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The impact of the COVID-19 pandemic on parliament

by Talina Drabsch

Key democratic institutions, including parliaments, have not been immune from the impacts of the COVID-19 pandemic. The pandemic has at times affected the ease with which parliaments can fulfil their functions of making laws, controlling state finances, overseeing the executive arm of government, and providing a forum for debate of matters of importance.

Early in the pandemic, it seemed that some Australian parliaments would not function for many months, as was the case during the Spanish flu pandemic in 1919.¹ However, changes to practice and procedure, and the use of technology, enabled parliaments to continue operating albeit in a limited form. Parliamentary sittings were held and some committee inquiries continued.

This e-brief outlines how Australian parliaments adapted in a fast-moving and uncertain environment, focusing on the NSW Parliament. It also examines the implications for parliamentary democracy from parliament operating in its diminished form and from the government's legislative response to the crisis. Finally, the paper considers how parliaments can best adapt and respond should similar challenges arise in future.

1 The government's initial response to the pandemic

On 30 January 2020, the World Health Organisation declared a public health emergency of international concern in response to the coronavirus outbreak. By 11 March 2020, the COVID-19 outbreak had been declared a global pandemic. The way in which the Federal and NSW governments initially responded to the COVID-19 outbreak serves as important context for the environment in which NSW Parliament operated in the first half of 2020. A sense of urgency and great uncertainty permeated many of the decisions made.

On 18 March 2020, the Governor General of Australia declared a human biosecurity emergency under section 475 of the [Biosecurity Act 2015](#) (Cth). Before this declaration could be made, the Federal Health Minister had to be satisfied that:

- (a) A listed human disease is posing a severe and immediate threat, or is causing harm, to human health on a nationally significant scale; and

- (b) The declaration is necessary to prevent or control:
 - (i) the entry of the listed human disease into Australian territory or a part of Australian territory; or
 - (ii) the emergence, establishment or spread of the listed human disease in Australian territory or a part of Australian territory.

The [Biosecurity \(Human Biosecurity Emergency\) \(Human Coronavirus with Pandemic Potential\) Declaration 2020](#) empowered the federal Minister for Health to issue directions and set requirements as necessary to combat the outbreak.²

The various governments within Australia then set about establishing the way that they would manage the threat posed by the COVID-19 pandemic. In contrast to the other states and territories, the NSW Government did not declare a state of emergency or a public health emergency, preferring to use general powers available under the [Public Health Act 2010](#) (NSW) to manage its response to the pandemic.³

[Section seven](#) of the *Public Health Act 2010* (NSW) empowers the NSW Health Minister to issue directions by order in times of public health risk and does not require a state of emergency to first be declared. The NSW Health Minister may take such action and give such directions as considered necessary to deal with the risk identified and its possible consequences. Whilst these orders may not be disallowed by NSW Parliament, they have a maximum period of operation of 90 days.⁴

The first public health order commenced on 16 March 2020 and restricted public events to 500 persons.⁵ However, within the following fortnight a further 14 orders or amendments to orders had been made in NSW and widespread restrictions on gatherings and movement had been imposed as a result of the [Public Health \(COVID-19 Restrictions on Gathering and Movement\) Order 2020](#).⁶ This order prohibited a person from leaving their place of residence without a reasonable excuse (including to obtain food or other goods and services, for work or education if not possible to do it at home, for exercise, or for medical or caring reasons). Public gatherings were limited to two persons. NSW Parliament next sat in the middle of this period of rapid change, with the population of NSW increasingly directed to stay home and limit in-person interaction with others outside of their immediate residence.

2 Practice and procedure changes in the NSW Parliament

In accordance with the sitting calendar, the Parliament of NSW sat on 24 March 2020 after a two week planned break. However, much had changed in relation to the COVID-19 outbreak since the Legislative Assembly had previously sat on 5 March 2020. In the interim, the World Health Organisation had confirmed the COVID-19 outbreak to be a pandemic, and a human biosecurity emergency had been declared by the Australian Government. Adjustments were urgently made to parliamentary practice and procedure in NSW to account for these circumstances. Arrangements were made to enable the Houses to sit to pass the appropriate emergency legislation to deal with the repercussions of the pandemic.

2.1 Sittings on 24 March 2020

The sitting of the Legislative Assembly on 24 March 2020 differed to usual practice in a number of aspects. Pairing arrangements that allowed 50 of the 93 Members of the Legislative Assembly to be absent from the Chamber without disrupting its party composition were made. This enabled the appropriate social distancing of those Members who were physically present. The Speaker noted that, “Today is a day like none other in the history of this Parliament and we have just added to the historical nature of that”.⁷

The public galleries in both the Legislative Assembly and Legislative Council were closed to the public.⁸ Whilst it was intended that the proceedings of the Chamber would be broadcast on the parliamentary website, there were technical difficulties with the sound and the sitting was suspended for a short period. An attempt was made to resolve the audio issue before a live stream of the Legislative Assembly proceedings was added to Parliament’s Facebook page.

Standing and sessional orders were suspended to permit the passage of emergency legislation responding to the COVID-19 pandemic. This allowed the following bills to be introduced without notice and to pass through all stages of both Houses on 24 March 2020:

- [COVID-19 Legislation Amendment \(Emergency Measures\) Bill 2020](#); and the
- [Treasury Legislation Amendment \(COVID-19\) Bill 2020](#).

Both the Legislative Assembly and Legislative Council adjourned on 24 March 2020, agreeing to return on 15 September 2020. The 2020 Autumn and Spring sittings for the Legislative Assembly were accordingly amended to remove 24 sitting days from the calendar.⁹ Acknowledging the unusually long length of adjournment, the Hon Andrew Constance MP stressed that the House could be recalled as necessary in the public interest:

...we are empowering the Speaker to have the House sit at any time. Given what our community is facing with the COVID-19 virus, there could be occasions when the House does need to sit to deal with emergency legislation.¹⁰

Further:

The key point I make again is that we are in very tough times and for that reason we need to have flexibility with the sitting times of the House. The House will be recalled as necessary in the interests of our community, given what we are facing and will continue to face with the pandemic.¹¹

A leave of absence was granted to every Member of the Legislative Assembly and Legislative Council from the rising of the House to the date of the next sitting.

A motion was also passed in the Legislative Council to override the parliamentary sitting calendar with the effect that the House would not meet again until 15 September 2020. The Hon Don Harwin MLC acknowledged the influence of the approach adopted by the Federal Parliament which had suspended its sitting calendar until September 2020 the previous day. He

explained some of the reasoning behind what was accepted to be an unusually long special adjournment:

The Government is proposing this based on the advice that it has received from NSW Health, the dimension of the public health crisis facing the State from COVID-19 and having taken note of what the Federal Parliament did yesterday, facing similar circumstances. The date chosen in the special adjournment is the next scheduled sitting date of the Legislative Council after the date chosen by the Federal Parliament. That is the logic behind the date chosen.¹²

A key purpose of the Parliament of NSW is to scrutinise the Executive Government and hold it to account. The reduction of days in the sitting calendar for 2020 potentially hampered the ability of Parliament to fulfil this role (see section four of this paper for further discussion of some of the democratic implications). Aulby argues that:

...parliaments should continue to sit during the COVID-19 crisis. The scrutiny of legislation in public view is crucial to our democratic process, particularly at [sic] time of increased government intervention and public spending.¹³

It also raised questions about the appropriate role of Parliament. As warned by Mills:

