

Law in the Time of Corona: Optimising parliamentary functions during long-term crises

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In the wake of crises, it's common for legislatures to temporarily yield greater power to executive governments to allow their response to be fast and impactful. While this works for short-term emergencies, it is unsustainable to maintain this imbalance of power over longer-term crises, such as pandemics. This paper explores methods for optimising parliamentary functions without jeopardising the executive's capacity to respond effectively during long-term crises. This is illustrated through the experiences of the Legislative Assembly for the Australian Capital Territory in managing the imbalance of power during the ongoing novel coronavirus pandemic.

Legislating is an exercise in diligence, persistence, and stamina in the best of times, but doing so during crises tests the mettle of even the most experienced politician. It's conventional for parliaments to yield greater power to executive governments during crises to allow their responses to be swift and impactful. However, this arrangement has its limitations, especially during extended emergencies such as pandemics. But all is not lost. In this paper, I explore methods for optimising parliamentary functions during long-term crises without jeopardising the executive's capacity to respond effectively. I do this in reference to three unique challenges that legislatures face during long-term emergencies: executive overreach, legislating by delegation, and technocratic accountability. Experiences from my own parliament are interwoven in my discussion of methods for responding to each challenge. Through this, I aim to make the case for the importance of adaptability and creativity in ensuring the core functions of parliaments endure throughout persistent crises.

Why do these challenges arise?

Before progressing, it's valuable to reflect briefly on what it is about long-term emergencies that lead to these challenges arising.

The source of the issue lays largely in the distinction between response and recovery. In a short-term crisis, the actual incident begins and ends quickly. Its immediate impact is obvious and static, which enables a prompt and distinct shift from response to recovery. This importantly allows a reset of the temporary increase in authority yielded by legislatures to executives so they can respond to emergencies, restoring the balance of power. By contrast, incidents in long-term crises are drawn out over weeks, months, or

years and their immediate impact evolve continuously. The fluidity and extended nature of these emergencies blur the line between response and recovery, often requiring them to occur simultaneously. It is from blurring that challenges arise, as the absence of a distinct end to the response period makes it unclear when to restore the pre-crisis balance of power.

Executive overreach

The rationale behind yielding increased authority to executive governments during long-term crises is to empower them to respond to an immediate incident effectively. For parliaments, this sometimes includes relaxing the rigidity of the executive/legislative divide and complying with government directions issued as part of the crisis response. Though an exercise in solidarity, it presents the risk of being seen as institutional acquiescence and opening the doors to governments overreaching the separation of powers and imposing on the legislature. Though this may seem alarmist, the extended nature of long-term crises and inevitable ‘crisis fatigue’ means such imposition could innocuously manifest over time without anyone noticing.¹

Unchecked, such overreach can evolve into ‘executive aggrandisement’, where governments concurrently consolidate their increased authority and weaken its checks and balances.² The main casualty in this is parliamentary scrutiny and oversight, which can be discretely curtailed by closing the legislature or limiting its operations. This is especially concerning as research indicates that decisions to take these measures appear unrelated to the severity of crises.³ Parliaments therefore require responsive measures which allow them to function effectively during crises while limiting cause for overreach or aggrandisement to occur.

Preserving parliaments’ capacity to sit

One important way to preserve this is by preserving the capacity for the legislature to sit during emergencies. While business continuity plans are common for modern parliaments, these often cater to the short-term where sitting might be unsafe, such as security threats or natural disasters, and feature plans for alternative venues.⁴ What

¹ Matthew Flinders. “Coronavirus and the politics of crisis fatigue.” *The Conversation*, March 26, 2020, theconversation.com/coronavirus-and-the-politics-of-crisis-fatigue-134702.

² Nancy Bermeo, “On Democratic Backsliding,” *Journal of Democracy* 27, no. 1 (2016).

³ Maritza Lozano, Michael Atkinson, and Haizhen Mou, “Democratic accountability in times of crisis: Executive power, fiscal policy and COVID-19,” *Government and Opposition* (2021), and; Israel Waismel-Manor et al, “COVID-19 and legislative activity: A cross-national study,” *Bar Ilan University Faculty of Law Research Paper* No. 20-12 (2020).

