
Parliament in a Time of Virus: Representative Democracy as a 'Non-Essential Service'*

Stephen Mills¹

Honorary Senior Lecturer, School of Social and Political Sciences, University of Sydney

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Abstract The emergency response to the COVID-19 pandemic in Australia saw an unprecedented expansion of the authority of the executive at the expense of Parliament. Using emergency powers and the innovation of a 'National Cabinet', the executive managed the crisis response, while the Federal Parliament was reduced to an unrepresentative 'rump' and then adjourned for twenty weeks. This eliminated or substantially compromised Parliament's ability to perform its principal functions of representation, executive legitimisation, authorisation, deliberation and accountability. In the event, Parliament was recalled earlier than planned, albeit on a limited and truncated basis, and a Senate Select Committee was established to provide scrutiny of the executive's pandemic response. Yet the overall crisis response demonstrated a growing capacity and willingness of the executive to govern without Parliament, and an acquiescent Parliament unable to define a more assertive role for itself. The COVID-19 response surrendered key features of Australia's system of parliamentary democracy, posing troubling questions for the Australian system of representative democracy. Some measures are proposed to revive a role for Parliament in a time of crisis.

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INTRODUCTION

Australia's response to the COVID-19 pandemic was directed and coordinated by a committee of first ministers of the Commonwealth, states and territories, gathered under the title of a 'National Cabinet'. Activating emergency powers, the governments imposed nationwide residential lockdowns, business closures, event cancellations, border closures and restrictions on public assembly and on individual liberties. They also embarked on unprecedented expenditure programs to support economic activity through the crisis. This rapid expansion of the authority of executive government was matched at the federal level by a contraction in the role of the Federal Parliament. The House of Representatives and Senate were recalled in March for a one-day sitting of an unrepresentative 'rump'² of Members and Senators to approve a \$189 billion package of stimulus measures; they were then, over the protest of opposition parties, adjourned for twenty weeks until August. Parliament was in fact recalled for a further one-day sitting in April and then for three days in May—again, however, with severely pruned attendances.³ The COVID-19 response eliminated or substantially compromised Parliament's ability to undertake its core roles of representation, executive legitimisation, authorisation, deliberation and accountability.

This outcome represented a historically significant, if temporary, shift in the balance between executive and Parliament. The Australian House of Representatives has for more than a century provided Commonwealth governments with a stable foundation for executive power. The key factor has been the rise, after the first decade of Federation, of a strong party system in which, thanks in part to preferential voting, one or other of the two major party groups have secured a workable majority in the House, and in which individual Members of Parliament have only rarely bucked their party's line. Constitutionally, while the balance between the powers of the executive and the legislature is ambiguous, it seems clear that the executive possesses a substantial inherent prerogative, particularly where it needs to carry out activities of national

² The term 'rump Parliament' was applied during the English Commonwealth to that part of the Long Parliament that survived Pride's Purge (1648), and describes a Parliament that sits with a membership reduced by executive intervention.

³ In New South Wales, the Parliament was adjourned for a longer period, and local government elections were postponed for twelve months, with all incumbent councillors extended in their roles for the duration. See Jonathan O'Dea, 'Socially Distant but Democratically Together: Towards a Virtual Parliament in NSW' in this issue of the *Australasian Parliamentary Review*.

scope that could not be otherwise carried out.⁴ Developing an effective national response to a pandemic clearly falls within that ambit.

Yet the COVID-19 response was of such a radical and unprecedented character as to suggest the scales have tipped out of balance, with an excessively expanded role for the executive and a severely contracted role for the legislature. There are three aspects to this imbalance as briefly noted above. First, emergency powers had been invoked that overrode legislation and could not be disallowed. Second, the National Cabinet emerged to occupy a new space for executive action, operating without accountability linkages back to any legislature. Third, providing the principal focus of this article, the severe restrictions imposed on the Federal Parliament served to eliminate or substantially compromise its capacity to perform its key functions.

Critical voices in the media, academy, civil liberty groups and judiciary, as well as the Labor Opposition, protested the reduction of Parliament.⁵ Common themes were that the Australian Parliament had sat uninterrupted through previous crises of war, epidemic and economic depression, and that its absence during the present crisis carried the risk of unaccountable and indeed authoritarian rule. The Centre for Public Integrity quickly demonstrated that the Commonwealth Government's initial drastic closure of Parliament made Australia an 'outlier' among comparable parliamentary democracies; a five month adjournment, it said, was a 'uniquely Australian' response

⁴ George Winterton, 'The Limits and Use of Executive Power by Government'. *Federal Law Review* 31(3) 2003, pp. 421-44.

⁵ Peter van Onselen, 'Coronavirus Australia: War Couldn't Stop Parliament, So Why Should COVID-19?'. *The Australian*, 24 March, 2020. Accessed at: <https://www.theaustralian.com.au/commentary/coronavirus-australia-war-couldnt-stop-parliament-so-why-now/news-story/a6b3ea10778ca67818142c5d01e41b37>; Peter van Onselen, News Item. 10News First, 24 March 2020. Accessed at: <https://twitter.com/10newsfirst/status/1242363251721191429?s=21>; Guy Rundle, 'Parliament Must Sit Through the Crisis. We Need More Democracy, Not Less'. *Crikey*, 25 March 2020. Accessed at: <https://www.crikey.com.au/2020/03/25/parliament-sitting-coronavirus/>; Anne Twomey, 'A Virtual Australian Parliament is Possible—and May Be Needed—During the Coronavirus Pandemic'. *The Conversation*, 25 March 2020. Accessed at: <https://theconversation.com/a-virtual-australian-parliament-is-possible-and-may-be-needed-during-the-coronavirus-pandemic-134540>; NSW Council of Civil Liberties, 'Prolonged Parliamentary Adjournment Unacceptable and Dangerous for Democracy'. Media Release, NSW Council of Civil Liberties, 30 March 2020. Accessed at: https://www.nswccl.org.au/statement_covid_19_and_government_oversight; Edward Santow, 'We Must Combat Covid-19 but Creeping Authoritarianism Could Do More Harm Than Good', *Guardian Australia*, 8 April 2020. Accessed at: <https://www.theguardian.com/commentisfree/2020/apr/08/we-must-combat-covid-19-but-creeping-authoritarianism-could-do-more-harm-than-good>.