...the COVID-19 episode raises important, even existential, questions about the role of Australia's long-standing institutions and practice of representative democracy. What fundamentally are the expectations, responsibilities and possibilities of Parliament in a time of crisis? Can Parliament contribute to the management and resolution of the problem – or must it simply stand aside and allow the executive to get on with the job? Has the widely reported international and domestic malaise become so pervasive that Australians are prepared to do without Parliament entirely for long periods?¹⁴

To facilitate the continued accountability of the NSW Government throughout the pandemic, irrespective of whether Parliament itself was sitting, the Legislative Assembly passed new sessional orders to allow for the electronic tabling and transaction of documents. [Standing Order 266](#) was altered to adapt the procedure for the tabling and printing of papers. Reports or documents required by statute to be tabled in the House could instead be lodged with the Clerk if the House was not sitting ([sessional order 266A](#)). In addition, unless ordered otherwise, any reference to printing in the Standing and Sessional Orders was to mean publication, including by electronic means ([sessional order 266B](#)). [Sessional order 369](#) allowed the requirement that matters be authorised or transacted in writing to be met electronically, with documents to bear clearly displayed signatures. In the Legislative Council, standing order 55 already provided for documents to be tabled with the Clerk when the House is not sitting.

Other sessional orders were passed to manage the schedule of meetings of the House and to facilitate COVID safe sittings. In the Legislative Assembly, [Standing Order 180](#) was amended to introduce a new process for recording divisions that allowed for social distancing requirements. If a division was called, Members no longer needed to move to the appropriate side of the Chamber and remain there until everyone had been counted. Instead, Members could enter through one of two entrances to the Chamber, be

counted and then immediately exit the Chamber. The Speaker could extend the time allocated to the division at his or her discretion if Members were still arriving to vote after 14 minutes had lapsed.

The NSW Government, if the House was not sitting, was permitted under [sessional order 47A](#) to request that the Speaker, in the public interest, set an alternative day or hour for the next meeting of the House. If the Speaker was satisfied with the request, a new date and time would be set and Members of Parliament subsequently informed. The intention behind the Order was to provide greater flexibility for the House. It allowed the next meeting of the House to occur at a date later than that scheduled where necessary (the previous version of the Order only permitted an earlier meeting).

Comparable changes were also made in the Legislative Council. While the Council had existing recall provisions, the President had no capacity to postpone a scheduled meeting. The House adopted a new sessional order which authorised the President, in the event of a public health concern and following consultation with the leader of each party and independent crossbench member, to postpone a scheduled meeting of the House and fix an alternative day or hour of meeting by communication addressed to each member.

The smaller number of Members (42 Members as opposed to the 93 Members of the Legislative Assembly) enabled the Council to more readily accommodate social distancing requirements. By utilising the public galleries in addition to the Chamber, all Members were able to continue to participate in the sittings. Standing orders 114 and 115 were amended to vary the procedure for conducting divisions, to allow Members to stand in place to be counted for a division rather than moving to either side of the Chamber. In addition, temporary orders for a 'paperless Chamber' were introduced, allowing amendments, formal business requests and signed copies of notices to be lodged by email.

2.2 Sittings from May 2020 onwards

It eventuated that the Legislative Assembly was recalled under sessional order 47A four months earlier than the scheduled date of 15 September 2020.¹⁵ The House sat on 12 May 2020, with further sittings added for June, July and August. As a result, only ten scheduled sitting days for the Legislative Assembly were missed (as opposed to 24).¹⁶

The Legislative Council was recalled to sit on 12 and 13 May 2020 to consider bills that would implement emergency measures in response to the pandemic. It also amended its sitting calendar so it could continue to sit throughout the pandemic.¹⁷ In the end, nine of the sitting days originally scheduled for the Legislative Council for 2020 were missed.

Alterations to the rules and procedures for the Legislative Assembly that had been introduced to accommodate social distancing remained in place. The Legislative Assembly required social distancing of 1.5 metres between each person and four square metres of floor space around each person. Changes had been made to allow different areas of the Chamber to be utilised so that as many Members as possible could be present. Members were rostered and paired for each sitting day so the number of Members on the floor of the Legislative Assembly Chamber did not exceed 23 (excluding the Speaker).

The doors to the Chamber remained open to ensure the maximum flow of fresh air as well as eliminating the need to handle doors.

Other changes to usual practice were made. The Legislative Assembly permitted certain items of business, such as notices and motions for business, proposed amendments to motions and amendments to bills, to be submitted by electronic means to minimise the handling of paper in the Chamber. Question Time was altered to comprise five questions instead of ten. However, all questions were to come from the Opposition and crossbench only (four questions asked by the Opposition and one by the crossbench).¹⁸ Members would be informed of the Ministers to be present for Question Time by 12pm on a sitting day. In addition, on 12 May 2020, the Legislative Assembly resolved to suspend standing and sessional orders to allow written questions to be lodged during two non-sitting weeks so as to allow Members to continue to scrutinise the executive government when Parliament could not sit.¹⁹

Six additional [sessional orders](#) were adopted in the Legislative Assembly on 2 June 2020 to further adapt to the circumstances presented by the pandemic:²⁰

- **Community recognition statements** – sessional order 108A permitted MPs to submit two written Community Recognition Statements each sitting day, as opposed to one, for the remainder of 2020;
- **Notices of motion** – sessional order 133 imposed a 30 second time limit on the giving of a General Business Notice of Motion;
- **Copies of notices of motion** – sessional order 134 provided for the electronic receipt of Notices of Motion as opposed to paper copies;
- **Removal of Members** – sessional order 249B permitted the Speaker to direct a MP to leave the Chamber if they exhibited symptoms of COVID-19 or were unable to demonstrate that they had cleared temperature and symptom screening that day;
- **Written questions** – sessional order 132 provided that written questions be lodged only in the Table Office and not handed to the Clerks-at-the-Table;
- **Tabling of papers** – sessional order 266 permitted Ministers to table papers electronically or in hard copy in the House.

Social distancing measures were also in place in the Legislative Council with Members continuing to use the public gallery for this purpose. However, unlike the Legislative Assembly, all Members could be present in the Chamber at the same time, thus requiring fewer changes to be made to its practice and procedure.

On 10 August 2020, Members of the Legislative Council were informed by the President that the House would be recalled to sit on 25 August, in response to a request by a majority of Members that the House meet sooner than the next scheduled sitting day to consider a range of matters.²¹

2.3 Deferral of the 2020-21 Budget

On 20 March 2020, the NSW Treasurer announced that the 2020-21 Budget would be delayed until later in the year.²² The Treasurer explained that its deferral aligned with the approach adopted by the other states and territories and followed a recommendation by the National Cabinet. However, he noted that the support of NSW Parliament would be sought “to ensure that necessary funds are available to continue the delivery of Government services and projects, until the full Budget is handed down”.

The [*COVID-19 Legislation Amendment \(Emergency Measures – Treasurer\) Act 2020*](#) was passed on 13 May 2020 which allowed for:²³

- deferral of the 2020-21 Budget from June until later in 2020;
- an extended time for the Treasurer to authorise payments from the Consolidated Fund on the lapse of appropriations made by the 2019-20 Budget; and
- authorisation of payments from the Consolidated Fund (with the Governor’s approval) until the enactment of the 2020-21 Budget for emergencies resulting from the COVID-19 pandemic.

The Treasurer made a Ministerial Statement on 16 June 2020 (the date originally set for delivery of the new Budget) updating the parliament on the economic situation in NSW as a result of the COVID-19 pandemic.²⁴ The Leader of the Opposition addressed the Legislative Assembly in reply.

