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Executive Accountability in Emergencies: Lessons from the COVID-19 Pandemic

Janina Boughey

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UNSW Sydney NSW 2052 Australia

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Executive Accountability in Emergencies: Lessons from the COVID-19 Pandemic

Janina Boughey*

The COVID-19 pandemic revealed many things about our society—both negative and positive. It showed us the worst of people—fighting over toilet paper; and the best—our ability to come together, support one another, put the collective good before our individual interests, and our creativity and adaptability. One thing that the past two years have highlighted, is the significant gaps in our system of government accountability. This is something that should concern us all, irrespective of whether we happened to agree with the balance our governments struck in limiting individual freedoms to protect public health. For it is fundamental to our democracy, and our system of law, that those exercising public power explain their decisions to those affected by them.[1]

Yet a large portion of the decisions made by federal and state governments were not adequately justified. We were frequently told that governments were "following health advice" in making orders limiting our movement, association, and ability to earn a living, among other things. But most of that advice was not released. And the legislation empowering the making of health orders in some jurisdictions, including NSW and the Commonwealth, did not confer power on the Chief Health Officer to make the decisions, but on Ministers.[2] Where powers are conferred on Ministers, this suggests that the legislatures assumed that a range of matters would be considered and balanced in making emergency orders. Not only health, but the economy and other relevant considerations. While the NSW orders clearly did take factors other than health into account, there was little explanation as to what these were or how they were balanced. We were simply told to trust that the government was following health advice.

This lack of accountability and transparency is the result of vulnerabilities in the mechanisms we use in Australia to hold governments to account and require them to explain their actions. I will give three examples here. First the oversight of delegated legislation. Second the transparency of National Cabinet decisions. And third the limited accountability over police powers. I will also give solutions, and argue that accountability does not undermine the capacity of governments to respond powerfully, quickly and decisively to emergencies. The loss of transparency and accountability which we have seen over the course of the pandemic are not necessary.

Delegated legislation

Most of the rules used to respond to the pandemic were set out in delegated legislation. Ordinarily delegated legislation is subject to parliamentary scrutiny via tabling and disallowance.[3] However, a substantial portion of COVID measures were not.

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* Associate Professor, UNSW Law & Justice. My thanks to Elisabeth Perham for helpful feedback on a draft.

[1] For explanations of the democratic importance of justifications/reasons see, eg, Etienne Mureinik, "Reconsidering Review: Accountability and Participation" [1993] *Acta Juridica* 35, 35-40; Jerry Mashaw, "Public Reason and Administrative Legitimacy" in John Bell et al, eds, *Public Law Adjudication in Common Law Systems: Process and Substance* (Oxford: Hart, 2016) 11, 17; Jerry Mashaw, *Reasoned Administration* (New York: Cambridge University Press, 2018) ch 7; John Rawls, "The Idea of Public Reason Revisited" (1997) 64(3) *University of Chicago Law* Review 765.

[2] *Public Health Act 2010* (NSW) s 7(2); *Biosecurity Act 2015 (Cth)* s 474. By contrast, most of Victoria's orders were made under *Public Health and Wellbeing Act 2008* (Vic) s 199, which confers power on the Chief Health Officer.

[3] David R Elder (ed), *House of Representatives Practice* (Department of the House of Representatives, 7th ed, 2018) 406–09; Andrew Edgar, "Law-making in a crisis: Commonwealth and NSW coronavirus regulations", *AUSPUBLAW* (Blog Post, 30 March 2020) <auspublaw.org/2020/03/law-making-in-a-crisiscommonwealth-and-nsw-coronavirus-regulations/>.

At the federal level, s 44 of the *Legislation Act 2003* (Cth) provides that delegated legislation may be exempted from disallowance through several means. Determinations made by the Commonwealth Health Minister under the *Biosecurity Act 2015* (Cth) s477(1) in response to a health emergency are not disallowable.[4] Thus, the Commonwealth's travel bans,[5] orders taking over hotels to quarantine returning travellers,[7] rules making it illegal to 'price gouge' when selling personal protective equipment,[8] and regulations dealing with the use of data collected from the COVID tracing app,[9] among countless others, were not disallowable. The Senate Standing Committee for the Scrutiny of Delegated Legislation (the SDL Committee) was concerned enough about the lack of parliamentary oversight over much of the COVID regulations to establish an inquiry and committee which kept a track of these instruments.[5] At the end of 2020, the SDL Committee calculated that "approximately 20 per cent of the 249 pieces of delegated legislation made in response to COVID-19 were exempt from disallowance by the Parliament and scrutiny by the committee."[6]

