

Legislative Scrutiny in Times of Emergency

A Case Study of Australian Parliaments

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Abstract

Citizens' trust in Australian governments and parliaments has fallen in recent years, yet trust is critical for governments to do their job effectively and attack challenging issues. The coronavirus pandemic provides an opportunity for governments and parliaments to bridge the gap between citizens' expectations and parliamentary and government performance and therefore rebuild trust. In doing so, parliaments need to balance their desire for speedy action with proportionate measures and mechanisms for review.

This article examines the scrutiny of primary legislation by the parliaments of Western Australia the Commonwealth of Australia during the initial stages of the pandemic, through the application of principles from the House of Lords Select Committee inquiry into fast-track legislation. The data shows that both parliaments had severely abridged time to consider, debate and consult on bills during the initial stages of the emergency. The parliaments took a different approach to address this issue. The Western Australian Parliament supported the inclusion of sunset clauses into most of the bills whereas the Commonwealth Parliament did not. The Commonwealth Parliament's scrutiny committees considered and commented on the bills post-enactment. The Western Australian Parliament does not have mechanisms for the technical scrutiny of all bills by parliamentary committees. This divergence of approach is noteworthy as the Commonwealth Parliament has information about the impact and technical quality of bills but no power to address the issues identified. The Western Australian Parliament has little information about the impact and technical quality of the Acts but will likely have the opportunity to reconsider the laws if they are sought to be extended.

Keywords: legislative scrutiny, sunset clauses, emergency laws, virtual parliament, parliamentary committee, trust.

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A Introduction

Like many countries around the world, Australia has seen a rapid-paced response to the COVID-19 pandemic. The speed and scale of this response has seen Australian governments play a larger role in people's lives through the enactment of legislative and regulatory measures. Many of these measures step beyond the established norms of government involvement in citizens' lives. The pandemic comes at a time when people's trust in Australia's governments and parliaments is at an all-time low. Since March 2020 parliaments and governments have been contending with how they balance their responsibilities of legislating, scrutinizing and providing opportunities for representation with the necessity of a rapid response to the health and economic threats caused by COVID-19.

This study is focused on the scrutiny of primary legislation by two parliaments at the commencement of the COVID-19 pandemic. It explores the theoretical framework of legislating during times of emergencies and emerging best practice. It then examines data in relation to bills passed by the Western Australian and Commonwealth Parliaments, to assess the extent of and deficiencies in legislative scrutiny of primary legislation.

B Declining Trust in Government and Parliament

Trust can be defined as the "ratio of people's evaluation of government performance relative to their normative expectations of how government ought to perform".¹ In more straightforward terms, trust occurs when a person trusts that another will act on their behalf and in their interests.² Trust is critical for governments to do their job effectively and attack challenging issues.³ This is particularly the case where citizens are asked to make either material or ideological sacrifices.⁴

If trust is a measure of expectation versus performance, then an emergency such as terrorism, pandemic or economic turmoil significantly disrupts this equation as expectations of government shift rapidly from broad programmes to programmes that ensure the physical and economic security of its citizens. In 2020 the world faces a global pandemic of major proportions. Alongside the health crisis is an economic crisis. As the pandemic increasingly affects people's lives, there will likely be a rise in expectations of government. This sets a challenge for governments to re-evaluate their policy objectives and behaviours to address the urgent needs being expressed by their citizens.

In Australia, trust in governments, parliaments, politicians and political institutions has been in decline for many years. In a recent World Values Survey

1 M. Hetherington and J. Husser, 'How Trust Matters: The Changing Political Relevance of Political Trust', *American Journal of Political Science*, vol. 56, no. 2, 2012, p. 313.

2 M. Evans, W. Jennings & G. Stoker, *How Does Australia Compare: What Makes a Leading Democracy?*, Canberra: Democracy 2025, 2020, p. 5.

3 *Ibid.*, p. 6.

4 *Supra*, note 2.

report, 71% of Australian respondents had ‘not very much’ or ‘no confidence’ in the government. Notably, respondents had less trust in parliament than they did in the government (69%).⁵ Other research indicates that satisfaction with how democracy works in Australia dropped from 85.6% in 2007 to 41% in 2018.⁶

In seeking to deliver challenging programmes and do their jobs effectively, Australian governments, and, by extension, their parliaments, commence from a standing start when it comes to a baseline of trust. Equally, the way that these institutions respond to the pandemic may provide them with the opportunity to restore trust into the future. One way in which parliaments can meet the expectations of citizens in a time of crisis is to fulfil their symbolic role as the centre of government and order.⁷ They give comfort that the wheels of government are still turning and provide some surety that government is continuing to meet the best interests of its citizens. This may be informative as to the decisions taken by parliaments to continue legislating and scrutinizing throughout the depths of the pandemic.

