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Accountable Lawmaking

Delegated Legislation & Parliamentary
Oversight during the Pandemic

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Summary

Key Points

This Policy Brief makes the following key points:

- (a) In responding to the COVID-19 pandemic, democratic states around the world have massively expanded executive powers. Much of this transfer of power has occurred through the delegation of legislative power from parliament to the executive.
- (b) Delegated legislation has been a major means of public governance in Australia during the pandemic. It is a process of executive law-making whereby government ministers, departments, agencies or other officers, rather than parliament, are empowered to make regulations with the force of law.
- (c) Governing by delegated legislation can raise concerns rooted in the rule of law and democratic legitimacy, which are heightened by the stringency of the measures they contain to suppress the virus and to address its economic and societal impacts. These concerns can be addressed by effective parliamentary oversight of such legislation.
- (d) However, in Australia, some state and territory parliaments have exhibited a worrying lack of initiative in overseeing the extraordinary executive powers exercised through delegated legislation.
- (e) There are a number of ways in which Australia could improve its parliamentary oversight of delegated legislation. Ensuring that executive-made laws are appropriately overseen by parliament will enhance democratic legitimacy and need not detract from the speed and efficiency with which such laws are made.

Recommendations

This Policy Brief makes the following recommendations:

- (a) **Drawing lessons from elsewhere:** Useful lessons can be drawn from measures taken in states such as New Zealand and the United Kingdom to ensure parliamentary oversight of delegated legislation.
- (b) **Adequately resourcing oversight committees:** Parliamentary committees charged with overseeing delegated legislation should be sufficiently resourced and appropriately structured, including with requirements for regular meetings and multi-partisan composition.
- (c) **Curtailing oversight exemptions:** The practice of exempting delegated legislation from parliamentary oversight should be curtailed, potentially by imposing greater requirements for justifying exemptions in second reading speeches and explanatory memoranda.
- (d) **Employing sunset clauses:** Delegated legislation should contain strict sunset clauses that require parliamentary authorisation if an executive power is proposed to extend beyond its initial expiry date.

Accountable Lawmaking

Delegated Legislation & Parliamentary Oversight during the Pandemic

1. Introduction

In responding to the COVID-19 pandemic, democratic states around the world have massively expanded executive powers. Much of this transfer of power has occurred by the delegation of legislative power from parliament to the executive. As will be explained, delegated legislation is a process of executive law-making whereby government ministers, departments, agencies or other officers are empowered to make regulations with the force of law. Although these powers can arguably be justified in some circumstances because of the need for swift and decisive action, there is room for reasonable debate about the scope, duration and conditions of such executive powers. Concerningly, scholars have demonstrated that the checks and balances that ordinarily constrain constitutional governance have come, during the pandemic, to tolerate many unbounded executive powers.

While some democracies have struggled to provide even a modicum of parliamentary oversight of executive actions during the pandemic, other countries have managed to provide space for the examination of executive decision-making. This policy brief analyses trends in the working and monitoring of delegated legislation in Australia, New Zealand, and the United Kingdom during the pandemic. It focuses

on how the pandemic has affected parliamentary oversight of executive actions and assesses how institutional responses have conformed to democratic standards. The identification of points of difference within similar contexts appears most likely to reveal novel but transposable inter-jurisdictional learning.

2. Pandemic Governance & Delegated Legislation

In a disturbingly short period of time the COVID-19 pandemic has provided a snapshot of conceptual and structural weaknesses in the laws of many democratic states. The stress-testing provided by the pandemic has caused a collective crisis around the ways we exercise our key civic freedoms, and has caused unprecedented regulatory and legal challenges as a result of the measures adopted by states to allay the effects of the pandemic.

Specifically, scholars have drawn attention to the fact that to mitigate the crisis, countries across the globe have delegated extraordinary powers to individual ministers, resulting in excessive executive dominance in policymaking. While the contours of these extraordinary powers differ from country to country, they are typically conferred by vague and general empowering

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provisions and make liberal use of Henry VIII clauses (that is, a provision of a law of parliament that allows the law to be amended by the executive without returning to parliament).

While the increased use of delegated legislation for lawmaking has always been a concern for constitutional purists who view it as usurping parliament's role, there has also been widespread appreciation of its benefits, especially during emergencies. To offset the democratic costs of delegated legislation, attempts have been made to strengthen its scrutiny and monitoring through mechanisms such as parliamentary committees, disallowance mechanisms, and sunset clauses.

established ad-hoc parliamentary committees to inquire into their own responses to the pandemic. The prevalence of a rights scrutiny culture in these countries may also be the reason that they have not joined in the 'pandemic backsliding' that has become a trend among other established democracies. However, despite their relative successes in maintaining democratic traditions there are clearly ambiguities and weaknesses that need improvement.