This is indicative of broader trends both in the use of delegated legislation and in the proportion of it that is non-disallowable. Delegated legislation makes up "about half the law of the Commonwealth by volume". [7] In June 2020, 31,132 legislative instruments were in force.[8] The volume of delegated legislation is increasing.[9] So too is the proportion that is disallowable; from under 15% in 2014 to around 20% in recent years.[10]

There are no clear, public, transparent rationales for when it is justifiable to exempt delegated legislation from parliamentary scrutiny.[11] Worse, some mechanisms for disallowance themselves occur via delegated legislation.[12]

The problem of the lack of parliamentary scrutiny of delegated law making is clear. The *Australian Constitution* vests legislative power in the Parliament.[13] While the modern reality is that Parliament must and should delegate many legislative functions to the executive branch, Parliament remains constitutionally responsible for lawmaking. It may not "'abdicate' its powers of legislation."[14] Although it is not clear as a matter of constitutional law where the line between delegation and abdication lies, without parliamentary scrutiny of delegated legislation parliament has no way to know how delegated power has been exercised, which is at least a practical, or effective abdication.[15] Parliamentary scrutiny is the most appropriate mechanism to ensure delegated laws are within power, which includes being proportionate to achieving the objectives of the primary Act.[16]

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[4] *Biosecurity Act 2015* (Cth) s 477(2)

[5] The Senate Select Committee on COVID-19, which tabled its final report on 7 April 2022.

[6] Commonwealth Parliament, Senate Standing Committee for the Scrutiny of Delegated Legislation, *Senate committee calls on Parliament and government to remove barriers to oversight of emergency-related delegated legislation* (Media Release, 2 December 2020) <www.aph.gov.au/DocumentStore.ashx?id=8572ca7c-4439-496b-a589-3d796236af11>.

[7] Commonwealth Parliament, Senate Standing Committee for the Scrutiny of Delegated Legislation, *Exemption of Delegated Legislation from Parliamentary Oversight* (Report, 16 March 2021) 5 ("SDL Committee Report").

[8] Commonwealth Attorney-General's Department, Submission no 14 to Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight* (June 2020) 5.

[9] SDL Committee Report (n 7) 8.

[10] SDL Committee Report (n 7) 9.

[11] Gabrielle Appleby, Janina Boughey, Sangeetha Pillai and George Williams, Submission no 1 to Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight* (June 2020) 6.

[12] Via the *Legislation (Exemptions and Other Matters) Regulation 2015* (Cth).

[13] *Australian Constitution* s 1.

[14] *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73, 120-21 (Evatt J).

[15] SDL Committee Report (n 7) 30-32, citing evidence of Anne Twomey in particular.

[16] *South Australia v Tanner* (1989) 166 CLR 161, 167-8 (Wilson, Dawson, Toohey and Gaudron JJ); *Williams v Melbourne Corporation* (1933) 49 CLR 142, 155 (Dixon J).

There may be a few limited situations in which non-disallowance is justifiable, such as bylaws made by elected bodies.[17] But emergency is not one of those categories. Parliaments have shown a capacity of act quickly when required,[18] and are able to adapt their procedures.[19] Parliamentary scrutiny does not delay delegated legislation from coming into force, so is not a barrier to quick, effective action. It is also very rare for parliamentary scrutiny to result in disallowance. "Between 2010 and 2019, of the thousands of pieces of delegated legislation tabled in the Parliament, only 17 were disallowed."[20] There also tends to be a good deal of bipartisanship in emergencies—at least at the beginning.[21] There is no justification for exempting emergency delegated law making powers from parliamentary scrutiny.