2.4 Parliamentary committees

Parliamentary committees in NSW perform a number of functions including:²⁵

- overseeing specific activities of the Executive in greater detail;
- conducting detailed examination of legislative proposals, regulations and the operation of policy;
- provision of a link between Parliament and the people, as an authoritative forum where interest groups can put their views on the record;
- provision of a link to Parliament and ultimate accountability for such independent statutory officers as the Auditor-General, the Ombudsman’s Office, and the Independent Commission Against Corruption; and
- reporting to and better informing the Parliament.

These functions, especially that of scrutinising the Executive, assumed a particular importance during the pandemic. The reduction in the number of sitting days provided Members with fewer occasions to hold the Executive to account in the parliamentary chamber itself. This was further exacerbated by the limited available opportunities for debate and discussion on the days that Parliament did sit, as the business of the House was typically focused on the speedy passage of emergency legislation.

The flexibility of the committee structure in NSW was demonstrated by its ability to quickly adapt to the circumstances of the pandemic. In the Legislative Assembly, [*Standing Order 295*](#) already provided for Legislative

Assembly administered committees to conduct proceedings by electronic communication without members of the committee or witnesses being present in one place. Such proceedings are permissible so long as Members can speak to and hear each other contemporaneously whilst deliberating. Members of the committee must also be able to contemporaneously hear a witness giving oral evidence and be able to put questions to the witness in each other's hearing.

However, some changes to the procedure for Legislative Council committees were necessary to enable them to operate throughout the pandemic. On 24 March 2020, a temporary order was adopted to allow the full electronic participation of all Members and witnesses in committee proceedings.²⁶ The importance of the role of parliamentary committees in such a time was highlighted by the Hon Don Harwin MLC:

Other changes that we will make today include strengthening the capacity of another very important part of our work, the committee system, by broadening the way in which the committee system can do its work. We will be making changes so that deliberative meetings can be held by way of electronic means. This means that the opportunity for non-Government members, and indeed Government members, to scrutinise the activities of the Executive Government at this very worrisome time for everyone in the community will not be affected. The committee system will still be able to function—and function in a more practical way—during this difficult time for all of us.²⁷

Committee meetings and hearings were soon being conducted throughout the pandemic, with Members connecting from various locations within NSW. On 22 April 2020, the [Legislation Review Committee](#) became the first Committee during the pandemic to hold a meeting via videoconference. It tabled the [Legislation Review Digest No 12/57](#) later that day, which examined the *COVID-19 Legislation Amendment (Emergency Measures) Bill 2020* and the *Treasury Legislation Amendment (COVID-19) Bill 2020*.

The [Investment, Industry and Regional Development Committee](#) was the first Committee to hold a virtual public hearing, doing so on 5 May 2020.²⁸ Its Chair, Justin Clancy MP acknowledged that:

Whilst these virtual proceedings are not without their technical and procedural challenges, they have enabled us to perform one of our most important roles – listening to public evidence.²⁹

The committee system also provided a means for specifically scrutinising the way in which the COVID-19 pandemic was being managed in NSW. The [Legislative Assembly Public Accounts Committee](#) received a [confidential briefing](#) from the Secretary of the Treasury on 30 April 2020 about the economic forecast and the Government's response to the crisis. This was to counter the absence of a formal process for parliamentary scrutiny of the fiscal and budgetary response to COVID-19. The [Treasurer's response](#) in September 2020 (made public) to a series of written questions from the Committee provided a means to hold the Government to account and maintain fiscal scrutiny.

Further, the Legislative Council Public Accountability Committee self-referred its [inquiry](#) into the NSW Government's management of the COVID-

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19 pandemic on 27 March 2020. Its Chair, David Shoebridge MLC, noted the importance of the Committee in:

...ensuring the highest levels of public accountability and oversight at a time when governments everywhere are being given unprecedented powers, and the normal parliamentary checks and balances on executive government are being temporarily suspended.³⁰

It held seven public hearings in May and June 2020 and was the first Legislative Council Committee to hold hearings completely by videoconference. Various Government portfolios, including health, education, treasury, policy, better regulation and innovation, and planning, came before the Committee at hearings in 2020.³¹ After the initial restrictions associated with the pandemic eased, hearings reverted to their traditional format but some witnesses still attended virtually. The Committee was due to report by 30 June 2021.

The ability of parliamentary committees to provide executive oversight during a pandemic has been highlighted by Moulds:

From within this rush of emergency law-making and institutional power transfer, one parliamentary oversight mechanism managed to struggle to its feet. The very same parliamentary mechanism that owes its existence to war-time law-making emerged as a touchstone in this modern crisis: the parliamentary committee. While parliaments themselves have suspended or reduced sitting days, parliamentary committees have emerged as the forum of choice when it comes to providing some form of parliamentary oversight of executive action.³²

However, according to Moulds, this reliance on parliamentary committees raises questions “as to whether parliamentary committees are up to the job – particularly when the stakes are so high and the political terrain so uncertain”.³³ Chaplin has outlined some of the advantages and disadvantages of proceeding by committee at this time:

The advantages to committee proceedings is (sic) that they are smaller, having lower quorum requirements, with smaller numbers; there are fewer technological challenges; they can adopt their own rules (subject to House-imposed constraints); they can allow the participation of non-members (witnesses and experts); they are less formal (for example no need for the mace etc.); the form of proceeding can allow for more follow-up and secondary questioning that is not normally part of Question period; they can more easily review documents and proposed legislation since there are smaller numbers; they can act with greater agility; and they can aid in the simplification and streamlining of any work that must be carried out by the House. However, there are limits. Committees can more easily be structured to exclude certain members from attending by having a limited and even identified membership. They cannot make final decisions. They cannot give binding direction to the government. They cannot vote on legislation, and they cannot vote non-confidence in the government.³⁴

Despite some of the limits under which parliamentary committees operate, Moulds has highlighted the potential for committees to at least “sound the alarm”:

Australia’s approach depends heavily on the idea that groups of parliamentarians, brought together with members from all sides of politics in parliamentary committees, will sound the alarm about a proposed law that

looks likely to have a negative impact on individual rights and liberties or to transfer too much power to the executive government or its agencies. Sounding the alarm won't necessarily stop the law being made, but it will at least make sure that other parliamentarians and the public know what they are in for when the law is debated.³⁵

2.5 Modernisation project

There have been a number of innovations adopted by the NSW Parliament which were driven by the circumstances of the pandemic and a desire to retain the 'public' nature of parliament. This includes the livestreaming of Legislative Assembly proceedings on social media following the closure of the public galleries from 20 March 2020. Video tours were also developed and shared on digital platforms following the cancellation of public tours.³⁶

Other modernisation initiatives began prior to the COVID-19 pandemic, such as development of the eDivision app and ePetitions.

One of the strategic priorities of NSW Parliament for 2019 to 2023 is the modernisation of Parliament.³⁷ The 'Digital Parliament' transformation is a joint project under this objective. The potential value of these initiatives was enhanced by the pandemic.

2.5.1 eDivision app

The eDivision app was first used on 25 February 2020 to digitally record votes in the Legislative Assembly.³⁸ Clerks-at-the-Table are able to view the tally of a division via a parliamentary portal. This app, which was already in development well before the pandemic, assisted the Legislative Assembly to accommodate the need for social distancing throughout divisions as well as minimising the handling of paper in the Chamber.