For instance, the New Zealand government justly received widespread praise for its successful handling of the pandemic through a combination of effective political leadership, anticipatory policy making, and use of parliamentary and legal

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3. A Mixed Picture in Westminster Systems: New Zealand & the UK

The results of parliamentary oversight over executive law-making during the pandemic are a mixed picture to date in Westminster systems, as the pandemic has magnified some shortcomings and revealed others, while also offering examples of effective monitoring and scrutiny. Parallels can be found between the ways in which the New Zealand and United Kingdom governments have used the 'legislative model of emergency powers' to deal with the crisis.

They have adapted multi-generational legal frameworks, enacted bespoke legislation, and

dispositions like multi-partisan committees and sunset clauses to make sure that emergency powers are continuously monitored and have a short life span. However, concerns have been raised regarding the democratic costs of such a concentration of political power, the legality of some government orders, and the use of enforcement powers under emergency legislation. The High Court also declared that restrictive measures imposed on New Zealanders under relevant laws during the early days of lockdown were not prescribed by law and were limitations on the New Zealand Bill of Rights Act 1990.

The New Zealand Human Rights Commission also expressed strong reservations about the fast-tracking of New Zealand's bespoke COVID-19 legislation, which granted sweeping powers to executive officers without appropriate parliamentary scrutiny and public deliberation. Moreover, the preliminary report of the New Zealand Regulation Review Committee in response to COVID-19 has identified certain non-legislative instruments that are becoming difficult to monitor owing to variations in their drafting,

notification, presentation to parliament, and publication, thus putting them outside the scope of parliamentary scrutiny. Another major concern has been flagged by a scholar regarding the disallowance process in New Zealand during the pandemic – that is, the inability of the Epidemic Response Committee to trigger disallowance of delegated legislation without Parliament being recalled by the speaker on advice of the Prime Minister.

In the UK, even as the fast-tracked Coronavirus Act 2020 is testing the constitutional relationship between government and parliament – especially regarding the parliamentary scrutiny of delegated legislation – the parliamentary committees have continuously maintained oversight of delegated legislation during the pandemic by mixing traditional and innovative practices.

By undertaking urgent scrutiny of the Coronavirus Act 2020, establishing a special COVID-19 committee, and reviewing government responses to the pandemic through public inquiries, the parliamentary committees have served important oversight functions during the pandemic.

However, concerns still exist regarding legal certainty, proportionality, excessive executive dominance, and sunset clauses in delegated legislation in the UK. The protection of key civic rights and freedoms has also been an important concern among scholars due to the discretionary nature of the delegated powers.

Another major issue has been the lack of parliamentary control through veto processes, as can be seen in the majority of statutory instruments being subjected to the ‘made negative procedure’ and not complying with established conventions. This is despite the fact that some of the delegated legislation creates summary offences and requires whole swathes of lawful economic activity to cease.

Although the substantive policies enshrined in

these instruments may be justifiable due to the rapidly evolving situation, urgency alone is not a justification for bypassing parliamentary oversight.

4. Australia’s Pandemic Response

Like its Westminster counterparts, Australia’s pandemic response has been achieved through interwoven layers of law and government decrees or administrative decisions – devolving extensive decision-making powers to individual ministers. The core of such institutional power transfer at the Federal level and State and Territory level has been through the declaration of states of emergency through pre-existing public health legislation and/or emergency legislation.

However, as the crisis evolved, many governments in different jurisdictions responded to the public health threat by legislating brand-new emergency laws, with the sole purpose of delegating special powers to the executive to deal with the pandemic. Invariably, these measures have prompted scrutiny of the general institutional and procedural system of delegated legislation and the democratic costs associated with such law making. This is reflected in concerns regarding the diminished accountability of individual ministers to parliament, lack of and/or limited legislative oversight, and constraints in deliberative processes raising the possibility of an executive power grab.

While these issues were already a source of tension due to the rise of executive law making in Australia, the pandemic-related delegated legislation has spurred additional concerns. These concerns include the liberal use of Henry VIII clauses to make amendments in primary legislation without appropriate explanation and justification, procedural infirmities in publications

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of subordinate legislation affecting transparency and accessibility, and an assertion of illegitimate claims of necessity that has at first instance allowed the expansion of ministerial power during the pandemic.

Despite the range of potential issues raised, Australia's successful pandemic response to date stands in stark contrast to other democracies. This success can, at least in part, be attributed to Australia's democratic responsiveness – i.e. institutional innovations based on the principle of solidarity, external scrutiny of government's action, and effective political leadership resulting in high levels of public trust in government.

Even so, the massive concentration of executive power poses a significant challenge to the rule of law. While we acknowledge that is not possible to follow every avenue of accountability associated with lawmaking during an evolving emergency, there is always scope for review and deliberation.

We have attempted to draw together some themes that we believe warrant serious governmental consideration:

- (a) **Legal Certainty:** The continuous legal/political saga around the definition of a 'COVID-19 hotspot' and inconsistent rules surrounding national border closures have put the need for predictability at the forefront of post-COVID reopening measures. Certainty and predictability in law are key requirements in the rule of law, and integral for maintaining constitutional values during emergencies.
- (b) **Enforcement Actions:** Discretionary policing during the pandemic has raised serious concerns among community legal groups, including concern over the possibility of over-policing of marginalised groups and disadvantaged areas. With public order regulations being inevitably vague and open-ended, and their implementation left to the discretion of police, the issue of inconsistency and the disproportionate impact of policing is being reported in different

jurisdictions. As Australia rolls back its emergency measures, urgent review is needed for judicious use of discretion during public health emergencies.