to the pandemic.⁶ But amid the progressively tighter lockdowns deemed necessary by the National Cabinet, the restrictions on Parliament were described, and largely accepted, as appropriate and consistent with the emergency response to limit the spread of the virus, particularly the requirement for ‘social distancing’.⁷ They did not attract the outright condemnation that would almost certainly have been voiced in pre-virus times. In acquiescing to the restrictions, Parliament too seemed prepared to show that it could adjust to the new conditions. While executive government seized the opportunity to demonstrate a firm and coordinated response to the threat of the virus, Federal Parliament showed itself less able to assert a role for itself in managing the crisis. Amid the national shutdowns, services provided by hospitals and pharmacies, energy suppliers, supermarkets and some other businesses were declared ‘essential,’ and were permitted to continue.⁸ Parliamentary democracy, however, along with shuttered restaurants and bars, darkened theatres, and cancelled sporting fixtures, seemed to have been rendered a ‘non-essential’ service.

Overall then, 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 democratic malaise⁹ become so pervasive that Australians are prepared to do without Parliament entirely for long periods?

⁶ Centre for Public Integrity, ‘Pandemic International but Shutting Parliament Uniquely Australian’. 1 April, 2020. Accessed at: <https://publicintegrity.org.au/wp-content/uploads/2020/04/Briefing-paper-shutting-Parliament-uniquely-Australian.pdf>.

⁷ Australian Government. Department of Health, ‘Physical Distancing for Coronavirus (COVID-19)’. Accessed at: <https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/how-to-protect-yourself-and-others-from-coronavirus-covid-19/physical-distancing-for-coronavirus-covid-19>

⁸ Definitions of ‘essential’ and ‘non-essential’ remained somewhat fluid throughout the shutdown period, and varied across the states and territories. Gary Mortimer, ‘What Actually Are “Essential Services” and Who Decides?’. *The Conversation*, 31 March 2020. Accessed at: <https://theconversation.com/what-actually-are-essential-services-and-who-decides-135029>

⁹ For example, Marc Plattner, ‘Is Democracy in Decline?’. *Journal of Democracy* 26(1) 2015, pp. 5-10; Gerry Stoker, Mark Evans and Max Halupka, ‘Trust and Democracy in Australia: Democratic Decline and Renewal’. December 2018. Accessed at: <https://www.democracy2025.gov.au/documents/Democracy2025-report1.pdf>

Before seeking to answer these questions, this article will first describe the measures taken between March and mid-May 2020 to expand the authority of the Commonwealth Government and to restrict the normal operation of the Federal Parliament. Particular attention is paid to the extraordinary organisational and procedural innovations put in place for the conduct of the one-day sitting of the House of Representatives on 23 March. The article then demonstrates that this response eliminated or substantially compromised Parliament's capacity to perform its key functions, surrendering key features of Australian representative democracy. The article concludes by outlining possible ways in which Parliament could exercise a constructive role in management and oversight of this and future crises.

THE EXECUTIVE EXPANDS, PARLIAMENT CONTRACTS: MARCH TO MID-MAY 2020

Federal Parliament was convened on 23 March with an urgent legislative agenda amid a declared pandemic. More than three weeks earlier, on 27 February, Prime Minister Scott Morrison had activated the Australian Government's Health Sector Emergency Plan, noting the rate of transmission of the virus outside mainland China indicted an imminent pandemic phase. On 11 March, the World Health Organisation had declared the outbreak of COVID-19 a pandemic. On 18 March, the Governor-General, acting on the advice of the Executive Council, had issued a declaration under the *Biosecurity Act 2015* that a human biosecurity emergency existed. This empowered the Federal Health Minister, for a three-month period, to make emergency requirements or declarations, including restricting or preventing the movement of persons, goods or vehicles, and ordering evacuations. These emergency powers overrode existing laws, and the declaration itself was a non-disallowable instrument in order, as the Explanatory Statement put it, 'to ensure that the Commonwealth is able to take the urgent action necessary to manage a nationally significant threat or harm to Australia's human health'.¹⁰

¹⁰ The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020 and Explanatory Statement. Accessed at: <https://www.legislation.gov.au/Details/F2020L00266>. The powers were exercised to ban entry of cruise ships and outbound overseas travel. In NSW, similar provisions were activated under the Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020. Accessed at:

The emerging public health crisis had been discussed at a scheduled meeting on 13 March of the Council of Australian Governments (COAG), the regular forum for the leaders of the nine governments in the Australian federal system (the Prime Minister, six Premiers and two Chief Ministers). According to *Guardian* journalist Katherine Murphy, as the COAG leaders received progressively more stringent recommendations from a parallel meeting of state medical advisers, they ‘invented a new governance structure’.