The position in the states is worse in some respects. In some states, including NSW and Victoria, it was not clear what the status of the health orders was—whether they were delegated legislation or administrative decisions.[22] While the Court of Appeal was no doubt correct to say that for the purposes of determining whether the orders were within power, the distinction does not matter. And Leeming J is right to note that the distinction between legislative and administrative powers is itself artificial and problematic.[23] Nevertheless, there are accountability consequences which flow from the distinction. Administrative decisions are properly overseen via review applications to tribunals and courts. Legislative decisions are appropriately overseen by Parliament. Court and tribunal review processes are not suited to, or in many situations capable of, providing accountability for legislative decisions. The health orders themselves were quite clearly largely legislative in nature—that is they set out general rules for large sections of the population.[24] However, the relevant Acts seem to assume they are administrative. For instance, the NSW Act, in a badly worded subsection, seemed to provide for NCAT review.[25] The Minister took advantage of this ambiguity in his submissions to NCAT in response to a challenge to the NSW health orders.[26] The confusion meant that there was limited oversight of state health orders by any institution. This needs to be fixed, and easily could be via legislative amendments clarifying that orders of a general nature are subject to parliamentary oversight, and their application is subject to merits review.

Even had parliamentary review and disallowance been available, however, another major barrier to accountability was the failure of some Australian parliaments to sit for long periods. For example, the NSW Parliament did not sit for most of the long lockdown in NSW 2021; sittings were suspended from late June until mid-October.[27] This meant that the NSW Parliament was not scrutinising the orders nor

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[17] Appleby et al (n 11) 4.

[18] For instance, much of the legislation enacted in response to 9/11 was considered by parliamentary committees in very short timeframes. Though, as Williams has pointed out, this is not ideal and resulted in weaknesses in the legislation. See George Williams, "A Decade of Australian Anti-Terror Laws" (2011) 35(3) *Melbourne University Law Review* 1136.

[19] Nicholas Horne, "COVID-19 and parliamentary sittings" (Parliamentary Library Website, 2 April 2020) <www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2020/April/COVID-19_and_parliamentary_sittings>; Anne Twomey, "A virtual Australian parliament is possible – and may be needed – during the coronavirus pandemic", *The Conversation* (25 March 2020) < https://theconversation.com/a-virtual-australian-parliament-is-possible-and-may-be-needed-during-the-coronavirus-pandemic-134540>.

[20] SDL Committee (n 7) 7.

[21] Anna Patty, 'Australians less ideological about COVID lockdown than Americans', *The Sydney Morning Herald* (online, 10 May 2020) <www.smh.com.au/national/australians-less-ideological-about-covid-lockdown-than-americans-20200508-p54rai.html>.

[22] Janina Boughey, "Executive power in emergencies: Where is the accountability?" (2020) 45(3) *Alternative Law Journal* 168, 171–72.

[23] *Kassam v Hazzard* [2021] NSWCA 299 (8 December 2021), [144], [146], [153].

[24] Though Leeming J referred to the orders as a hybrid of legislative and administrative in nature: *Kassam v Hazzard* [2021] NSWCA 299, [144].

[25] And NCAT has found that they are reviewable: *Davis v Minister for Health* [2022] NSWCATAP 115.

[26] *Davis v Minister for Health* [2022] NSWCATAP 115, [46]–[55].

[27] NSW Parliament, Legislative Assembly, "Procedural Digest", No 5/2021 (12 October 2021) <www.parliament.nsw.gov.au/la/proceduralpublications/Documents/Procedural%20Digest%20No%205%202021%20-%208%20October%202021.pdf>.

calling on ministers to justify the restrictions they had decided to impose on the NSW population.[28] While premiers, chief health officers and ministers appeared at press conferences, this is not a substitute for oversight by our elected representatives. There was no reason why parliaments could not continue to function by meeting virtually in 2021. Parliaments in other countries, including the UK, had adapted their procedures to sit in virtual and hybrid modes, so that they could continue to provide oversight of the extraordinary executive powers exercised during the pandemic.[29] It is unacceptable that ours did not.

National Cabinet and FOI

The Federal Government's refusal to release National Cabinet documents highlights a second vulnerability in our laws and systems designed to hold governments to account. National Cabinet was initially heralded as one of the great successes of Australia's response to COVID; as evidence of the Commonwealth and states cooperating rather than blaming one another for problems and failures as often occurs in our federation.[30] Although that cooperation did not last,[31] National Cabinet was certainly an effective forum for communication between premiers and the Prime Minister. But what it is not, is a cabinet.

As an intergovernmental body, National Cabinet is not held to account in the same way that federal state and territory cabinets are. It is not responsible to a single parliament, but to nine separate parliaments.[32] So the same rationales for unity, and thus confidentiality, do not apply as they do to actual cabinets.[33] This is not to say that there might not be good reasons to keep some, perhaps even many, of its documents confidential, at least for a period. But those reasons are not the same reasons which justify the blanket exemption of cabinet documents from access to information laws.