Parliament has a unique role in being the only place where laws can be changed to adapt to fast-changing circumstances and the government can be publicly held to account. In order to fulfil their symbolic role and execute their responsibilities, parliaments have adapted to the challenges of the pandemic through alternative methods of sitting, such as the hybrid approach adopted at Westminster and wholly online parliaments, such as the Welsh Assembly, or have continued to sit in person with temporary standing orders to expedite debates, limit the number of members in the chamber and prevent members and staff from coming into close contact with each other.

A time of crisis presents an opportunity for parliaments and governments to build on their low levels of trust in the community by increasingly bridging the gap between citizens’ expectations and parliamentary and government performance. In bridging this gap, parliaments must be adequately legislating, scrutinizing and representing. Parliaments need to balance their desire for speedy action with proportionate measures and mechanisms for review should they wish to rebuild trust in the community.

C Legislative Scrutiny During Emergency Periods

Emergencies put a strain on governments. They test the plans that the executive has in place to deal with unknown threats. They also highlight possible legislative and regulatory gaps where greater powers may be needed to address threats.

5 C. Haerpfer, R. Inglehart, A. Moreno, C. Welzel, K. Kizilova, J. Diez-Medrano, M. Lagos, P. Norris, E. Ponarin & B. Puranen et al. (eds.), *World Values Survey: Round Seven – Country-Pooled Datafile*, Madrid, Spain & Vienna, Austria: JD Systems Institute & WVSA Secretariat, 2020 [Version: www.worldvaluessurvey.org/WVSDocumentationWV7.jsp].

6 G. Stoker, M. Evans & M. Halupka, *Trust and Democracy in Australia*, Canberra: Democracy 2025, 2018, p. 21.

7 A. Prior, ‘COVID-19: Why It’s So Difficult to Make the Call to Close Parliament’, *The Conversation*, 20 March 2020.

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Despite the wide powers available to the executive under emergency management laws, the commencement of the pandemic resulted in a flurry of legislation in Australian parliaments. This was likely because of the uncertainty of the impact of the pandemic in Australia and the perceived inability of parliaments to meet should the extent of the pandemic be severe.

The making of primary legislation in an expedited fashion puts a strain on all actors in the legislative process. The government must rapidly compile policy and legal experts to identify a legislative solution to the problem at hand and to draft a bill. The draft bill has to be expedited through the usual cabinet process, where ministers ensure that the bill fits within the whole statutory scheme. Often, expedited bills bypass the usual regulatory impact process.⁸ Bills would ordinarily proceed through scrutiny within the party room, but this step may be significantly truncated in emergencies. Expedited bills put pressure on members of parliament to scrutinize the bill to ensure it is validly achieving its objectives and to consult with relevant stakeholders.

The expedited passage of legislation is not unheard of in Australian parliaments and often occurs prior to a parliamentary recess, at the end of the electoral cycle or in response to an emergency or perceived emergency. However, a key difference between expedited bills and the COVID-19 experience is that, ordinarily, when bills are passed quickly, they have been in the parliament or the public domain for some time, thus providing an opportunity for members to consult with representative groups, stakeholders and the public. In the case of emergencies, bills may not have had any exposure to stakeholder groups prior to their consideration by parliaments. This can put immense pressure on such groups, and particularly parliamentarians, to adequately acquaint themselves with the content and effect of the bills to be able to scrutinize them in plenary debate.

The risk of legislation passed in an abridged fashion is that it could lead to poorer legislation. This risk is heightened where legislation has not been subject to consultation drafts or committee scrutiny or where it has been passed through its parliamentary stages quickly so as to limit the time for parliamentarians and interest groups to consider the proposed bills. It is not clear whether there is a definitive link in Australia between the technical quality of a bill and the time that it took to pass the parliament, and this could be the subject of future research.