Within the hour, entirely on the hop, nine political leaders had invented a new governance structure. No papers, no proposals, no guidance from officials. Morrison suggested they manage the crisis by convening regularly as a National Cabinet. The proposal materialised in the room. The states agreed and insisted the group just be them, first ministers—no opposition leaders.¹¹

The self-description of this committee as a ‘National Cabinet’ was quickly and widely adopted, but it is a misnomer. This body is not a Cabinet as commonly understood in Australian practice. Cabinets are collections of senior ministers of one government, not leaders of nine different governments representing two different parties. Cabinet members are accountable individually, and collectively, to the one Parliament of which they are all members; the so-called ‘National Cabinet’ was not, beyond the accountability of individual leaders to their separate Parliaments, collectively accountable to any Parliament. Cabinet decisions are routinely exposed to debate and scrutiny by Parliament; decisions of the National Cabinet were announced at media conferences. Further, while cabinet government operates on principles of collective responsibility, with each member bound to support the decision of the whole,¹² the ‘National Cabinet’ operated with an in-built flexibility that allowed Premiers and chief ministers to vary the COVID-19 response within their own jurisdictions.¹³ Thus while

[https://www.legislation.nsw.gov.au/_emergency/Public%20Health%20\(COVID-19%20Restrictions%20on%20Gathering%20and%20Movement\)%20Order%202020.pdf](https://www.legislation.nsw.gov.au/_emergency/Public%20Health%20(COVID-19%20Restrictions%20on%20Gathering%20and%20Movement)%20Order%202020.pdf)

¹¹ Katherine Murphy, ‘The Two Meetings that Changed the Trajectory of Australia’s Coronavirus Response’. *Guardian Australia*, 4 April 2020. Accessed at: <https://www.theguardian.com/australia-news/2020/apr/04/the-two-meetings-that-changed-the-trajectory-of-australias-coronavirus-response>

¹² Department of Prime Minister and Cabinet, *Cabinet Handbook*, 13th edition. Canberra, 2019, pp. 9-11.

¹³ As the Prime Minister conceded: ‘Ultimately, the National Cabinet is not a compulsory mechanism. That’s not how our Federation is built. That’s not what our constitution provides for. It is, I think, the preference of all the National Cabinet that wherever possible, they can move together and they can move together in a consistent way. But there

the National Cabinet proved to be an effective coordination mechanism to deal with the COVID-19 crisis across the Australian federation, its true innovation was the severing of accountability links to Parliament.

Concerns about the anti-democratic implications of inter-governmental relations within the Australian Federation long predate the advent of the National Cabinet. As Paul Kildea has observed of COAG, executive activity at this level of the national governance system has the capacity to ‘marginalise Parliaments and undermine responsible government’, including through generating new agencies and agreements that are ‘beyond the accountability of any single government’.¹⁴ The transformation of COAG into a National Cabinet has only intensified these accountability concerns. The unexpected elevation of National Cabinet to become a supreme decision-making body—or in the enthusiastic description of one minister ‘a single national unified government, the national unity Cabinet’¹⁵—has further undermined the principles of parliamentary democracy.

Recognising that the public health crisis posed significant economic challenges, the Commonwealth Government foreshadowed a substantial financial assistance package. The Coronavirus Economic Response Package provided \$189 billion in new household payments, cash flow assistance to small and medium business, investment support and regional assistance. The Commonwealth also proposed Supply Bills to provide assured funding for the normal operations of government until the passage of the 2020-21 budget, the introduction of which had been postponed from May until October 2020. Parliament was recalled to consider and approve these two legislative measures.

The Speaker of the House of Representatives, Tony Smith, took the chair at 10am on 23 March, and immediately drew the attention of the House to ‘special arrangements for the operation of the Chamber’. Consistent with prevailing ‘social distancing’ rules, which required individuals to keep at least 1.5m away from each other, the familiar

is also an important discussion about where other states are under more extreme circumstances, that measures that may be required there more urgently may be less urgent in other parts of the country’. Transcript, Prime Minister Press Conference, 25 March 2020. Accessed at: <https://www.pm.gov.au/media/press-conference-australian-parliament-house-act-250320>

¹⁴ Paul Kildea, ‘Making Room for Democracy in Intergovernmental Relations’, in Paul Kildea, Andrew Lynch and Greg Williams (eds.), *Tomorrow’s Federation: Reforming Australian Government*. Leichhardt: Federation Press 2012.

¹⁵ Health Minister Greg Hunt, Transcript, Prime Minister Press Conference, 29 March 2020. Accessed at: <https://www.pm.gov.au/media/press-conference-australian-parliament-house-act-12>

seating arrangements had been rearranged. Only one Member sat on each bench, and additional seats had been installed behind the benches, allowing those present to sit ‘sufficiently far apart from each other’. The Speaker also noted that attendants would provide reduced services, the advisors’ boxes would be vacated during divisions, and the press galleries had been closed to all but four press photographers. ‘I’m very conscious of the need to limit the total number of people in the chamber at any one time,’ he said.¹⁶

The Speaker failed to mention that achieving this level of separation in the Chamber was possible only because nearly half the House was not in attendance. Over the previous days, Leader of the House and Attorney-General Christian Porter and Manager of Opposition Business Tony Burke had negotiated a drastic reduction in attendance. As Burke explained later outside Parliament, ‘Each side had organised for thirty members to stay home, so we never had more than 100 people in the room’.¹⁷ Through unprecedented use of pairing arrangements, 30 Coalition MPs and 30 Labor MPs were freed by their parties from the obligation to attend the sitting. Along with the single Greens MP and three of the five independents, who chose to attend, only 88 MPs (including the Speaker) attended—just 58 percent of the total of 151 elected MPs. The only explanation was offered by Burke—not by a government minister—who informed Parliament:

There are a large number of members of Parliament who want to be here today and who are not, because they understand the circumstances that we’re in and the importance of the different distancing measures that are in place.¹⁸

This arrangement allowed Parliament to proceed with a quorum, protected the proportionate standing of the parties and safeguarded the Government’s narrow majority on the floor. It also allowed Parliament to provide a model for social distancing. But these achievements came at a cost to the essential, representative, character of the Parliament. The absence of 60 MPs in the interests of social distancing

¹⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 23 March 2020, p. 1.