Some cynics suggested that labelling the body as a "cabinet" might be an attempt by the Federal Government to rely on the cabinet exemption to the *Freedom of Information Act 1982* (Cth) ("*FOI Act*").[34] We were proven right when, after the AAT found that the national cabinet is not a cabinet, and that its documents are not exempt from the *FOI Act*,[35] the Prime Minister introduced a Bill to amend the *FOI Act* to prevent release of National Cabinet documents.[36] However, the Bill went much further and would have exempted from disclosure a host of documents produced for other intergovernmental bodies. There is no clear rationale for withholding public access to much of this information.[37]

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[28] Sittings of the Victorian Parliament were similarly suspended during lockdowns: Sumeyya Ilanbey, "Call for greater scrutiny as state spends billions", *The Age* (online, 30 August 2020) <www.theage.com.au/politics/victoria/call-for-greater-scrutiny-as-state-spends-billions-20210829-p58mtg.html>.

[29] Institute for Government, "The UK Parliament and Coronavirus" (Webpage, 3 November 2020) <www.instituteforgovernment.org.uk/explainers/uk-parliament-coronavirus>.

[30] Tom Burton, "A Peacetime War Cabinet", *The Australian Financial Review* (19 March 2020) 44.

[31] See, eg, Eliza Laschon, "Fractures deepen on the eve of National Cabinet as rift over arrivals cap grows", *ABC News online* (17 September 2020) <www.abc.net.au/news/2020-09-17/stress-fractures-appear-in-national-cabinet-as-wa-goes-it-alone/12672472>.

[32] Jennifer Menzies, "Explainer: What is the national cabinet and is it democratic?", *The Conversation* (online, 31 March 2020) <theconversation.com/explainer-what-is-the-national-cabinet-and-is-it-democratic-135036>; Boughey, "Executive Power" (n 22) 169–70.

[33] See Murphy J's explanation of cabinet confidentiality in In *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 373–74.

[34] See Cheryl Saunders, *A New Federalism? The Role and Future of the National Cabinet* (APO Report, Melbourne School of Government, 1 July 2020) <apo.org.au/sites/default/files/resource-files/2020-07/apo-nid308767.pdf>; Boughey, "Executive Power" (n 22) 169–70.

[35] *Patrick and Secretary, Department of Prime Minister and Cabinet* [2021] AATA 2719.

[36] COAG Legislation Amendment Bill 2021 (Cth). The Bill lapsed at the dissolution of the 46th Australian Parliament.

[37] Cheryl Saunders, "The Government Is Determined to Keep National Cabinet's Work a Secret. This Should Worry Us All", *The Conversation*, 15 September 2021 <theconversation.com/the-government-is-determined-to-keep-national-cabinets-work-a-secret-this-should-worry-us-all-167540>.

As with the diminution of accountability for delegated legislation, these developments are not unique to the COVID emergency. They reflect a broader trend towards Federal Government secrecy over the past decade in particular.[38] Ministers have routinely refused to comply with Senate Orders for the Production of Documents, claiming public interest immunity. For example, ministers refused to provide the health and economic data and information which formed the basis of its response to COVID-19, despite public servants initially being willing to provide that information.[39] The Senate Select Committee on COVID-19 found that these public interest immunity claims were not adequately justified and said that the claims "reflect a pattern of conduct in which the government has wilfully obstructed access to information that is crucial for the committee's inquiry".[40] Ministers made blanket immunity claims over information about the "Robodebt" scheme, even after litigation having concluded, without explaining how the public interest would be damaged by release of the information.[41] They did the same with other information that might embarrass the government, including Sports Rorts.[42] The fact that release of information might be politically damaging and embarrassing to the government is not a justification for refusing to release it under the *FOI Act* or to the democratically elected Parliament. Without access to this information, voters are unable to understand and make judgments about the basis on which decisions have been made and public funds used.