The House of Lords Select Committee on the Constitution considered the implications of fast-tracked legislation in its 2009 report.⁹ The committee heard conflicting evidence as to what a 'fast-tracked' bill was but settled on a definition that included legislation that had passed through two or more stages in one day in the House of Lords, legislation where there had been a significant departure

8 For example, bills passed by the Australian Commonwealth Parliament were exempted by the prime minister from the regulatory impact process.

9 Select Committee on the Constitution, House of Lords, *Fast-track Legislation: Constitutional Implications and Safeguards* (2009).

from the normal intervals between stages or legislation where parliament had been recalled to consider and pass.¹⁰

The committee identified five constitutional principles that should underpin legislation that is expedited through the parliament, namely:

- To ensure that effective parliamentary scrutiny is maintained
- To maintain ‘good law’ and ensure the technical quality of legislation
- To provide interested bodies and affected organizations with the opportunity to influence the legislative process
- To ensure that the legislation is proportionate, justified and appropriate in response to the issue at hand and that it does not jeopardize fundamental constitutional rights and principles
- To maintain transparency¹¹

These five principles are critical during the passage of all legislation and are not new concepts in the legislative scrutiny process.

D Addressing Deficiencies in Scrutiny During Emergency Periods

When making emergency legislation there is a risk that legislators will seek to be seen to be doing something in response to the threat and overestimating the risk that exists.¹² For this reason, we posit that a critical scrutiny aspect of fast-tracked bills must be an appropriate review mechanism. This was considered by the House of Lords Select Committee on the Constitution, who recommended that there be a presumption in favour of a sunset clause in fast-tracked legislation and that the minister concerned state the reasons why a sunset clause was not incorporated into any fast-tracked bill.¹³

In Australia, post-legislative scrutiny occurs in an ad hoc manner.¹⁴ Three main forms of post-legislative scrutiny are used in Australia – sunset clauses, review by the executive and review by parliament.

Of these three options, the only method that can bring about legislative change is sunset clauses – either through the expiry of contentious laws or through their reintroduction and debate. These clauses bring the operation of legislation or parts of legislation to an end at a certain date and consequently require the approval of the parliament to reinstitute the provisions. Despite their capacity to enable a parliament to review contentious provisions, sunset clauses have limited effect in changing laws. Ip (2012) measures the success of sunset clauses in substantive and procedural terms. Ip found that sunset clauses did not often lead to substantive change in anti-terrorism legislation as legislatures made ‘repeated extensions or remove the sunset clause altogether’, in particular, as the

10 *Ibid.*, p. 11.

11 *Ibid.*, p. 8.

12 J. Ip, ‘Sunset Clauses and Counterterrorism Legislation’, *SSRN Electronic Journal*, March 2012.

13 *Supra*, note 10, p. 46.

14 S. Moulds, ‘A Deliberative Approach to Post Legislative Scrutiny? Lessons from Australia’s Ad Hoc Approach’, *The Journal of Legislative Studies*, vol. 26, no. 3, 2020.

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threat of terrorism is always present.¹⁵ The author does point to some success in a procedural sense as the reconsideration of contentious clauses does enable consideration of the effects of laws by parliamentary committees and oversight bodies but notes that attendance at renewal debates is low.¹⁶ These findings may not translate into a health emergency, particularly if the threat to society abates.

Post-legislative scrutiny by parliament, for example by way of a committee inquiry, ensures parliamentary involvement in the nature and scope of a review. However, this method of post-legislative scrutiny cannot mandate legislative change and rarely leads to timely legislative change.¹⁷

The final form of systemic post-legislative scrutiny is through review of laws by the executive with subsequent tabling of reports in parliament. This form of review is weak in terms of impact and parliamentary engagement as reviews often do not take place, there is often little discussion of these reviews in parliament and they cannot result in immediate legislative change.¹⁸

E The Western Australian Context

The Western Australian Parliament is one of six state-based parliaments in Australia. This subnational parliament is bicameral with broad legislative responsibilities. It is comprised of a government-controlled lower house (Legislative Assembly) made up of 59 single-member electorates. The upper house (Legislative Council) is made up of 36 members from six multi-member electorates, elected on the basis of proportional representation. This often leads to a greater number of parties (currently 8 groupings) and the government not having a majority. The current government holds 14 seats and requires the support of other parties to pass legislation.