¹⁷ Tony Burke, ‘#5and5- the Coronavirus crisis.’ Email, 24 March 2020.

¹⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 23 March 2020, p. 2. At the end of the day, the names of the absent MPs were read into Hansard in gratitude for their having, in the words of Government whip Bert van Manen, ‘contributed to making the chamber work today by their absence’. Commonwealth, *Parliamentary Debates*, House of Representatives, 23 March 2020 p. 86.

traded away the representation of roughly 6 million voters. Women were underrepresented: only about one-fifth of those present in the Chamber (18 out of 88) were women MPs. Labor selected only seven women in its contingent of 37, despite its commitment to gender parity; all three female Independents were in attendance. None of the five Tasmanian MPs was present, and of the 14 Western Australians, only two ministers and two Labor backbenchers made the journey across the Nullabor. Neither of the Indigenous Members of the House was present. Given most ministers did attend, the backbench as a whole was relatively underrepresented.¹⁹

In securing this outcome, these parties underlined their continuing dominant role in Australian governance, and illustrated an unexpected new manifestation of ‘cartel’ behaviour; that is, cooperation by rival party elites working on behalf of the state and without regard to smaller parties.²⁰ In this instance, the two major parties collaborated in a reduction of Parliament to secure expedited authorisation of the Government’s stimulus packages without referenced to the minor parties. A group of eight independents and minor party representatives protested to the Government about being cut out of the negotiations and deprived of an important part of their role as Members of Parliament.²¹

In the House of Representatives, the need for Parliament to provide an urgent legislative response to the crisis was accepted and endorsed by the Prime Minister, the Opposition Leader and all other speakers. Standing orders were suspended—again, by agreement of the two major parties—to permit expedited consideration of the Government’s two legislative packages. Government ministers had met with Opposition shadow ministers in the Cabinet room over the previous weekend to discuss the legislation and build support for it. The Opposition flagged its general support for the package, its desire to move selected amendments on the floor, and its

¹⁹ The Senate met under similar ‘rump’ circumstances, with Leave of Absence granted to 34 out of the total of 76 Senators, including Senators Susan Macdonald (Lib, Qld) and Andrew Bragg (Lib, NSW), who had contracted the COVID-19 virus. Commonwealth, *Parliamentary Debates*, Senate, 23 March 2020, pp.1-7.

²⁰ Richard Katz and Peter Mair, ‘Changing Models of Party Organisation and Party Democracy: the Emergence of the Cartel Party’. *Party Politics* 1(1) 1995, pp. 5-28; Richard Katz and Peter Mair, ‘The Cartel Party Thesis: a Restatement’. *Perspectives on Politics* 7(4) 2009, pp. 753-766.

²¹ The letter was signed by Greens leader Adam Bandt, Independent MPs Helen Haines, Bob Katter, Andrew Wilkie, and Zali Steggall, Centre Alliance MP Rebekah Sharkie and Senators Stirling Griff and Rex Patrick. See David Crowe and Rob Harris, ‘New Committee to Monitor Government on Coronavirus Measures’. *Sydney Morning Herald*, April 5 2020.

commitment to support the legislation even if the amendments failed.²² After focused cognate debates on each bill, and a Question Time of notable discipline and courtesy, that is what occurred. Further minor amendments made in the Senate were duly agreed to. Parliament, in other words, performed its legislative duty with care and alacrity.

All the more surprising then was Porter's release, at 6.45pm, of the Government's revised sitting calendar for Parliament. Porter's short speech was a model of ambiguity: the unpalatable reality was implied but never stated. He reminded Members that in the uncertainty created by COVID-19, the Government was unable to forecast economic parameters and had decided to delay the May Budget until October. Moreover, Parliament had just passed supply bills to cover the period ahead. A further consideration, Porter said, had played in the Government's mind in redesigning the sitting calendar:

[S]ome risk attaches to the operation of parliament, particularly during what is anticipated to be the peak point in the transmission of the coronavirus. Obviously, we come from all points in Australia. We've done our level best today, I think, to conduct this session and today's sittings with all of the appropriate social distancing that has been recommended for Australia at large. Nevertheless, some risk attaches to flying in multiple members from every corner in Australia.²³

In this utilitarian view, Parliament's only role during the pandemic was to provide the Government with supply and appropriation. Further, social distancing, used to justify the pared down membership of the Parliament, was now being used to rationalise the suspension of Parliament itself. Tellingly, Porter did not spell out the implications: the new sitting calendar omitted the 18 sitting days that had been scheduled for the May and June session, implying that Parliament would not be recalled until 11 August, twenty weeks away. Despite opposition from Labor, the Greens and one Independent, the new calendar was approved.

In the event, however, the Government did recall Parliament for a second one-day sitting, on 8 April, to gain legislative approval for its second support package, the \$130

²² Commonwealth, *Parliamentary Debates*, House of Representatives, 23 March 2020, p. 11

²³ Commonwealth, *Parliamentary Debates*, House of Representatives, 23 March 2020, p. 82

billion ‘JobKeeper’ program. This sitting was even less representative than the first. Pairing arrangements saw the Coalition and Labor each excuse 47 Members from attendance; three Independents also opted not to attend. The package was voted on by the remnant 54 Members—barely one-third of the entire House, mostly drawn from NSW and Victoria. Labor had again signalled it would move amendments to the package but, if these were defeated, would vote in favour of the Government’s legislation. When the amendments were defeated 29-24, the Government’s ‘majority’ of 29 included 15 ministers; the executive essentially ensured Parliament approved its own legislation intact.²⁴ By mid-April, with the lockdowns yielding positive progress against the virus, the Prime Minister flagged a further recall, this time for a ‘trial week’ in May—although this too would have to conform to the reduced membership arrangements established for the previous sessions.²⁵ When the House convened on 12 May for an economic update and to approve the operation of the Government’s proposed COVIDSafe contact-tracing app, the Government and Opposition had paired a total of 82 Members, leaving just 65 voting Members in the Chamber.²⁶