Other developments which support my claim of a decline in government transparency include: the stripping of funds from the Office of the Australian Information Commissioner ("OIAC"), after an unsuccessful attempt to abolish it;[43] under-funding of most other integrity and accountability agencies, such as the Australian National Audit Office;[44] attempts to place strict controls on the advocacy activities of charities and not-for-profit organisations;[45] secret prosecutions of whistleblowers;[46] and (unlawful) police raids on journalist's homes and offices in efforts to find the source of government leaks.[47] A New York Times journalist, in 2019, described Australia as "the world's most secretive democracy".[48]

The problem this highlights is that government transparency very much depends on the willingness of the government of the day to *be* transparent. The executive branch has a lot of power to simply refuse to explain themselves, refuse to comply with Senate orders for production of documents, and falsely claim exemptions under the *FOI Act*. There are currently no independent bodies with strong enforcement powers, and willing to use them, to provide an incentive or require secretive governments to be transparent. There should be. The Senate should establish an independent

[38] See further Janina Boughey, "A Call for Ongoing Political Commitment to the Administrative Law Project" (2021) 28(4) *Australian Journal of Administrative Law* 242, 249–52.
[39] See Commonwealth Parliament, Senate Select Committee on COVID-19, *Second Interim Report: Public Interest Immunity Claims* (February 2021) ("COVID 19 Committee Report").
[40] COVID-19 Committee Report (n 39) 1.
[41] Commonwealth Parliament, Senate Community Affairs References Committee, *Centrelink's Compliance Program: Fourth Interim Report* (August 2021).
[42] Commonwealth Parliament, Senate Select Committee on the Administration of Sports Grants, *Final Report* (March 2021) 66.
[43] See Johan Lidberg, "Closing Down FOI: A Case Study in Sneaky Government", *The Conversation*, 5 October 2015 <theconversation.com/closing-down-foi-a-case-study-in-sneaky-government-47424>.
[44] See Boughey, "Political Commitment" (n 38) 246-47.
[45] *Australian Charities and Not-for-profits Commission Amendment (2021 Measures No 2) Regulations 2021* (Cth), which the Senate disallowed on 25 November 2021.
[46] See Kieran Pender, "Witness J, K – and L? Open Justice, the NSI Act and the Constitution", *AUSPUBLAW* (Blog, 12 October 2021) <auspublaw.org/2021/10/witnesses-j-k-and-l-open-justice-the-nsi-act-and-the-constitution/>.
[47] *Smethurst v Commissioner of Police (Cth)* (2020) 94 ALJR 502.
[48] Damien Cave, "Australia May Well Be the World's Most Secretive Democracy", *The New York Times*, 5 June 2019 <www.nytimes.com/2019/06/05/world/australia/journalist-raids.html>.

arbitration process to deal with public interest immunity claims, like that in NSW, and be willing to enforce it.[49] And the OAIC should be fully funded and independent.

Police Discretion

The third accountability gap I want to address relates to police powers and discretion. During the pandemic, state health orders were largely enforced by police via fines. The orders were necessarily drafted and re-drafted in haste. This meant that there were often ambiguities in the orders themselves, and uncertainty about what the rules were at any given time.[50] In addition, the orders included a range of discretionary elements, such as deciding whether a person's excuse for leaving their house was "reasonable". The result was a great deal of discretionary power in the hands of police, which is not unusual.

But studies and data show that the there was a disproportionate impact on disadvantaged communities.[51] Research by Ben Mostyn and Niamh Kinchin shows that fines were used as "an extra form of punishment for alleged criminal behaviour" by "suspected drug users, young people, people with mental health issues and people with unstable housing".[52] That same research shows that police were themselves often unsure of the law, due to its rate of change, and took an overly restrictive approach to interpreting it. For example, seeing listed exceptions as fixed and exclusive, rather than examples of reasonable excuses.

When the police get the law wrong or act inconsistently or disproportionately in issuing fines, there are few options for challenging their decisions. There is no quick, cheap, independent review mechanism. There are internal review processes, but they are limited in the grounds on which fines can be challenged,[53] and reviews rarely succeed.[54] There is no avenue to argue that police exercised their discretion in a manner that was discriminatory, disproportionate or unfair. And the mechanisms that do exist may not be known, or accessible, to disadvantaged communities.[55] The only other option for challenging an infringement notice is to go to court, which, if unsuccessful typically results in a much higher penalty, plus court and legal fees. Thus, there is a strong incentive to pay fines even if they have been issued unlawfully or unfairly. Those who can afford to usually take this option. Those who cannot often do not pay, which can have significant consequences, including an escalation in

[49] See, eg, Commonwealth Parliament, Senate Legal and Constitutional Affairs References Committee, *A Claim of Public Interest Immunity Raised over Documents* (March 2014) ch 3; Janina Boughey and Greg Weeks, "Government Accountability as a Constitutional Value" in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart, 2018) 99, 109–112.