After the threat of COVID-19 increased, the Legislative Council and Legislative Assembly implemented temporary measures to ameliorate the danger. From a health perspective, these measures included increased distancing, reduced contact between members and staff and limiting access to the parliamentary buildings. Both Houses implemented temporary standing orders concerning the conduct of business. The temporary orders enabled the Houses to move through the stages of a bill in an expedited manner, enabled the introduction and debate of bills on the same day and enabled the government to set time limits for debate on a bill. Such reforms were extraordinary given the Legislative Council's convention not to use a 'guillotine' to restrict parliamentary debate.

15 *Supra*, note 13, p. 14.

16 *Ibid.*, p. 18.

17 K. Doust and S. Hastings, 'An Overview of Post-legislative Scrutiny in Western Australia', *Journal of Southeast Asian Human Rights*, vol. 3, no. 2, pp. 231-257, 2019.

18 *Ibid.*

F The Commonwealth Context

Australia's national Commonwealth Parliament is bicameral with a House of Representatives of 150 members elected from single-member constituencies and a senate that is comprised of 12 senators from each state and two senators from each Territory, elected on a proportional basis. The government holds a majority in the House of Representatives but requires the support of the cross bench or opposition to pass legislation in the senate.

In late March 2020 the Commonwealth Parliament implemented special arrangements in response to COVID-19. Less than two-thirds of the House of Representatives members were in attendance and less than half of the total number of senators attended. Social distancing measures were implemented, the handling of papers was reduced, doors remained open and visitors and advisers were limited. Temporary orders were used to facilitate the passage of bills during this period, including a time-limited debate on the packages of bills.

G Data Set and Methods

In order to assess the extent of scrutiny of bills enacted during the COVID-19 emergency, a data set was prepared of the bills passed by the Western Australian Parliament and the Commonwealth Parliament immediately after the commencement of the COVID-19 pandemic. Bills included in the data set must have either passed through all stages of debate between 15 March 2020 and 30 April 2020 or were the subject of a parliamentary recall. In setting these criteria, the aim was to restrict the data set to those bills that had been fast-tracked and exclude bills that had been in the public domain for some time yet passed during the relevant period as being COVID-19 related.

Detail on the bills' procedural passage along with amendments proposed and review provisions contained therein were compiled. These measures assist in evaluating the bills' passage against the House of Lords' constitutional principles. In addition, Hansard was reviewed to ascertain the date that draft bills were available to members, any consultation that was conducted with stakeholders and when the process to enact legislation commenced. Collection of this information was dependent on its being raised in debate and therefore may not provide a comprehensive view of the amount of consultation conducted in the formation process.

H Results

The Western Australian data consists of 11 bills passed in two sitting weeks. The first sitting week was a scheduled sitting of three days. During this week, six bills passed all of their stages. A further three bills outside of the data set were passed by the Legislative Council. The second sitting week was not a scheduled sitting week and was the subject of a parliamentary recall by the presiding officers. Five bills passed both Houses of Parliament during the second week.

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Table 1 *Bills Passed by Western Australian Parliament*

Bill	Days to pass	Pages	Amendments moved (by government)	Amendments successful	Sunset clause
Treasurer's Advance Authorisation Bill 2020	1	4			No
Emergency Management Amendment (COVID-19 Response) Bill 2020	2	11	4(1)	1	Yes
Criminal Code Amendment (COVID-19 Response) Bill 2020	2	5			Yes
Family Violence Legislation Reform (COVID-19 Response) Bill 2020	2	28			No
Transport (Road Passenger Services) Amendment (COVID-19 Response and Regional Assistance) Bill 2020	3	11			No
Guardianship and Administration Amendment (Medical Research) Bill 2020	2	34	5(1)	3	Yes
Lotteries Commission Amendment (COVID-19 Response) Bill 2020	2	10	1(1)	1	Yes
Pay-roll Tax Relief (COVID-19 Response) Bill 2020	2	10			Yes
Local Government Amendment (COVID-19 Response) Bill 2020	2	7			Yes
Residential Tenancies (COVID-19 Response) Bill 2020	2	59	18(15)	17	Yes
Commercial Tenancies (COVID-19 Response) Bill 2020	2	21	9(6)	9	Yes

The bills, as set out in Table 1, ranged in subject matter from finance and taxation, tenancy law, criminal law, emergency management and the rights of vulnerable people. The average size of the bills was 18 pages, and the range was 4 to 59 pages.