IMPACT ON THE FUNCTIONS OF PARLIAMENT IN TIME OF CRISIS

In systems of representative government, Parliaments can be understood to perform five principal functions. As briefly mentioned earlier, Parliaments:

- represent the interests and preferences of individual voters in aggregate decision-making (*representation*);
- provide the institutional basis on which governments are formed and can be broken (*executive legitimisation*);
- provide the ultimate authority for legislation and the appropriation of public funds (*authorisation*);
- act as an assembly for advocacy, debate and consideration (*deliberation*); and

²⁴ Again, the Senate was reduced by similar measures, with Leave of Absence granted to 33 Senators.

²⁵ Transcript, Prime Minister Press Conference, 16 April 2020. Accessed at: <https://www.pm.gov.au/media/press-conference-australian-parliament-house-act-15>

²⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 12 May 2020, pp. 43-4

- scrutinise executive actions (*accountability*).

The argument of this article is that the emergency response to the COVID-19 pandemic either eliminated or by substantially compromised Parliament's capacity to perform each of them.

First, and of fundamental importance, the three parliamentary sittings held from late March to early May subverted Parliament's *representative* role. These 'rump' sittings were unrepresentative of the Australian electorate and unrepresentative of the 46th Parliament that had been elected in May 2019. The March sitting of the House included representatives from just over half the 151 electorates in Australia—as noted earlier, this effectively left 6 million voters unrepresented. The April and May sittings were even less representative, with around a third of electorates represented. Reduced representation was ostensibly necessary to model social distancing. But the method of reduction was the outcome of negotiation between the major parties (Liberal and Labor), and their agreement on pairing reflected their self-interest. Reducing the size of the Parliament on party lines had the effect of subverting the key organising principle of a democratically elected Parliament: that it is assembled on the basis of broadly equivalent electorates drawn from every part of the country. The major party negotiations did not consider representation of minor parties, and their negotiations also set aside principles of gender and backbench representation.

In effect, the reduction of Parliament proceeded on the basis that the Government's majority remain secure. This denied Parliament the capacity to perform its *executive legitimisation* role. By contrast, during the perils of the Second World War in 1941 and just months before Pearl Harbour, the 16th Parliament (1940-1943) asserted its legitimisation role. By voting down a budget bill, the House of Representatives broke the Fadden Government and installed the Curtin Government. This occurred without noticeable disruption of the war effort. In the first decade of Federation, five Governments resigned after being defeated on significant legislation on the floor of the House.²⁷ Parliament's reserve capacity to bring about a change of government without an election, then, is a key component of Australian political arrangements, albeit one that has not been employed in recent decades. It is not suggested that the COVID-19 response led by the Morrison Government provided any political justification for its majority, earned at the May 2019 elections, to be tested on the floor of the House. It

²⁷ Ian Marsh, *Beyond the Two Party System*. Cambridge: Cambridge University Press, 1995, p. 277.

is to say that the reduction in size of Parliament, and its lengthy adjournment, effectively eliminated this capacity. A 'rump' Parliament could not have performed that function, as it could not express a legitimate view of 'the House'.²⁸

Parliament did of course perform its function of *authorising* the Government's spending packages. However, the *ad hoc* sequence of sittings—the recall for a one-day sitting on 23 March, the adjournment until August, the recall for a further one-day sitting on 8 April and then a three day sitting in May—and their minimally quorate character, suggest the executive saw Parliament's contribution as requiring, and limited to, a speedy performance of this authorising role. Parliament's *deliberative* role was likewise substantially compromised. In normal circumstances, expenditure on this mammoth scale would have received more protracted and careful consideration by the whole Parliament. In the circumstances however, Parliament's adversarial structure and practice was a potential impediment to speedy completion; this was no time for arguing. Introducing his first package of legislation, Treasurer Josh Frydenberg described it as a 'Team Australia moment';²⁹ his Labor opposite number Jim Chalmers agreed that, when it was not business as usual in the economy or society, 'it shouldn't be business as usual in our politics either'.³⁰ Speaking outside Parliament later, the Prime Minister was even more explicit about the desirability of abandoning party-based adversarial politics: 'There are no blue teams or red teams. There are no more unions or bosses. There are just Australians now, that's all that matters'.³¹

Parliament's fifth core function of Parliament in a representative democracy is *accountability*: holding the government to account through scrutiny of its decisions and actions. The suspension of Parliament effectively terminated Parliament's ability to perform this function – even at a time of unprecedented budget spending, novel

²⁸ *House of Representatives Practice*, 7th edition, p. 319. Accessed at: https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/Practice7/HTML

²⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 23 March 2020 p. 6.

³⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 23 March 2020 p. 11

³¹ Peter Hartcher, 'Triumph of Unity is PM's Resurrection'. *Sydney Morning Herald*, 10 April 2020. Accessed at: <https://www.smh.com.au/politics/federal/triumph-of-unity-is-pm-s-resurrection-20200410-p54ixu.html>

mechanisms of ‘cabinet’ government, emergency ministerial powers and at least some public evidence of executive bungling.³²

In the absence of parliamentary scrutiny, civil liberties are at greater risk. President of the NSW Council for Civil Liberties Nicholas Cowdery described the prolonged parliamentary adjournments by the Commonwealth and NSW governments as ‘unacceptable and dangerous’: ‘The emergency circumstances in which we find ourselves render it difficult to overstate the potential for the dramatic overreach of unreviewable executive power ... [and] can seriously endanger our civil liberties’.³³ Australian Human Rights Commissioner, Edward Santow, also urged rejection of ‘authoritarian restrictions,’ arguing that while international law allowed freedoms to be restricted in a public health emergency, ‘emergency restrictions must be temporary, with genuine independent oversight’.³⁴

Labor and the Greens continued to call for Parliament itself to sit to provide scrutiny of executive actions. Shadow Attorney-General Mark Dreyfus QC said Parliament had provided the Government with emergency powers to respond to the crisis, and ‘every’ Member of the Parliament had a role in ensuring those powers were exercised in the best interests of their constituents and of the nation.³⁵

In the absence of a full parliamentary sitting, several substitute methods of scrutiny were proposed. The Finance Minister, Matthias Cormann, undertook to provide weekly updates on disbursements from the \$40 billion discretionary fund that had been set aside for unexpected emergency spending—transparency, at least, though

³² The decision to allow passengers from cruise liner Ruby Princess to disembark in Sydney Harbour, despite evidence of virus, became the subject of blame shifting between Federal and NSW authorities, a NSW police investigation and a NSW Government inquiry—but no parliamentary inquiry. In Canberra, amid lengthening queues of newly unemployed, the responsible Minister Stuart Robert told a media conference the Centrelink website had been attacked; in a later radio interview he took responsibility for this misinformation by using the informal expression ‘my bad’. When called to account in the 23 March parliamentary sitting, Robert provided a more coherent explanation: the website had simply been strained by unexpectedly high usage. Commonwealth, *Parliamentary Debates*, House of Representatives, 23 March 2020, p.44.

³³ NSW Council of Civil Liberties, ‘Prolonged Parliamentary Adjournment Unacceptable and Dangerous for Democracy’. Media Release, 30 March 2020. Accessed at: https://www.nswccl.org.au/statement_covid_19_and_government_oversight

³⁴ Santow, ‘We Must Combat Covid-19 but Creeping Authoritarianism Could Do More Harm Than Good’.

³⁵ Paul Karp, ‘Labor says Parliament should sit to scrutinise government's coronavirus emergency powers,’ *Guardian Australia*, 1 April 2020. Accessed at: <https://www.theguardian.com/australia-news/2020/apr/01/labor-says-parliament-should-sit-to-scrutinise-governments-coronavirus-emergency-powers>

not scrutiny.³⁶ Labor suggested a role for the Australian National Audit Office; perhaps mischievously, given ANAO's recent role in investigating the Community Sport Infrastructure Program ('sports rorts') scandal.³⁷ But the logical vehicle for scrutiny was not an external agency but Parliament itself, through its committees; these continued to operate through the adjournment period. The Senate Standing Committee for Scrutiny of Delegated Legislation declared itself responsible for reviewing regulations made under certain legislation—although not the non-disallowable declarations under the emergency powers.³⁸

But a compelling model of parliamentary oversight quickly emerged in New Zealand. Its unicameral Parliament having been suspended for just over one month, a bipartisan select committee was established, chaired by the Opposition leader, Simon Bridges, to scrutinise the Government's response to the epidemic. Bridges commented: 'Scrutiny improves things. That scrutiny function will be constructive and could add to a confidence in New Zealanders about what is happening right now'.³⁹

In Australia, a group of six judges, convened by the Australia Institute thinktank and led by former High Court judge Mary Gaudron, urged Parliament (not the Government) to emulate the New Zealand model.⁴⁰ The suggestion was taken up by opposition parties and then supported by the Government. When Parliament was recalled for its second one-day sitting on 8 April, the Senate established a Select Committee on COVID-19. Chaired by Opposition Senator Katy Gallagher and with a majority of non-Government Members, the committee has wide terms of reference 'to inquire into the Australian Government's response to the COVID-19 pandemic'. It has powers similar to a Senate Estimates Committee.⁴¹

³⁶ Rob Harris, 'COVID-19 Emergency Measures to be Scrutinised for Civil Liberty Overreach'. *Sydney Morning Herald*, 2 April 2020. Accessed at: <https://www.smh.com.au/politics/federal/covid-19-emergency-measures-to-be-scrutinised-for-civil-liberty-overreach-20200401-p54g62.html>

³⁷ Karp, 'Labor Says Parliament Should Sit'.

³⁸ Harris, 'COVID-19 Emergency Measures to be Scrutinised'; Karp, 'Labor Says Parliament Should Sit'.

³⁹ Henry Cook, 'Coronavirus: Parliament Will Close Until Late-April, Replaced with Simon Bridges Chaired Select Committee'. *Stuff.co.nz*, 24 March 2020. Accessed at: <https://www.stuff.co.nz/national/health/coronavirus/120526301/coronavirus-parliament-will-close-until-lateapril-replaced-with-simon-bridgeschaired-select-committee>

⁴⁰ Peter Hartcher, 'Calls for Greater Scrutiny of Government During Shutdown,' *Sydney Morning Herald*, 2 April 2020.