⁴ One such example includes the New Zealand Parliament’s alternative chamber plans: “Parliament prepares for emergencies,” *New Zealand Parliament*, January 15, 2015, parliament.nz/en/get-involved/features/parliament-prepares-for-emergencies, and; “Emergency preparedness: Setting up an

became clear as the coronavirus pandemic set in was that protracted crises involving communicable diseases presented a different set of challenges. The most visible evidence of this came when our Assembly sat during the first wave of the coronavirus in 2020. For a period, the Assembly agreed that only 13 members would occupy the chamber (thus ensuring adequate physical distancing requirements were met) and that only 13 MLAs would attend divisions etc. Also, Question Time was arranged so that only ministers who had to answer questions were present in the chamber, with the Opposition having to give a period of notice (I think it was 2 hours) of which ministers they wished to question, with no government backbench questions being asked, and only 13 MLAs present. Clerks-at-the-table were split between two different desks. Later, when all 25 members were permitted in the chamber at once and in order to maintain physical distancing, we utilised the public galleries to seat some MLAs and installed a temporary podium from which those members could speak,

Physical changes to the layout of the Assembly chamber were made to adapt to the conditions of the crisis. Two new crossbenches were commissioned and a pair of tables were retrofitted to increase the number of seats available on the floor. When it became clear that the pandemic would persist, microphones were added to the new desks and the temporary podium was removed. An acrylic divider was also installed between the clerks-at-the-table.

Box 1: Changes to the layout of the Assembly debating chamber



Figure 1: A screenshot of the Assembly during question time on 2 April 2020. Note the Assistant Clerk sitting alone at the Table, with the Clerk sitting in the top-left corner of the chamber.⁵



Figure 2: The new layout as of 23 July 2020. Note the new curved cross benches and extended leaders' table. Not visible is the acrylic divider between the clerks-at-the-table.⁶

alternative debating chamber," YouTube video, 1:19, posted by the New Zealand Parliament, December 21, 2016, [youtube.com/watch?v= DdPVul-Erg](https://www.youtube.com/watch?v=DdPVul-Erg).

⁵ Screengrab from a recording of proceedings of the ACT Legislative Assembly, 1:27:10, April 2, 2020, aod.parliament.act.gov.au/A84601

⁶ Office of the Legislative Assembly, photograph of the Assembly chamber, July 23, 2020.

These changes allowed all members to participate in sittings at even the most restrictive level of physical distancing (1 person per 4m²). It ensured the Assembly could safely operate during periods of community transmission. This included during the August 2021 delta variant outbreak when a new requirement to wear a mask in the chamber added a further layer of protection to proceedings. Measures such as these are an effective way to strengthen a legislature's operations during a long-term crisis while limiting opportunities for executive overreach or aggrandisement.

Conducting proceedings using non-traditional mediums

For parliaments that are unable to reformat their chambers, conducting proceedings using non-traditional mediums is a functional alternative with similar results. Access to new digital technologies is making it easier for legislatures to ensure they can perform their core functions during long-term crises without having to meet physically – either in part or at all. While many hands have been wrung over the implications of digitising parliaments, the Covid-19 pandemic has again shown us the value of embracing non-traditional technologies. The University of Ottawa's Steven Chaplin frames it best, saying:

Throughout history there have been a number of technological changes that have allowed parliaments to carry out their proceedings differently. The printing press, televised proceeding, and ... the growing use of remote video attendance of witnesses, have all been safely adopted without interference with proceedings or infringement on privilege.

What parliaments are now facing is the challenge of rapid and multiple changes on a large and unprecedented scale. Such challenges undoubtedly will figure in how parliaments carry out their functions, but they ought not be used as an excuse to thwart or deny members and parliaments their constitutional rights and obligations to carry out their functions to the fullest extent possible.⁷

As we were able to reformat our chamber, our Assembly hasn't had to use remote voting or conduct sittings with mixed or full virtual participation, though many others have.⁸ However, our committees shifted to conducting virtual meetings and hearings with support staff coordinating them from within the Assembly building. What this did was optimise the capacity of standing committees to continue to scrutinise non-pandemic-related actions of the government. Only through being able to adapt our procedures

⁷ Steven Chaplin, "Protecting parliamentary democracy in 'plague' times: Accountability and democratic institutions during the pandemic," *Commonwealth Law Bulletin* 46, no. 1 (2020), 116.

⁸ For a compiled list, see: Inter-Parliamentary Union, "Country compilation of parliamentary responses to the pandemic," accessed October 13, 2021, www.ipu.org/country-compilation-parliamentary-responses-pandemic.

was this achieved, which highlights how valuable institutional flexibility is. It is entirely possible for legislatures to have robust procedures and traditions without the use of prescriptive rules which restrict its responsiveness during crises.⁹

This is important for limiting the opportunity for executive overreach. It ensures that the focus on the crisis doesn't lead to the under- or non-examination of policies and decisions which would be subject to parliamentary scrutiny in normal circumstances. It also provides a check on government transparency, preserving the power to send for documents to balance the often-restricted public access to information during crises.¹⁰ Conducting committees digitally is also a strong failsafe against aggrandisement. As committees are already the detailed inquiry arm of a legislature, meeting virtually allows them to continue to compel and question, regardless of whether an executive closes parliament or not.