[50] Edgar (n 3); Boughey, "Executive Power" (n 22) 172.

[51] Mostafa Rachwani and Nick Evershed, "'Incredible imbalance': NSW Covid fines during Delta higher in disadvantaged suburbs", *The Guardian* (online, 10 February 2022) <www.theguardian.com/australia-news/datablog/2022/feb/10/incredible-imbalance-nsw-covid-fines-during-delta-higher-in-disadvantaged-suburbs>; Osman Faruqi, "Compliance Fines under the Microscope", *The Saturday Paper* (online, 18 April 2020)<www.thesaturdaypaper.com.au/news/health/2020/04/18/compliance-fines-under-the-microscope/15871320009710>.

[52] Ben Mostyn and Niamh Kinchin, "Can I Leave the House? A Coded Analysis of the Interpretation of the Reasonable Excuse Provision by NSW Police During the COVID-19 Lockdown" (2021) 49(3) *Federal Law Review* 465, 495.

[53] A person will generally need to show that the fine was issued unlawfully, or that they are particularly vulnerable and cannot pay the fine, and possibly that their vulnerability contributed to their conduct See, eg, *Fines Act 1996* (NSW) s 24E; "Infringement Notices", *Victoria Police* (Web Page, 9 January 2020) <www.police.vic.gov.au/infringementnotices# disputing-an-infringement-notice>; "Fines and Fees", *NSW Revenue* (Web Page) <www.revenue.nsw.gov.au/fines-and-fees/request-a-review>.

[54] See the Attorney-General of Victoria's annual reports on the infringement system at: <www.justice.vic.gov.au/justice-system/fines-and-penal
ties/annual-reports-on-the-infringements-system-2007-18>. See also NSW Law Reform Commission, *Penalty Notices* (Report 132, February 2012) 208–11 <www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-132.pdf>.

[55] NSW Law Reform Commission (n 53) 12.

penalties, a far larger debt, garnished wages, seizure of property and ultimately even imprisonment.[56]

This limited review system makes sense given that fines are designed to be an efficient enforcement mechanism for minor, non-violent offences and save all parties (and taxpayers) the cost of criminal proceedings. However, as the NSW Law Reform Commission observed in 2012:

> The penalty notice system does not have the transparency normally associated with justice systems in democratic societies. . . . Most people simply pay the penalty. Only 1% elect to go to court, so that the guilt or innocence of the recipient is rarely scrutinised. . . . There are avenues for independent review of a penalty notice, but they are limited. Further the system is regulated by guidelines. Some of these are public but others are not.[57]

A truly independent, quick, fines review system would help address this accountability gap. It should not be full-scale merits review by a tribunal, or (usually) involve an oral hearing. But a truly independent review on the papers should be available, with a broader remit than currently exists for public order offences. Mostyn and Kinchin also recommend better training on what the law is for those charged with enforcing it.[58] There is probably not much that can be done about certainty in the law in emergencies, where the rules need to change rapidly to respond to evolving circumstances. But the rules themselves need to be easily accessible to those governed by them. For much of the last two years, it was difficult to find some of the state orders, particularly those in Victoria which were published only in government gazettes.

Conclusion

None of the accountability issues I have discussed today are unique to COVID or even to emergencies more broadly. Nor are they new. They are existing gaps in our system of executive accountability and transparency, which the experience of the last two years brought into the spotlight. What some of them highlight is that even with a web of laws and systems designed to hold the executive to account, much still rests on a government's willingness to comply, and commitment to explaining their decisions to the public. There are loopholes which can be exploited to evade accountability and transparency. But these can and should be fixed. Accountability might look different in an emergency, but it does not need to disappear.

[56] NSW Law Reform Commission (n 53) 29–31; Poppy Morandin, "Australia: Suburbs with the highest rates of COVID related fines revealed", *Mondaq* (Web page, 21 April 2022) <www.mondaq.com/australia/government-measures/1169868/suburbs-with-highest-rates-of-covid-related-fines-revealed>.

[57] See also NSW Law Reform Commission (n 53) xv.

[58] Mostyn and Kinchin (n 51) 494.