⁴¹ Proceedings of the Committee are available at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/COVID-19/COVID19. See also Paddy

From the perspective of the executive in the midst of a crisis, these wide-ranging and systemically crucial parliamentary functions no doubt appear as potential impediments to action. The Morrison Government appeared to prefer a minimal and subordinate role for Parliament. This was exemplified by Attorney-General Porter, who used a media interview to reject criticism of the adjournment of Parliament:

The power exists to recall parliament any time it's needed, which is exactly what we're doing on Wednesday and we're doing it in a flexible way. But why would we set down a regular sitting schedule over the coming weeks and months, in the most irregular time Australia has ever known? What is the point of that? Why we are being dragged into these bizarre procedural debates? If people want to sit out there during the greatest economic crisis Australia's experienced and read *Practice and Procedure of the House of Representatives*, good luck to them. But we've got better things to do.⁴²

In this frame the executive has 'better things to do' while Parliament is engaged in 'bizarre procedural debates'. If this suggests a merely rhetorical, short-lived, threat to norms of representative government, some troubling recent precedents are worth noting. Parliamentary prorogation and adjournment have become more familiar, if not yet routine, features of Australian governance over recent years. Parliament was unexpectedly prorogued by the Turnbull Government in 2016 and immediately recalled, to force consideration of its industrial relations legislation.⁴³ During the s44 eligibility crisis in 2017, the parliamentary calendar was altered so as to avoid sitting when ineligible Government Members of the House were awaiting by-elections.⁴⁴

Manning, 'Power House: the COVID-19 Senate Committee is Set to Have Huge Impact'. *The Monthly Today*, 9 April 2020. Accessed at: https://www.themonthly.com.au/today/paddy-manning/2020/09/2020/1586411110/power-house?utm_medium=email&utm_campaign=The%20Monthly%20Today%20-%20Thursday%209%20April%202020&utm_content=The%20Monthly%20Today%20-%20Thursday%209%20April%202020+CID_e0c7ebabba5f79851fdb81c9f28acf0d&utm_source=EDM&utm_term=Read%20on

⁴² Christian Porter, speaking on *RN Breakfast*, ABC Radio, 6 April 2020. Accessed at: <https://www.abc.net.au/radionational/programs/breakfast/government-will-not-broaden-definition-of-casual-workers/12124212>

⁴³ Paul Karp, 'How the PM Used an Obscure Part of the Constitution to Recall Parliament'. *The Guardian*, 21 March 2016. Accessed at: <https://www.theguardian.com/australia-news/2016/mar/21/how-the-pm-used-an-obscure-part-of-the-constitution-to-recall-parliament>

⁴⁴ For example, the House of Representatives did not sit in the lead-up to by-elections in New England (2 December 2017) or Bennelong (16 December 2017).

During leadership tensions within the Government in 2018, Parliament was hastily adjourned as numbers were counted in the Liberal party room for a leadership challenge against Turnbull.⁴⁵ And in the lead-up to the May 2019 federal election, the newly installed Morrison Government authorised just ten sitting days. Each of these measures seemed designed to suit the political convenience of the government of the day, either to protect its majority or to forestall political embarrassment of question time and urgency debates.⁴⁶ State Labor governments in NSW (2010) and South Australia (2006) procured early prorogation in the lead-up to elections, shutting down potentially embarrassing inquiries and scrutiny.⁴⁷

The Prime Minister's suggested role for Parliament—floated at a media conference, not in Parliament—was somewhat more constructive than the Attorney-General's. Members of Parliament could contribute to the crisis by advising their constituents on how to access the Government's stimulus and safety net programs:

Our parliamentarians, while they may not be meeting here [in Canberra], they're working incredibly hard in their communities. The phones are running hot every day, connecting people up in their communities to care and support the many programs. Frankly they've got a bigger job to do out there in their communities at the moment than they would have here, because their community needs them in their community, because they are local leaders who can help lead their communities through what will be the very difficult months ahead.⁴⁸

⁴⁵ 'Parliament Adjourned as Turnbull Says Leadership Meeting Possible Tomorrow,' *The New Daily*, 23 August 2018. Accessed at: <https://thenewdaily.com.au/news/national/2018/08/23/malcolm-turnbull-peter-dutton-new-challenge-2/>; Nikki Savva, *Plots and Prayers: Malcolm Turnbull's Demise and Scott Morrison's Ascension*. Brunswick: Scribe, p. 160.

⁴⁶ In the United Kingdom, the House of Commons was prorogued so as to avoid further debate on the Brexit negotiations by newly-appointed Prime Minister Boris Johnson; the move was overturned on appeal to the UK Supreme Court. See D.L. Harper, 'R v The Prime Minister; Cherry and Others v Advocate General for Scotland'. *Australasian Parliamentary Review* 34(1) 2019, pp. 20-27.

⁴⁷ Gemma Jones, 'Kristina Keneally Closes Parliament Three Months Before Election'. *Daily Telegraph*, 22 December 2010. Accessed at: <https://www.dailytelegraph.com.au/keneally-closes-parliament-three-months-before-election/news-story/e15bda3927b10802b6c56f01fe3fc7b7?sv=d57c7f80571885182804e4785038b879>; Jordan Bastoni, 'The Executive versus the Legislative Council: A Case Study from the South Australian Parliament', *Australasian Parliamentary Review* 27(1), 2012: 126-133.

⁴⁸ Transcript, Prime Minister's Press Conference, 2 April 2020. Accessed at: <https://www.pm.gov.au/media/press-conference-australian-parliament-house-act-020420>

In this minimalist vision, MPs are policy takers, not policy makers; they busy themselves by individual work in their communities, rather than by working together in the parliamentary forum in Canberra.

CONCLUSION – REVIVING A ROLE FOR PARLIAMENT IN TIME OF CRISIS

The emergency response to the COVID-19 crisis subverted Parliament's representative function and eliminated its capacity to express confidence in the executive. Parliament's authorising and deliberative functions were expedited and, with adjournment, then terminated. Parliament's accountability function was saved from elimination only by the Senate's capacity to install a mechanism for all-party scrutiny of executive decision making. The subsequent recalls of Parliament ahead of the anticipated twenty-week adjournment returned some degree of normality to the operations and expectations of representative democracy, but its representative function remained stunted.