Legislating by delegation

Governments rely on an increased legislative power delegated to them during crises by legislatures. These so-called 'emergency powers' allow the executive to make and amend regulations and direction outside of the parliamentary legislative process to aid their crisis response. While this is proportional to the brevity of the delegation during short-term crises, the existence of a second legislative stream outside of a parliament during extended emergencies is conflicting. A University of Melbourne report notes that this conflict stems from the passage of stringent delegated crisis legislation without deliberation, especially when the parliament is able to sit.¹¹ Parliaments therefore need to be creative in using the tools they have available to provide increased scrutiny of these measures which, by reason of the crisis and prior delegation, are not being passed in the legislature.

⁹ One such example of this is the Bharatiya Sansad (Indian parliament), whose committees could not broadcast hearings or conduct virtual inquiries due to restrictive rules of procedure and government intervention. See: Sobhana Nair, "Government against virtual meetings of parliamentary standing committees, citing confidentiality," *The Hindu*, July 12, 2020, and; Swati Mathur, "No virtual meetings of parliament panels for now, physical meetings when situation improves: Rajya Sabha to opposition MPs," *The Times of India*, May 15, 2021

¹⁰ David Cullier, "Governments are using the coronavirus to hide information from reporters and citizens," *Nieman Lab*, April 6, 2020, Harvard University, niemanlab.org/2020/04/governments-are-using-the-coronavirus-to-hide-information-from-reporters-and-citizens.

¹¹ Pritam Dey and Julian Murphy, *Accountable lawmaking: Delegated legislation and parliamentary oversight during the pandemic* (Melbourne: University of Melbourne School of Government, 2021)

Using committees to provide ongoing scrutiny

Establishing a specialist committee is the quintessential way to provide this scrutiny. Committees are already suited to conducting the detailed work of parliaments due to their size and capacity to sit more frequently than the whole legislature. During this pandemic, the Assembly established two select committees into the Territory's response. The first committee was established on 2 April 2020 shortly after the ACT entered its first lockdown in late March. It had five members – two government, two opposition, and one from the crossbench – and was chaired by then-Leader of the Opposition Alistair Coe.¹² Over its life, the committee held 21 hearings, produced four interim reports, and made 40 recommendations before dissolving before the 2020 Territory election. The second committee was established on 16 September 2021 during the first sitting after the ACT entered its second lockdown on 13 August.¹³ It has one member from each of the Assembly's three parties and is again chaired by the opposition leader, now Elizabeth Lee MLA. The committee has held three hearings to date and is yet to produce any reports.



Figure 3: A screenshot of a public hearing of the Select Committee on the Covid-19 Pandemic Response held on Friday 1 May 2020.¹⁴

In addition to performing the parliament's scrutiny function for the delegated crisis legislation, these committees also invited public submissions and heard from individuals and community and industry groups about the impact of the government's response. This unique function of committees has provided members with a holistic angle to their scrutiny which has in turn resulted in responsive, informed recommendations. For the most part, the pandemic response committees have enjoyed a robust but collaborative relationship with the executive, notwithstanding a difference in technical advice which

¹² ACT Legislative Assembly, *Resolution of establishment*, April 2, 2020.

¹³ ACT Legislative Assembly, *Resolution of establishment*, September 16, 2021.

¹⁴ Screengrab from a recording of proceedings of the Select Committee on the Covid-19 Pandemic Response, 29:52, May 1, 2020, aod.parliament.act.gov.au/C26274

initially saw a stand-off over the committee's preferred videoconference platform.¹⁵ The innate flexibility and collaborative nature of committees allows parliaments to maintain thorough oversight of delegated legislating without jeopardising an executive's crisis response.

Limitations

It is important to acknowledge that there can be limitations to this scrutiny depending on the type of delegation legislatures provide. In the ACT, health declarations made under the *Public Health Act 1997* are notifiable instruments, rather than disallowable. Though the Assembly can debate them in motions in the chamber or summon the minister responsible to appear before a committee, it lacks the easy recourse to amend or veto available with disallowable instruments.

There is no 'silver bullet' solution that perfectly balances the executive's need to be efficient when responding to crises and the legislature's need to provide oversight. That which works well for one branch is unlikely to satisfy the other. However, it is important we as parliamentarians continue to explore possible solutions to ensure the appropriate balance between informed decision-making and democratic legitimacy.