2.5.2 ePetitions

Another development was the implementation of [ePetitions](#) from August 2020. Like the eDivision app, the consideration of its potential had begun well and truly before the pandemic. In 2017, the Legislative Council Procedure Committee inquired into the merits of introducing e-petitions and the mechanisms by which they could be accepted in the Legislative Council.³⁹ However, the need for an electronic option for petitions assumed an urgency with the onset of the pandemic. As stated by Mr Shoebridge MLC:

We are about to go into a potentially long shut down. Our current petition mechanisms involve paper petitions. They simply will not work when we are in a lockdown. Passing around a paper petition would be a public health danger as well. We urgently need to get on with introducing e-petitions.⁴⁰

The Legislative Assembly began to accept online petitions from 10 August 2020.⁴¹ This enabled the community to continue to present their direct requests to Parliament and thus be involved in the legislative process.

It is expected that ePetitions will be introduced in the Legislative Council by the second half of 2021.

3 Changes in other Australian Parliaments

3.1 Federal Parliament

3.1.1 Changes to sitting calendar

Federal Parliament sat on 23 March 2020 after a two week break. As in NSW, there had been a number of major developments in relation to the COVID-19 pandemic in the fortnight since Parliament had last sat. These impacted the practice and procedure for the Federal Parliament as it prepared to meet under these changed circumstances.

Pairing arrangements were used to accommodate the need for the social distancing of Members in the Chamber whilst maintaining the party composition of the House. The House of Representatives resolved to allow the House to meet in a manner and form not otherwise provided by the Standing Orders, provided that the Leader of the House and Manager of Opposition Business agreed.⁴² Standing Orders were also amended on 23 March to enable motions to suspend standing orders without notice to be carried by a simple majority as opposed to an absolute majority, where the Leader of the House and Manager of Opposition Business agreed.⁴³

Similar to NSW, the Federal Parliament initially decided that it would suspend sittings for a number of months. On 23 March 2020, the House of Representatives resolved to adjourn until a date and hour to be fixed by the Speaker. The House of Representatives authorised the Government and Opposition to determine by agreement the rules and orders necessary to enable such meetings to take place. The equivalent authority for determining the rules and orders for Senate meetings was given to the Senate Procedure Committee. The Senate resolved that its orders relating to meeting days for 2020 be suspended until 11 August 2020. The President of the Senate was to alter the date and time of the next meeting of the Senate at the request and agreement of the Government and Opposition.

As highlighted by the Centre for Public Integrity, the suspension of Federal Parliament for five months reduced the number of sitting days planned for 2020 by almost 30%, with 21 scheduled sitting days to be missed.⁴⁴ This was criticised by the Centre for Public Integrity which noted that other democracies had limited any reduction in the number of sitting days to a maximum of nine days, whilst also providing for continued and transparent governance by other means.⁴⁵

However, as in NSW, the fears of a long period between parliamentary sittings were not realised as the Federal Parliament was recalled and sat much earlier than originally expected. It was recalled for a one sitting day in April and then both Houses of Parliament sat from 12 to 14 May 2020. The Parliament next met from 10 to 18 June 2020 for its first full sitting fortnight since the start of March.⁴⁶ This sitting period saw such changes as the doors to both Chambers being left open to minimise the need to touch the door handles when entering or leaving the Chamber.⁴⁷

There was subsequently a nine week break before a sitting week scheduled for 24 August 2020. Border closures within Australia, in addition to quarantine requirements, were making it difficult for some Members to physically attend this sitting in Canberra.⁴⁸ The form this sitting week was to take subsequently

attracted much attention and debate, notably whether or not parliament would accommodate the remote attendance of Members rather than requiring them to be physically present in Canberra.⁴⁹

In the end, the Federal Parliament adopted a hybrid model with some Members present in the Chamber and others attending via a secure video link from their electorate office.⁵⁰ Members were able to attend via a video link if they could prove that it was “essentially impossible, unreasonably impracticable, or would give rise to an unreasonable risk for the Member to physically attend” as a result of the pandemic.⁵¹ In accordance with the [Agreement for Members to contribute remotely to parliamentary proceedings](#), those who attended via video link were not able to vote or be counted towards quorum, nor move amendments to a motion or bill. Nonetheless, they could participate in debates and ask questions during question time. This was the first time the asking of questions in question time by video link had been permitted. The *Agreement for Members to contribute remotely to parliamentary proceedings* applied from 24 August to 3 September 2020.

3.1.2 Parliamentary committees

Remote access to parliamentary proceedings was made possible via the technology used for parliamentary committee hearings. Federal parliamentary committees could already hold and attend proceedings utilising video technology prior to the pandemic. [House of Representatives Standing Order 235\(b\)](#) enables a committee to conduct proceedings via audio visual or audio links so long as members and witnesses can speak to and hear each contemporaneously. [Senate Standing Order 30\(3\)](#) similarly provides for Senate committees to hold meetings by electronic communication.

The pre-existence of these standing orders enabled federal parliamentary committees to readily adapt to the circumstances of the pandemic. Whilst some committees temporarily suspended their inquiries, others were able to continue to meet remotely using tele and video conferencing technology.

Like in NSW and other states and territories (see section 3.2), parliamentary committees were utilised as a means of keeping the executive arm of government accountable as it responded to the pandemic. The [Senate Standing Committee for the Scrutiny of Delegated Legislation](#) announced on 1 April 2020 that it would regularly meet and report to the Senate to enable it to fulfil its role in scrutinising laws made by the executive when Parliament was not sitting.⁵² The Chair of the Committee, Senator the Hon Concetta Fierravanti-Wells, stated:

Parliamentary scrutiny of executive-made laws is essential in critical times like these. By continuing to scrutinise legislative instruments which would ordinarily be subject to parliamentary oversight, the committee will play its part in ensuring that the government remains accountable to the Parliament during this time.⁵³

As an additional measure, the Senate Standing Committee for the Scrutiny of Delegated Legislation [published](#) all COVID-19 pandemic-related delegate legislation on its website to facilitate the public scrutiny of such legislative instruments.

A [Senate Select Committee on COVID-19](#) was also established on 8 April 2020 to inquire into the response of the Australian Government to the COVID-19 pandemic. Its [interim report](#) was published in December 2020, with a final report due by 30 June 2022.

3.2 State and Territory Parliaments

Parliaments in Queensland⁵⁴, Victoria, South Australia⁵⁵, Tasmania, the Australian Capital Territory and the Northern Territory also faced challenges to their usual practice and procedure as a result of the pandemic.⁵⁶ A number of them adjusted their sitting calendars for 2020.

Parliamentary committees were also utilised for scrutiny purposes in various Australian jurisdictions. This includes a number of committees and inquiries established for the specific purpose of examining the response of the executive government to the pandemic. Some relevant committees include:

- Queensland – Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee [Inquiry into the Queensland Government’s health response to COVID-19](#);
- South Australia – [COVID-19 Response Committee](#);
- Tasmania – Parliamentary Standing Committee of Public Accounts – [Inquiry into the Tasmanian Government’s response to the COVID-19 pandemic](#);
- Victoria – Public Accounts and Estimates Committee – [Inquiry into the Victorian Government’s response to the COVID-19 pandemic](#) (report tabled 2 February 2021);
- Western Australia – Procedure and Privileges Committee – [Inquiry into the Legislative Assembly’s response to the COVID-19 pandemic](#);
- Australian Capital Territory – [Select Committee on the COVID-19 pandemic response](#); and
- Northern Territory – Public Accounts Committee – [Public hearings on COVID-19 and Territory finances](#).