In effect, the executive set out—initially for twenty weeks—to govern through the pandemic in a Parliament-free zone, resourced by extended supply arrangements, equipped with draconian emergency powers, and leading an unaccountable and non-transparent 'Cabinet'. Through the cooperation of the two major parties, Parliament acquiesced in its subordinate and unrepresentative role. It seemed that all it could do was diligently but speedily to authorise the legislation and get out of the way. Its 'rump' status and truncated sessions, and its acquiescence in a subordinate role to the executive suggested a Parliament with a minimal, cameo, role in the management of the crisis.

Little explanation was offered to the Parliament, or the public, by the executive for these measures. In effect, the suspension of Parliament was justified, by the executive, on the grounds that it was not needed, by the executive, to provide the executive with appropriations until the October budget. In dealing with the twin crises in the realms of public health and economic management, the executive exacerbated a third, less widely acknowledged, crisis in the sphere of governance. Combating pandemic and recession required surrendering key features of Australia's system of parliamentary democracy.

Given the imbalance between the executive and Parliament, is it possible for the Federal Parliament to reassert its influence? Can the Parliament be imagined contributing to the speedy and effective resolution of the COVID-19 crisis or future crises?

Any response must begin with a full restoration of Parliament's representative role: only meetings of the full Parliament should be regarded as legitimate and adequate. For reasons of social distancing, any such assembly would need to be held in a space larger than the existing chambers—such as the Great Hall in Parliament House. Alternatively, arrangements would need to be made for a 'virtual' Parliament, with Members participating electronically from their own electorates.⁴⁹ Ensuring secure and verifiable methods of participation and voting is of course complex and indeed unproven.⁵⁰ Yet at a time when millions of Australians were using digital methods to conduct business, execute financial transactions, receive and deliver education and express their culture, Parliament's inability to take steps towards virtual meetings seems a particularly blatant failure.

A fully representative Parliament could have performed its authorising and scrutiny functions as intended, bringing to the task the same recognition of the need for a speedy legislative response to the crisis. But it is in deliberative role that Parliament's biggest contribution might be made, helping define the strategic and implementation challenges presented by COVID-19. At a critical time when the big-picture strategy was still evolving, the language of 'Team Australia' presented crisis management as a largely unproblematic, unitary, top-down directive process, rather than as a collaborative and iterative one. In COVID-19, policy makers faced complex problems at the levels of both strategy and implementation. Despite expert advice to the National Cabinet, the strategy for attacking these problems was not obvious and was subject to legitimate disagreement.⁵¹ No choice was simple: prioritising public health jeopardised the

⁴⁹ Twomey, 'A Virtual Australian Parliament is Possible'. A virtual sitting may have been contemplated when, towards the end of the 23 March 2020 sitting, standing orders were amended to allow the House to meet 'in a manner and form not otherwise provided in the standing orders'—wording widely interpreted as allowing non-physical presence of Members. See also Jonathan O'Dea, 'Socially Distant but Democratically Together: Towards a Virtual Parliament in NSW' in this issue of the *Australasian Parliamentary Review*.

⁵⁰ Unlike the UK, where the House of Commons set up a working group to investigate remote collaboration and videoconferencing, and actively tested virtual voting methods.

⁵¹ Consensus had developed around a strategy of 'flattening the curve'—that is, deferring the onset of the virus through social distancing and lockdowns to safeguard critical medical resources from being overwhelmed. But this inherently protracted process came at a steadily higher cost of social and economic dislocation. Alternative strategies were proposed. John Daley of the Grattan Institute, for example, argued for a quicker 'stop and restart' strategy. John Daley, 'The Case for Endgame C: Stop Almost Everything, Restart When Coronavirus is Gone'. *The Conversation*, 20 March, 2020. Accessed at <https://theconversation.com/the-case-for-endgame-c-stop-almost-everything-restart-when-coronavirus-is-gone-134232>. Researchers commissioned by the Group of Eight universities framed the choice as one between complete elimination of the virus and managing it at a very low level,

economy, and vice versa. The selection, testing and communication of proposed measures were unclear. In choosing among competing paths, policy makers needed to determine not just the costs and benefits of each course of action but how those outcomes should be allocated across members of society.

Such considerations should be the domain of a representative and deliberative assembly. Parliaments have conducted ‘conscience debates’ on sensitive subjects such as abortion, death with dignity and same sex marriage. It is a measure of the decline of the standing of the Federal Parliament that in the recent circumstances, parliamentary deliberation was not automatically and immediately seen as a vital contributor to the resolution of these problems, rather than as a potential impediment.

The deliberative forum of Parliament could have made a second equally valuable contribution to the crisis response. The strength of Parliament’s electorate-based design is that Members from around the nation can draw national attention, however fleetingly and imperfectly, to their local issues and insights. Not all parts of Australia are experiencing the crisis in the same way. Parliamentarians could play a positive role in this crisis by telling local stories of resilience and hardship, providing a medium for success transfer, recognising the achievements of local emergency response teams, and acknowledging individuals and communities experiencing joblessness, isolation and trauma.

In these ways a fully representative Parliament might exemplify the hopes of the proverb set into the floor tiles of the entrance to the Victorian Parliament: ‘Where no counsel is, the people fall: but in the multitude of counsellors there is safety’.⁵² In contemporary language, multiple sources of advice provide better outcomes.

rejecting a third option of herd immunity. See The Group of Eight Australia ‘Covid-19 A Roadmap to Recovery – A Report for the Nation’. Accessed at <https://go8.edu.au/research/roadmap-to-recovery>

⁵² Parliament of Victoria, ‘History of Parliament House’. Accessed at: <https://www.parliament.vic.gov.au/about/the-parliament-building/history-of-the-building>. The words are from the Old Testament book of Proverbs, 11:14.