpayers-to-underwrite-gas-industry-expansion>>.

<sup>236</sup> Evidence to the Senate Select Committee on Covid-19, Parliament of Australia, Canberra, 4 June 2020, 9 (Senator Peter Whish-Wilson),

<sup>237</sup> Melissa Coade, 'PM Disbands COVID-19 Advisory Board, Declares Emergency Response Over', *The Mandarin* (online, 3 May 2021) <<https://www.themandarin.com.au/155531-pm-disbands-covid-19-advisory-board-declares-emergency-response-over/>>.

<sup>238</sup> Anne Twomey, 'Cabinet Conventions and National Cabinet' (2022) 33 *Public Law Review* 111, 126.

<sup>239</sup> Barber (n 57) 67.



appropriate scrutiny to government administration and policy. We found that Australian parliaments generally responded poorly.

Australian Parliaments – with the sole exception of the Parliament of Western Australia – substantially reduced their sitting days during the pandemic. Some parliaments adjourned for lengthy periods and did not make up the days they lost. The Commonwealth, Victorian and New South Wales parliaments were particularly egregious; each lost more than 20 days than their average between 2015 and 2019. When parliaments did sit, opportunities for debate were provided. However, markedly increased pairing arrangements meant many citizens were unrepresented and their interests not considered.

Accountability functions were also limited. Parliaments failed to exercise appropriate legislative and executive oversight during the pandemic. Consider the Commonwealth Parliament as an example. The Australian Parliament could not scrutinise and overturn declarations of emergency, nor a considerable percentage of public health directions issued by the executive. Efforts to compel government to remove the veil of secrecy it placed over its administration were also mixed. Despite a significant victory in the AAT, the government maintained that National Cabinet was protected by cabinet confidentiality.

Our study offers sobering conclusions. Perhaps most worrying is the fact that many of the weaknesses and failures we identified in parliaments response to the pandemic were not caused by the public health emergency. Over many years, scholars have noted the increasing executive dominance over Parliament. Governments often guillotine bills, truncate debate, and even ban the introduction of non-governmental business in the lower House.<sup>240</sup> Oversight and accountability roles are also curtailed by government control of parliamentary committees and the over-use of non-disallowable legislative instruments. Similarly, COAG and the National Cabinet demonstrate how cooperative federalism can slip into a project of executive dominance that undercuts parliamentary review. The pandemic accentuated these trends. Covid-19 is unlikely to be the last pandemic we face.<sup>241</sup> If Australia is to respond effectively to future public health emergencies, it is vital that our parliaments improve their performance to better meet their core responsibilities. Parliament should not wait until the next pandemic.

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<sup>240</sup> See Benita Kolovos, 'Inside Victoria's Lower House, Where Non-Government Business isn't Allowed', *Guardian Australia* (online, 21 March 2022) <<https://www.theguardian.com/australia-news/2022/mar/21/inside-victorias-lower-house-where-non-government-business-isnt-allowed>>.

<sup>241</sup> Marco Marani et al, 'Intensity and Frequency of Extreme Novel Epidemics' (2021) 118(35) *Proceedings of the National Academy of Sciences* e2105482118.