4 Implications for parliamentary democracy

4.1 General

Mills defines the core roles of parliament as: representation; executive legitimisation; authorisation; deliberation; and accountability.⁵⁷ When parliament does not sit, or sits in a reduced capacity or with a limited agenda, some of these roles may not be performed to their full extent. Chaplin has highlighted some of the strain placed upon constitutional structures by the pandemic:

The demands of the public for quick and decisive action by governments has put democratic institutions, particularly democratically elected Parliaments, at risk of being sidelined from carrying out their constitutional functions of holding governments to account, authorizing and overseeing the expenditures of unprecedented peacetime spending, and seeing that the necessary legislative framework to provide services is in place, and ensuring that basic rights are not unnecessarily jeopardized.⁵⁸

He goes on to warn that:

Given the difficulties, it would be easiest to suspend Parliament for the duration. It is an emergency after all. Just let the government do what it needs to do, spend what it must, and we can sort it all out when it's over. And, if some modicum of authorization is required, just call a minimum quorum Parliament together, grant the government all the extraordinary powers it needs (or asks for), then suspend Parliament. Quick, easy, clean and efficient. Also, dangerous, autocratic, and wholly inconsistent with the Westminster system of government that underpins constitutions throughout the Commonwealth.⁵⁹

Aulby cautions that the adjournment of parliaments, coupled with the transfer of extensive decision making powers to individual Ministers, heightens the risk of corruption and poor decision making, as well as limiting the ability of Members of Parliament to fully represent their constituents.⁶⁰ Tham argues there is a greater risk that poor decisions will subsequently be made due to a concentration of executive power based on what he deems to be an illegitimate claim of necessity.⁶¹ He stresses that “Principles of parliamentary decision-making and public accountability are not just essential for effecting popular sovereignty but integral to good decision-making”.

White contends that at a time of national crisis, parliament is central not only in allowing the government to continue to function but also in maintaining the trust of the public in the government.⁶² Further, she argues that it is crucial that parliament not only does these things but is seen by the public to be doing these things. A similar view was expressed by the Speaker of the NSW Legislative Assembly who stressed the importance of the public knowing that “the Parliament continues to serve them despite the challenging circumstances”.⁶³

4.2 Shift of power to the executive

Several commentators have highlighted a shift in the distribution of power throughout the pandemic from the legislative to the executive arm of government. For example, Mills has highlighted how the rapid expansion in the authority of executive government occurred in parallel with a decline in the role of parliament, with implications for the scrutiny and accountability functions of parliament.⁶⁴ This section explores the democratic implications of parliament not functioning in its usual fashion and of the government's legislative response to the pandemic.

According to a Centre for Public Integrity Briefing Paper:

In response to the COVID-19 public health emergency, Parliaments all over the country have significantly expanded delegated emergency powers, resulting in a major concentration of power in the executive during this time. This has meant that major policy decisions affecting the welfare of millions of Australians, imposing rights and obligations on them, and involving multibillion-dollar public spending are made by the Executive with no parliamentary input and little parliamentary oversight.⁶⁵

McLean and Huf have described the COVID-19 pandemic as “a significant constitutional event” as “[a]uthorities have been empowered to impose restrictions on individual freedoms and movement that suspend constitutional norms, using directions that circumvent normal parliamentary

scrutiny”.⁶⁶ The United Nations Office of the High Commissioner for Human Rights has clarified that whilst a number of emergency measures will be appropriate in response to the COVID-19 pandemic, they must at all times be considered legal, necessary, proportionate and non-discriminatory.⁶⁷

NSW has not been immune to a shift in the role of the Executive Government. Some of the transfer of power resulted from the passage of emergency legislation introduced to deal with the public health risk created by the pandemic.⁶⁸ Numerous regulations have also been made in response to the pandemic. In many ways, Parliament authorised this shift in the role of the Executive Government by passing legislation which expanded regulation-making powers.⁶⁹

Some of the changes brought about by these laws could potentially trespass upon individual rights and liberties. This possibility, together with the wide and ill-defined powers involved at times, and the potentially inappropriate delegation of legislative powers has been considered by the Legislation Review Committee in the particular context of each bill and in relation to a number of regulations (see Legislation Review Committee, [Compilation of reports on COVID-19 related bills and regulations](#), Volume II: Reports, 2020). The Committee noted that much of this emergency legislation was designed as an extraordinary measure to respond to the public health risk created by the pandemic.⁷⁰ It also highlighted that a number of safeguards, such as time limits, are included in the various Acts, to help ensure that the measures adopted were proportionate to the risks posed by the pandemic.

Nonetheless, the ability of parliament to thoroughly scrutinise the scope and implications of some of the powers granted by the COVID-19 related legislation prior to the bills being passed was limited. For example, following the suspension of standing and sessional orders,⁷¹ the [COVID-19 Legislation Amendment \(Emergency Measures – Treasurer\) Bill 2020](#) was introduced in the Legislative Assembly on 12 May 2020 and passed through all stages of both Houses by 13 May 2020. Not only did it pass through Parliament at a much more rapid pace than allowed by the usual procedure, it did so as part of a group of cognate bills (together with the [COVID-19 Legislation Amendment \(Emergency Measures – Attorney General\) Bill 2020](#) and [COVID-19 Legislation Amendment \(Emergency Measures – Miscellaneous\) Bill 2020](#)). Consequently, there was limited time for Members to consider the implications of the bills before they were required to cast their vote. Nor was there an opportunity for the Legislation Review Committee to provide its comment on the bills and draw any issues to the attention of Members before the bills passed (its report on the cognate bills was tabled on 2 June 2020).⁷²

The implications of this are significant. For example, the [COVID-19 Legislation Amendment \(Emergency Measures – Treasurer\) Act 2020](#) granted the NSW Treasurer the power to authorise payments from consolidated revenue following the lapse of appropriations from the previous budget. As noted by the Legislation Review Committee:

In short, on the lapse of the 2019-2020 appropriations, the Bill allows the Treasurer to authorise much larger payments from the Consolidated Fund for a longer period than would otherwise be the case, before the 2020-2021 Budget is presented. In doing so, the Bill includes a wide and ill-defined administrative power affecting the right of citizens to know how public money is being spent.

However, the Committee acknowledges that the delayed presentation of the 2020-2021 Budget will allow the Government to allocate resources when it has a greater idea of the economic impact of COVID-19. It is also consistent with delays that are occurring in other jurisdictions. In these circumstances, until the Budget is presented, it is necessary to grant the Treasurer extraordinary powers to spend consolidated revenue to ensure that agencies are funded and that urgent demands created by the pandemic are met.⁷³

Some Members of Parliament voiced their criticism of what they perceived as a lack of consultation on the cognate bills and the limited opportunity for discussion and debate in the parliamentary chamber. For example, Alex Greenwich MP in the second reading debate noted:

The bills before the House are densely packed, with around 40 significant changes across multiple portfolios and Acts. They confer sweeping and unchecked powers on the Executive Government. We were given a summary of their provisions late last Wednesday, the draft bill over the weekend and additional provisions overnight.... I acknowledge that these are extraordinary times, with members of Government working hard, but we must never bypass democracy.⁷⁴

Tania Mihailuk MP expressed a similar view:

I am disappointed that the debate is truncated today and know that many members in the Chamber share my disappointment. I understand that we are navigating through uncharted waters but it is imperative that the House that represents the people of New South Wales is able to properly and thoroughly deliberate legislation foreshadowing major emergency measures. This is critical legislation. We are just shy of having 40 amendments for a variety of six government clusters.⁷⁵