- (c) **Omnibus Acts:** To deal with the pandemic at both the Federal and State level, significant powers were given to executive officials to amend and/or modify existing statutes and regulations through so called 'Omnibus Acts'. Although the rationale for passing this legislation seems justified for the moment, excessive use of such acts for lawmaking purposes can subvert the relationship between the parliament and the executive. Thus, there is a need to 'socially distance' emergency laws from ordinary lawmaking processes.
- (d) **Human Rights Scrutiny:** Though the functioning of the Joint Parliamentary Committee has been exceptional during the pandemic, the enactment of subordinate legislation during the pandemic without a human rights 'statement of compatibility' is problematic. Technically, it may be that such statements are not required to be made. However, given the potential impact of pandemic-induced regulations on key civic freedoms, such a statement would have strengthened the rights scrutiny culture in Australia.

5. Pandemic Parliamentary Oversight in Australia

As discussed above, a particular concern in Australia's response to the pandemic has been the use of delegated legislation to confer wide powers on the executive without sufficient parliamentary oversight. The recent interim report of the Senate Standing Committee for the scrutiny of delegated legislation revealed the significant extent to which the federal response to COVID-19 was achieved by delegated legislation that was exempt from parliamentary oversight. Some state and territory parliaments

have also exhibited a worrying lack of initiative in overseeing the extraordinary executive powers exercised through delegated legislation. In Tasmania, for example, Parliament was suspended from March until August 2020, during which time the committee normally charged with scrutinising delegated legislation showed little initiative in reviewing the many quasi-legislative ‘Declarations and Directions’ issued by the Executive.

6. Reforming Parliamentary Oversight

There are a number of ways in which Australian parliaments might learn from the overseas experience and our own shortcomings during the pandemic so as to improve parliamentary oversight in the future. A few are suggested here:

- (a) **Parliamentary committees:** As compared to the positive performance of parliamentary committees during the pandemic in the UK, the Tasmanian example referred to above shows that the mere existence of a committee will not necessarily ensure effective parliamentary oversight of delegated legislation. Accordingly, it is essential that parliamentary committees to oversee delegated legislation are appropriately structured and resourced. In particular, the committee should be composed, so far as possible, to ensure multi-partisanship. Further, there should be an expectation of regular and substantive meetings engaging with the high volume of delegated legislation being passed by Australian parliaments.
- (b) **Rethinking exemptions:** As the Senate Standing Committee for the scrutiny of delegated legislation recently explained, the exempting of delegated legislation from any parliamentary oversight has become far too common – such exemptions covering approximately 20% of delegated legislation. The Committee correctly notes that there is often insufficient justification for such exemptions. In order to arrest this slow slippage of standards there should be a rethink of the way in which delegated legislation is exempted from parliamentary oversight. It might be appropriate to require explanatory memoranda and second reading speeches to explicitly address issues of

exemption and to provide detailed justifications for the same.

- (c) **Sunset clauses** – David Hamer noticed long ago in Australia that “[d]elegated laws have a habit of surviving interminably, long after their usefulness has passed”. The concept of executive powers “creeping” from times of emergency into everyday life is well known. For these reasons it is essential that delegated legislation contains strict sunset clauses requiring parliamentary authorisation if an executive power is proposed to extend beyond its initial expiry date.

7. Conclusion

There is evidence – both in parliamentary and scholarly debate – to suggest that the pandemic might provide a catalyst for Australia to reconsider its tolerance of executive lawmaking. That would be a welcome result. Executive lawmaking is an understudied yet hugely consequential field of Australian governance. Indeed, it is thought that fully one half of Australian laws (by volume) are contained in delegated legislation rather than parliamentary enactments. Ensuring that such executive-made laws are appropriately vetted and overseen by parliament will enhance democratic legitimacy and need not detract from the speed and efficiency with which such laws are made. As has been explained, there are a number of methods for improving our parliamentary oversight that have proved effective in other jurisdictions.

Ensuring that executive-made laws are appropriately overseen by parliament will enhance democratic legitimacy and need not detract from the speed and efficiency with which such laws are made.

Fig 1 Ensuring Scrutiny is Real and Effective

A survey of selected overseas experiences indicates the positive performance of parliamentary committees during the pandemic in contexts such as the UK. However, the mere existence of a committee will not necessarily ensure effective parliamentary oversight of delegated legislation. In Australia, some state and territory parliaments have also exhibited a worrying lack of initiative in overseeing the extraordinary executive powers exercised through delegated legislation. In Tasmania, for example, Parliament was suspended from March until August 2020, during which time the committee normally charged with scrutinising delegated legislation showed little initiative in reviewing the many quasi-legislative 'Declarations and Directions' issued by the Executive.



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Note: A variety of references in this text are provided as hyperlinks within the text. This references section lists selected texts.

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