Technocratic accountability

Long-term crises such as communicable disease outbreaks, fiscal collapses, and extended civil unrest are characteristically technical. As such, it is common for relevant ministers and specialist public officials to be empowered to lead the technical response. Understandably, there is increased public and political interest in expert-led and informed decision-making during such emergencies.¹⁶ As a former health professional, I greatly value the expertise many have contributed to shaping the ACT's response to the present coronavirus pandemic. The challenge parliaments face is how to hold ministers and expert officials accountable for the decisions they make in response to extended crises without hampering their capacity to do so effectively.

¹⁵ Dan Jervis-Bardy, "ACT ministers refuse to use video conferencing app amid security fears," *The Canberra Times*, April 17, 2020, www.canberratimes.com.au/story/6725849/zoom-out-act-ministers-fear-apps-numerous-vulnerabilities/.

¹⁶ Eri Bertsou, "Public demand for technocratic expertise rises in times of crisis. What does this mean for democracy?" *EUROPP blog*, May 14, 2020, LSE, blogs.lse.ac.uk/europpblog/2020/05/14/public-demand-for-technocratic-expertise-rises-in-times-of-crisis-what-does-this-mean-for-democracy

Regular reporting of decisions

Requiring regular reports to the legislature of decisions and their rationale is one way by which accountability can be achieved without unnecessary impediment. In his critique of Australian pandemic responses, Monash University's Eric Windholz stresses that:

What is needed is a decision-making framework that ensures technocratic medical-scientific experts function within democratic and accountable governance structure, without losing the substantive and legitimising benefits that come from their prominent participation.¹⁷

The logic behind this is simple. Those who are delegated increased legislative power by a parliament during a crisis need to be held accountable for its use in a way which is comparable to if parliament itself were exercising the same power. There are a range of mechanisms available to do this, including dedicated committees to scrutinise government responses as discussed in the first section. In addition to this, our Assembly legislated a requirement for a report to be presented in the chamber every month for as long as emergency powers were in use. This was added to the *Covid-19 Emergency Response Act 2020* by an opposition amendment, in recognition of the reality that "significant decisions need significant scrutiny."¹⁸ There have been 19 updates provided to the Assembly since the Act's notification on 8 April 2020, delivered by ministerial statement. These have been a valuable opportunity for to record the rationale for why decisions have been made through Hansard and offer a regular opportunity for the Assembly to discuss the ongoing response in a robust, constructive way.

While it was acknowledged at the time the update alone was not an adequate long term accountability measure, this practice has continued to evolve. Recently, the first human rights consideration statement from the Chief Health Officer was presented to the Assembly by the health minister as part of their regular update.¹⁹ This developed out of observations by the pandemic response committee that health directions didn't require statements addressing their compatibility with the *Human Rights Act 2004 (ACT)* in the same way legislation presented in the Assembly would normally. Though it took some time for the government to adopt this practice,²⁰ it has established a good precedent

¹⁷ Eric Windholz, "Governing in a pandemic: From parliamentary sovereignty to autocratic technocracy," *Theory and Practice of Legislation* 8, nos. 1-2 (2020), 19.

¹⁸ Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 2 April 2020, 805 (Alistair Coe, Leader of the Opposition)

¹⁹ Recording of proceedings of the ACT Legislative Assembly, 51:06, October 6, 2021, aod.parliament.act.gov.au/A93708.

²⁰ The inclusion of a human rights compatibility statement with health directions and other pandemic-related delegated legislation was first recommended in May 2020. See recommendation 1 in ACT Legislative Assembly, *Interim report 2*, (Canberra: Select Committee on the Covid-19 Pandemic

for accountability in future long-term emergencies, health-related or otherwise. It's yet another example of how institutional flexibility (tempered with some persistence) can help optimise parliamentary functions – such as accountability – during extended crises.

Conclusion

This paper has provided an overview of just some of the ways in which a parliament can optimise its functions during long-term emergencies with reference to our own journey in the Australian Capital Territory. While how each legislature responds is unique to its political and constitutional realities, the challenges our institutions face are shared. Though we are a young, small jurisdiction, I hope that some value can be gleaned from our experiences, as stronger, more resilient parliaments make for stronger, more resilient democracies.

About the Author

Joy Burch is the Speaker of the ACT Legislative Assembly, a role she's held since October 2016. She was first elected in 2008 as a member for Brindabella, the ACT's southern-most electorate. She has held a range of roles during her parliamentary career, including Deputy and Assistant Speaker, Government whip, Manager of Government Business, and several ministerial appointments. Ms Burch is currently the acting Chair of the CPA Small Branches group.

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