In response to some of the concerns, the Attorney General, the Hon Mark Speakman MP referred to the various factors that had to be balanced:

The suspension of standing order motion allocates up to four hours for debate and voting on this bill. That is ample time for all members and all blocks of members to put their case on this bill and to move amendments. Of course, there is ample time in the other place to debate amendments as well. Speaking times have been limited but that is a measured and fair response to a pandemic, where we need to get this legislation before and through the House and allow a reasonable time for debate.⁷⁶

4.2.1 Subordinate legislation

Subordinate legislation is “law made under the authority of a power conferred by an Act of Parliament”.⁷⁷ It is most commonly a statutory rule which includes regulations, by-laws, rules and ordinances.⁷⁸ Written notice of the making of a statutory rule must be tabled in each House of Parliament within 14 sitting days of it being published on the NSW legislation website.⁷⁹ Subordinate legislation is generally disallowable. A House of Parliament may pass a resolution disallowing a statutory rule provided that notice is given no later than 15 days after the written notice of its making is tabled.⁸⁰ If it is disallowed, the statutory rule is repealed and the previous legislation reinstated. However, subordinate legislation that is not a statutory rule generally cannot be disallowed by the Parliament.

Parliamentary oversight of delegated legislation is retained by the requirement that it be tabled in Parliament and subject to disallowance, as well as being reviewed by a specialist scrutiny committee such as the Legislation Review Committee.⁸¹ Suspending parliamentary sittings, or restricting their number, as occurred in 2020, thus hinders parliamentary oversight of the executive whilst regulations continue to be made.

The Senate Standing Committee for the Scrutiny of Delegated Legislation in its interim report [Inquiry into the exemption of delegated legislation from parliamentary oversight](#) highlighted the impact of reducing the number of parliamentary sittings. The Committee described how parliamentary sittings enable the following parliamentary processes to occur that allow for the proper scrutiny of delegated legislation:⁸²

- the tabling and debating of reports relevant to delegated legislation;
- asking questions of the executive about the exercise of law-making powers delegated by the Parliament;
- the introduction and debate of motions relating to delegated legislation, including disallowance motions; and
- the establishment of, or referral of inquiries to, committees for the consideration of delegated legislation and related matters.

As subordinate legislation comes into effect from the time it is published on the [NSW Legislation](#) website, it may be in force for some time before a disallowance motion is passed by Parliament. The NSW Bar Council has stressed that the protections built into the [Interpretation Act 1987](#) (ie allowing Parliament to disallow a statutory rule) can only operate effectively if Parliament is sitting.⁸³ It argues that the suspension of Parliament in response to the pandemic demonstrated that there:

... appears to be no way to move disallowance when Parliament is not sitting, which further illustrates the importance of ensuring measures are in place to allow the Parliament to continue to sit, even during times of crisis, to ensure disallowance can occur if required, such as if unintended adverse consequences arise in practice.⁸⁴

It is for this reason that the Bar Council argues that provision should be made for the NSW Parliament to meet remotely so as to ensure that legislative scrutiny continues in a time of crisis:

This would reduce reliance on law-making by regulation as both Houses would be available to debate and pass primary legislation and ensure disallowance could occur if unintended consequences arose. Many institutions have been able to conduct business remotely during the pandemic and it is possible for Parliament to do so.⁸⁵

4.2.2 Use of public health orders

In NSW, forty-nine public health orders in relation to the COVID-19 pandemic were made by the Minister under section seven of the [Public Health Act 2010](#) (NSW) from the first one issued on 15 March 2020 to 24 February 2021.⁸⁶ A number of those orders have also been subject to several amendments. The issuing of multiple public health orders to manage the response to the COVID-19 pandemic in NSW could be seen as part of a shift in power to the executive arm of government. Public health orders in NSW are made by the

Minister for Health under section seven of the [Public Health Act 2010](#) (NSW) and as such are not statutory rules subject to the tabling and disallowance powers that apply to delegated legislation.⁸⁷ However, there are other checks and balances on their use. Public health orders are subject to an expiration date of 90 days. Further, applications may be made to the Civil and Administrative Tribunal for an administrative review of a direction given by such an order.⁸⁸

Whilst section seven of the *Public Health Act 2010* is designed to facilitate an effective and rapid response in the event of serious public health threats,⁸⁹ Edgar has identified some problematic elements to the use of public health orders in response to the COVID-19 pandemic.⁹⁰ A number of orders, particularly in the early stages of the pandemic, were rapidly repealed and replaced as circumstances evolved. This could be seen as hindering legal certainty as the general public may have found it difficult to determine the legal requirements that applied at a particular point in time. This was noted by the Legislative Council Regulation Committee which highlighted that stakeholders had:

...raised significant concerns about the accessibility of the public health orders made in response to the COVID-19 pandemic. These orders carry criminal penalties and confer wide discretions on police but are not subject to disallowance or scrutiny by the Legislation Review Committee. The duration of the pandemic is uncertain and may yet result in the further executive law-making which has the effect of curtailing citizens' freedoms. It is vital that delegated legislation which impacts on rights and liberties is clearly communicated to the public particularly if it is a type of instrument which is not subject to parliamentary oversight mechanisms.⁹¹

4.2.3 Use of Henry VIII clauses

Whilst bills must pass through all stages of parliament to become law, regulations are not scrutinised by parliament before coming into force. Nonetheless, they must fit within the scope of power for regulations as set out in the primary piece of legislation under which they are made. However, some Acts utilise what are known as 'Henry VIII' clauses, which permit delegated legislation to amend the requirements of primary legislation. The NSW Bar Association defines a Henry VIII clause as:

...a provision of an Act of Parliament that enables regulations to be made, or Executive action to be taken, that modifies the operation of the Act. Such clauses take their name from King Henry VIII who, under the 1539 Statute of Proclamations, was invested with the power to issue laws through Royal Proclamation without consulting Parliament.⁹²

In this sense, Henry VIII clauses can be seen as trumping the work of parliament and as an example of executive overreach. The Australian Law Reform Commission accordingly views Henry VIII clauses as an inappropriate delegation of legislative power.⁹³ The inclusion of a Henry VIII clause in any bill usually attracts comment by the Legislation Review Committee, which in accordance with [section 8A](#) of the *Legislation Review Act 1987* (NSW) generally highlights the potential of such a clause to be an inappropriate delegation of legislative power.⁹⁴

Some of the emergency legislation passed by the NSW Parliament in response to the COVID-19 pandemic included Henry VIII clauses. For

example, schedule 1 of the [COVID-19 Legislation Amendment \(Emergency Measures\) Act 2020 No 1](#) (NSW) inserted section 366 into the *Criminal Procedure Act 1986* (NSW). This enabled regulations to be made that provided for the alteration of: arrangements for criminal proceedings; and matters relating to bail and sentencing and the administration of sentences, for the purposes of responding to the public health emergency caused by the COVID-19 pandemic. Regulations thus made were permitted to override the provisions of any Act.

It should be noted that this power was not without limit. A maximum expiry date of six months applied. Further, the Minister could only recommend that such regulations be made if Parliament was neither sitting nor likely to within two weeks and the arrangements were in accordance with advice from the Minister for Health and Medical Research or the Chief Health Officer. The regulations must also be considered reasonable to protect the health, safety and welfare of persons regarding the administration of justice.

