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Commonwealth Government COVID-19 Response Inquiry
Department of Prime Minister and Cabinet
Australian Government
COVID-19Inquiry@pmc.gov.au

Dear Independent Panel

Thank you for the opportunity to make a submission to the Commonwealth Government COVID-19 Response Inquiry. We do so in a personal capacity.

We have been working over the past two years on a project examining how Australian Parliaments responded to the COVID-19 pandemic. As part of this work, we identified core functions that Parliament should play during a public health emergency. We then assessed Australian Parliaments against these functions. Below we set out several key findings from our study, relating to the Commonwealth Parliament. We have attached a recent paper that expands on this material and is forthcoming in the *UNSW Law Journal*.

The Commonwealth Parliament did not meet regularly at the height of the crisis.

It is important that Parliament meet regularly during a public health emergency. Fundamentally, the government's mandate rests on the support of the legislature. 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. Failing to sit regularly may have contributed to social unrest during the pandemic.

The pandemic severely affected the capacity of the Commonwealth Parliament to meet its core function of regular sittings. It was not alone. In 2020, every Australian parliament – except for the Parliament of Western Australia – sat for fewer days than their recent historical average pre-COVID-19. The Commonwealth Parliament, however, performed amongst the worst. In 2020, the Parliament sat for 21 days less than its recent historical average.

This failure was most pronounced at the height of the crisis. Between late March 2020 and May 2020, the Parliament met only five times. During this period legislation of great significance was being passed. On 23 March 2020, the Parliament passed legislation authorising \$66 billion in spending. At the next sitting on 8 April, \$130 billion of spending was authorised. The failure to sit regularly meant that these funding commitments did not receive appropriate debate.

It is not clear why Parliament did not sit regularly when technology was available to facilitate safe sittings. The Parliament recognised this fact but did not work expeditiously to make it possible. On 23 March 2020 it adopted a resolution to facilitate hybrid sittings. It was not until 20 August, however, that it agreed to allow members unable to travel to Canberra to participate remotely. Even then, significant restrictions were placed on those who attend online. Members participating remotely were not permitted to vote, be counted for a quorum, move motions, propose, or support a proposal to discuss a matter of public importance or call a division. Here, even when Parliament sat – many of its members were not able to contribute. Their constituents were left short-changed. This practice may also have breached ss 23 and 40 of the *Constitution*.

The Commonwealth Parliament allowed time for debate on key measures and issues, but pairing arrangements were problematic.

During a crisis, when urgent measures are required, the slow and deliberative legislative process may be unsuitable. At the onset of the pandemic, parliaments accepted that standing orders would need to be suspended to facilitate the expedited debate and passage of key measures.

In the Commonwealth 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, government 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. Debate was brief, but its existence was a recognition that constructive and genuine engagement from Members, drawing from issues experienced by their constituents could improve the government's immediate response.

Time may have been provided for debate on key measures and issues in the Parliament, but social distancing requirements and the need to reduce the risk of transmission meant that not all Members could attend sessions; many were paired. Pairing arrangements were important. They preserved the government's narrow majority while facilitating the meeting of Parliament in uncertain times. However, the extent of these arrangements weakened Parliament's representative character. On 23 March 2020, for example, fewer than 20 per cent of Members who attended were women, no Tasmanian MPs attended, and neither did the two Indigenous Members.

The extensive use of pairs should be avoided. Alternative options to facilitate the presence of Members 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 implement hybrid sittings.

The Commonwealth Parliament did not exercise sufficient legislative oversight.

Our constitutional system recognises that extreme measures may be necessary in moments of national crisis, 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 important institutional features that allow it to examine, and critique proposed laws and delegated legislation. Unfortunately, the pandemic exposed longstanding deficiencies in mechanisms of legislative oversight.

Legislation empowered the executive to impose unprecedented restrictions on the community through delegated instruments. While all public health orders imposed significant impositions on the lives of Australian residents, some had life or death implications. Under the *Biosecurity Act 2015* (Cth), for example, the Health Minister banned citizens from returning home if they had been in India over the prior 14 days. This decision left 9000 citizens with 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.

Delegated legislation is not unusual, but the government relied on its 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. Many of these orders were exempt from disallowance, preventing Parliament from testing or challenging the determinations made by ministers or chief health officers.

Parliamentary committees were active, providing a degree of legislative oversight. However, such was the speed with which government acted, these committees were not able to provide real-time scrutiny.

The Commonwealth Parliament also largely failed to effectively 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. 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.

Unfortunately, the Australian Parliament was largely unable to hold government administration and policy to account during the pandemic. For example, following the persistence of Senator ██████████ the AAT ruled that the National Cabinet was not a committee of the Commonwealth Government Cabinet. This meant it could not rely on conventions of cabinet confidentiality. Despite this victory, however, the Government refused to accept the outcome. It even went so far as to introduce legislation to exclude the National Cabinet from the *Freedom of Information Act*. While the bill lapsed at dissolution of the 46th Parliament, the Labor government has continued to prevent the release of National Cabinet documents.

Recommendations

In times of national crisis or emergency, the legislative branch of government is often perceived as unable to respond effectively. But Parliament should not 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.

Our study presents several key recommendations to better prepare our system of governance for a future public health emergency or national crisis.

1. The Parliament should conduct a comparative review into arrangements for hybrid or remote sittings to ascertain international best practice. In extreme cases, like a public health crisis, Members unable to travel to Canberra should be able to participate to the full extent.
2. Parliament should amend the *Biosecurity Act 2015* (Cth) to permit it to scrutinise and overturn declarations of emergency and public health directions by the Health Minister. A review should be undertaken to identify all similar legislation.
3. The practice of issuing non-disallowable legislative instruments should cease except in exceptional and clearly identified circumstances.

Yours sincerely

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