However, the NSW Bar Association has raised its concern with the heavy reliance on regulation and Henry VIII clauses in the health and justice responses in NSW to the COVID-19 pandemic.⁹⁵ It notes that there:

...may be rare instances where delegated legislation may be advantageous, such as when the law deals with rapidly changing or unlawful situations and requires flexibility and responsiveness that ordinary Parliamentary processes cannot provide. However, the Association considers these powers should be used as a last resort and regulation replaced at the earliest opportunity with legislation considered and passed by the Parliament.⁹⁶

4.2.4 National Cabinet

One of the many innovations sparked by the pandemic was the formation of a 'National Cabinet' comprised of the Prime Minister, Premiers and Chief Ministers of the various governments within Australia. It was established at a meeting of the Council of Australian Governments (COAG) on 13 March 2020, with the intention of meeting weekly to ensure a coordinated response to the COVID-19 outbreak in Australia.⁹⁷ The [Senate Select Committee on COVID-19](#) noted in its [interim report](#) in December 2020 that a number of the key decisions made by the National Cabinet were areas of responsibility for the states and territories, including:⁹⁸

- declarations to enforce social distancing measures;
- school closures;
- moratoriums on evictions; and
- operational responsibility for the health system.

The formation of the National Cabinet was perhaps another example of the shift towards the dominance of the executive government and the sidelining of parliament in a time of crisis.⁹⁹ It elicited questions of accountability, as Ministers in a 'cabinet' would normally be responsible to the same parliament, whereas the members of the National Cabinet were each accountable to a different parliament. In addition, whether parliaments were expected to 'rubber-stamp' the decisions made by the National Cabinet is worthy of consideration.¹⁰⁰

However, it is worth noting that, in practice, the various legislatures and executive governments of the individual states and territories continued to be responsible for implementing the majority of the decisions of the National Cabinet. Each leader in the National Cabinet remained responsible to their own cabinet and parliament.¹⁰¹

4.3 Extent of representation

Despite the best of intentions, the restriction of sitting days may not only undermine parliament's role as the primary law-making body, but also the ability of its Members to effectively represent their diverse constituents.¹⁰² If parliament does sit, but with a reduced number of Members due to pairing arrangements, it raises questions about which Members are afforded the opportunity to be physically present in parliament. For example, is there a balance of men and women? Is the number of Members from regional areas proportionate? Chaplin stresses the importance of asking who gets to participate in parliament when space is limited:

Although one may be tempted to see Parliament in terms of relatively monolithic blocks – the Government, the opposition, third parties – constitutionally each House is composed of all its members acting collectively, such that each member is of equal value and voice within the whole.¹⁰³

Further:

No doubt space, both physical and electronic, may require varying degrees of participation but the rights and privileges of all members to meaningful participation and attendance must be respected.¹⁰⁴

Whilst the pairing of Members has allowed parliament to accommodate the social distancing needs of Members in the chamber, Aulby has warned against depending too heavily on pairing as “relying on diminished attendance of MPs in person via pairing or proxy could limit the engagement of backbenchers, minor parties and the crossbench”.¹⁰⁵ In the discussion preceding the motion to suspend standing and sessional orders to permit the passage of emergency COVID-19 related legislation, Jenny Leong MP stressed the need for Members to adequately represent their constituency. She highlighted that:

We are elected to represent an individual electorate. By preventing individual members from being able to make a contribution to legislation, we are ignoring the fact that we are here as 93 representatives of individual communities.¹⁰⁶

The Inter-Parliamentary Union (IPU) has stressed the importance of ensuring that women are not excluded from parliaments operating in the COVID environment:

At a time when parliaments and their structures are meeting in a reduced capacity, often with a reduced number of members, it is vital to secure the participation of women at all levels and their leadership in the decision-making and oversight committees, units and/or task forces put in place in parliament to respond to the crisis. Equal participation of men and women, women's leadership and a clear gender-mainstreaming mandate are key to ensure the inclusivity and efficiency of such parliamentary mechanisms.¹⁰⁷

The IPU highlights some of the practical issues and obstacles presented by the pandemic that may need to be overcome to ensure there is a balance of male and female Members. It stresses that some Members may have reduced access to childcare, and suggests that virtual meetings be scheduled in office hours only. It also emphasises the importance of safe digital technology use by Members and staff, including knowing how to protect themselves from online violence.

The issue of participation and representation came to the fore in Australia in August 2020 as the Federal Parliament determined whether or not it would allow the virtual participation of Members in its upcoming sitting week. The particular situation faced by pregnant Members of the Federal Parliament in the context of state border closures and quarantine requirements was exposed. The various restrictions and quarantine arrangements encountered by Federal MPs from Victoria and Queensland who were also pregnant may have effectively prevented them from attending the Federal Parliament on the sitting week beginning 24 August.¹⁰⁸ The decision of whether or not to permit their virtual participation in parliament was accordingly of great consequence (see also section 3.1.1 of this paper for further context).

5. Lessons for the future

The COVID-19 pandemic unfolded rapidly in 2020 with many unknown factors. Decisions needed to be made quickly, under the threat of serious consequences should they either not be made fast enough or fail to adequately provide for the circumstances. Given the implications of parliament either not sitting or sitting in a reduced capacity, it is worthwhile considering what options exist should a future crisis again threaten to prevent parliament from sitting (such as the COVID-19 outbreak in Sydney in June 2021: see postscript below). Further, reflection of the events of 2020 onwards may illuminate changes that could be made to parliamentary practice and procedure that would be of benefit to parliaments in the future irrespective of whether or not there is a pandemic or some other crisis.¹⁰⁹

Chaplin has argued that the following are the basic requirements that must be addressed to allow a parliamentary government to continue to function in emergency situations:¹¹⁰

1. A recognition of the constitutional centrality of Parliament even, or particularly, in times of crisis, and that the Government's authority to act is still subject to parliament's approbation.
2. The parliamentary functions of approving taxes and spending, legislating, and the holding of government to account must be recognized and processes for their continued exercise be developed and implemented.
3. Oversight and accountability of the Government's management of the crisis is central to the legitimacy of the Government's actions.
4. Each member of parliament has the same rights and privileges as all other members to participate and vote in any proceedings established, and that only the House of which the individual is a member can regulate such involvement. Care must be taken not to disenfranchise any member or their constituents unnecessarily.
5. Any changes to parliamentary proceedings, practices or rules, are for Parliament, not the Government, to make.

6. Technology should be leveraged to allow for virtual participation and voting, recognizing the limits of technology but working for solutions.
7. Recognizing and insisting that whatever form the work of parliament takes, the result is a proceeding and parliamentary privilege attaches to it. As necessary, the Houses of Parliament and their Speakers must be prepared to assert and defend the principle that parliamentary privilege attaches to the functions being carried out, not the form that that work might take.
8. Recognize that any self-imposed restrictions that compromise the full range of the functions of Parliament, particularly the protection of the rights of all members, are temporary and last only for the duration of the pandemic, or as Parliament itself decides. Once the reasons for the changes subside, any such modifications must end. It is important that any increased grant of authority to the Government that might otherwise have required greater scrutiny of Parliament must also be limited by the duration of the pandemic.

Chaplin recognises that the accountability and scrutiny functions of parliament differ from legislating and acknowledges that different approaches may be required.¹¹¹ In particular, there may be additional constitutional requirements that need to be met for the legislative process to be legitimate.

The Commonwealth Parliamentary Association has developed a [toolkit](#) for Commonwealth parliaments that includes various measures and recommendations to enable them to continue to scrutinise legislation and deliver democracy in a time of pandemic.¹¹² It discusses ways to manage social distancing and highlights the potential of remote voting, as well as examining the role of information technology in developing appropriate strategies for parliaments.

Various responses were adopted by parliaments throughout the world as they adapted to the circumstances and limitations brought upon them by the pandemic.¹¹³ These responses may provide options for future consideration and include:

- virtual sittings;
- hybrid parliaments; and
- electronic voting.

The possibility of a virtual parliament is an option that was explored in Australia, particularly at the federal level (see section 3.1.1 of this paper). However, its potential for NSW was also raised by the Speaker of the NSW Legislative Assembly, the Hon Jonathan O’Dea MP.¹¹⁴ He argues that:

A virtual Parliament would help uphold robust democracy in NSW, as courts continue to operate under COVID-19 restrictions and executive government gains significant powers to impose restrictions on citizens.

It is in the public interest that the NSW Parliament continues to sit during each scheduled sitting week, including virtually when it is otherwise not feasible. Indeed, the emergence of the vile COVID-19 pandemic prompts an obligation to seriously consider implementing alternative methods of meeting.¹¹⁵

Moulds outlines some of the advantages and disadvantages of a virtual parliament.¹¹⁶ She suggests that whilst it may lack “spontaneous scrutiny” during question time and the “visual drama” of divisions, it may: encourage

less raucous question times; allow for more contributions to debate; facilitate the greater participation of female MPs; and allow Members to spend more time in their constituencies.

A House of Lords Library paper examined the extent to which the changes made to parliamentary practice as a result of the pandemic had affected Member's participation levels in debates.¹¹⁷ It found that virtual arrangements in the House of Lords in the United Kingdom facilitated the participation of Members, with 1,000 more contributions made over 18 sitting days between April and June when compared to the first 18 sitting days in 2020 (7 January to 5 February). However, whilst there were more contributions, they were made by fewer Members. It also found that slightly more women took part in the virtual sitting period.

Moulds highlights the potential for the positive reform of parliamentary institutions as a result of the COVID-19 pandemic.¹¹⁸ For example, allowing remote attendance at other times could encourage the broader participation of female and/or regional Members in parliament by removing some of the barriers or obstacles of time and geography. She concludes:

Yes, there are challenges when it comes to 'going virtual'. But by forcing our parliaments to experiment with new ways of operating, COVID-19 presents a critical opportunity to reimagine how our democratic institutions can work better.

If we embrace this moment with energy and enthusiasm, we can create new spaces for new voices (as well as better spaces for those we already have).¹¹⁹

The Department of the Legislative Assembly has recognised the benefits of videoconferencing for parliamentary committees. They note its potential for inquiries focused on regional areas, allowing committees to "liaise with and gather evidence from a greater range of witnesses and stakeholders". This may result in the wider and more frequent use of such technology after the pandemic.¹²⁰

In the Legislative Council, following the easing of public health and travel restrictions, committees generally returned to holding their hearings in person, with appropriate precautions. However, an ongoing legacy of the pandemic is that it is now rare for a committee hearing to pass without a number of committee members, witnesses or both participating electronically by videoconference facilities.

6 Conclusion

The COVID-19 pandemic has led to changes in parliamentary practice and procedure in NSW as Parliament adapted to the circumstances thrust upon it. The pandemic challenged parliamentary democracy in numerous ways. This period saw a shift in executive power throughout Australia as governments wielded significant power and budgets. NSW Parliament faced challenges in fulfilling its roles of scrutinising the Executive, holding the Government to account, continuing to legislate, representing the people of NSW, and enabling discussion and debate in a time of sometimes suspended or truncated sittings. The way in which the Parliament of NSW navigated these obstacles and continued to sit in some form as it sought to continue to serve the people of NSW in a time of crisis has been highlighted

throughout this paper. However, this was not the first time that NSW Parliament's ability to sit was affected by a pandemic. It was unable to sit for nearly eight months as a result of the Spanish Flu pandemic in 1919.¹²¹ It may accordingly be time that such options as a virtual parliament are fully explored as a contingency in times of emergency so that Parliament is better prepared for any future challenges.

Postscript

This paper was finalised before the COVID-19 outbreak in Sydney in mid-June 2021. Early on 24 June 2021, Agriculture Minister Adam Marshall [tested positive](#) to COVID-19. This had implications for the NSW Parliament as the Minister had attended a sitting day on 22 June, when the Budget was handed down. Both Houses of Parliament were scheduled to sit on 24 June to allow for the passage of the Appropriation Bills.

[Rapid COVID-19 testing](#) was carried out at Parliament House on 24 June 2021 and a minimal number of MPs attended the Legislative Assembly Chamber.¹²² Standing and sessional orders were suspended in the Legislative Assembly on 24 June 2020 to provide for the passage of the *Appropriation Bill 2021* and the *Appropriation (Parliament) Bill 2021* through all remaining stages.¹²³ Arrangements were also made for the Leader of the Opposition to deliver his Budget reply speech at a later date, namely 5 August 2021. The Appropriation Bills were declared to be urgent Bills before being passed in the Legislative Council.¹²⁴

With rising case numbers in the community, a [stay at home direction](#) was issued for Greater Sydney from 26 June 2021. This direction was initially in force until 9 July but has been extended to 16 July and is likely to be extended further. The next scheduled sitting for the NSW Parliament is 3 August for the Legislative Assembly and 7 August for the Legislative Council.

Acknowledgment

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¹ NSW Parliament was unable to sit for nearly eight months as a result of the Spanish Flu pandemic in 1919: Department of the Legislative Assembly, [Annual Report 2019-20](#), p 23.

² For a detailed discussion of the delegated legislation making powers in the *Biosecurity Act 2015* (Cth) and implications of their use see: Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight](#), Interim report, December 2020.

³ H McLean and B Huf, [Emergency Powers, Public Health and COVID-19](#), Research Paper No 2, Department of Parliamentary Services, Parliament of Victoria, August 2020, p 8.

⁴ Section 7(5) [Public Health Act 2010](#) (NSW).

⁵ [Public Health \(COVID-19 Public Events\) Order 2020](#) (15 March 2020)

⁶ L Roth, [NSW public health restrictions to deal with the COVID-19 pandemic: A chronology](#), NSW Parliamentary Research Service, Issues Background, No 5, November 2020, p 5.

⁷ J O'Dea MP, Suspension of Standing and Sessional Orders: Government Business, [NSW Hansard](#), 24 March 2020

⁸ J O'Dea and J Ajaka, [Statement by the presiding officers of the NSW Parliament](#), 20 March 2020. NSW Parliament House was subsequently closed to the public from 30 March 2020.

⁹ The days removed were March 25, 26 and 31; April 1 and 2; May 5, 6, 7, 12, 13 and 14; June 2, 3, 4, 15, 16, 17 and 18; July 28, 29 and 30; and August 4, 5 and 6 2020.

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- ¹⁷ Department of the Legislative Council, [Annual Report 2019-20](#), p 18.
- ¹⁸ Department of the Legislative Assembly, [Annual Report 2019-20](#), p 11.
- ¹⁹ Department of the Legislative Assembly, [Annual Report 2019-20](#), p 11.
- ²⁰ Department of the Legislative Assembly, [Annual Report 2019-20](#), p 14
- ²¹ Legislative Council, [In the House: 25 and 27 August 2020](#), [The House in Review](#), 28 August 2020.
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- ²⁸ Department of the Legislative Assembly, [Annual Report 2019-20](#), p 18.
- ²⁹ Legislative Assembly Committee on Investment, Industry and Regional Development, Inquiry into support for drought affected communities in New South Wales, [Transcript of virtual hearing](#), 15 May 2020, p 1.
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