In the relevant period the Commonwealth Parliament passed 11 bills through all stages on one sitting day in March and a further four bills through all stages on one sitting day in April, as set out in Table 2. The senate passed a further four existing bills during its one-day sitting in March. The bills were largely economic bills that sought to ensure supply, provide additional cash for businesses and individuals and adjust tax thresholds. The average size of the bills passed was 54 pages ranging from 8 to 162 pages.

I Principle One – Ensuring That Effective Parliamentary Scrutiny Is Maintained

Both parliaments passed an extraordinary number of laws in a short time. This presented difficulties in terms of scrutiny. The most pressing of these difficulties

Table 2 *Bills Passed by the Commonwealth Parliament in the Relevant Period*

Bill	Days to pass	Pages	Amendments moved (by government)	Amendments successful	Sunset clause
Coronavirus Economic Response Package Omnibus Bill 2020	1	91	25(12)	12	No
Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Bill 2020	1	20			No
Assistance for Severely Affected Regions (Special Appropriation) (Coronavirus Economic Response Package) Bill 2020	1	10	5(0)		No
Appropriation (Coronavirus Economic Response Package) Bill (No. 1) 2019-2020	1	34			No
Appropriation (Coronavirus Economic Response Package) Bill (No. 2) 2019-2020	1	22			No
Structured Finance Support (Coronavirus Economic Response Package) Bill 2020	1	15			No
Australian Business Growth Fund (Coronavirus Economic Response Package) Bill 2020	1	14			No
Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) Bill 2020	1	8	1(0)		No
Supply Bill (No. 1) 2020-2021	1	162			No
Supply Bill (No. 2) 2020-2021	1	92			No
Supply (Parliamentary Departments) Bill (No. 1) 2020-2021	1	21			No
Coronavirus Economic Response Package (Payments and Benefits) Bill 2020	1	20	16(0)		No
Coronavirus Economic Response Package Omnibus (Measures No. 2) Bill 2020	1	47	2(0)		No
Appropriation Bill (No. 5) 2019-2020	1	162			No
Appropriation Bill (No. 6) 2019-2020	1	95			No

was that ministers and other members had little to no time to scrutinize bills before they were debated in the parliaments.

In Western Australia, while members did receive briefings from government departments on the policy and mechanisms of the bills, members were on occasion debating bills that they had received less than 24 hours before, or, in one

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case, merely hours before the bill was debated.¹⁹ Such information asymmetry in the passage of legislation is unusual. The difficulties in having limited time to scrutinize bills before debate was amplified by some ministers and opposition members having multiple bills within their portfolio area to scrutinize.

Debates in the Legislative Council were time-limited debates, which in Western Australia is considered paradoxical for a house of review. Before a time limit could be applied to a debate, all parties had to agree to treat a bill as 'COVID-19 related'. The government then sought input from all parties as to how much time they would need for scrutiny before setting time limits. In effect, the decision to limit the time for scrutiny was owned by the House as a whole rather than being an exclusive decision of the government. Despite limited debate time, there were occasions when the time limit for a bill expired and the chair was required to put questions and amendments to bills without debate. This resulted in some aspects of bills receiving no scrutiny or explanation and in members not being able to advocate for their reasons why amendments should be agreed to or why clauses of the bills should be deleted.

At the Commonwealth Parliament, extensive arrangements were seemingly made between the government and the opposition to deal with the bills in an expedited manner without the need for extensive debate in the chambers. On the two sitting days considered in this study, bills were passed as a package, with up to eight bills being debated together. In the House of Representatives, the first package of bills was considered in detail by the House, but, owing to the lapse of time, the House only had minutes to consider the broad package of amendments proposed by the government and the opposition. There was no specific debate on the hundreds of pages of bills, and only two questions were put to the relevant minister before time expired. In the senate, the first package of bills was considered for one hour and 33 minutes. In a package of bills considered during April, the bills were considered in detail by the House for a total of 29 minutes and the senate for two hours and 14 minutes. Multiple amendments were put as one question. It is unclear from the Hansard when the bills were made available to members for scrutiny.

II Principle Two – To Maintain 'Good Law' and Ensure the Technical Quality of Legislation

It is difficult to establish criteria as to whether a law is a 'good law' or a 'bad law' and not enough time has passed to assess the practical effects of the bills in the data set. However, one measure of the technical quality of bills can be the number of times that a bill is amended by the House.

In Western Australia almost all amendments to legislation are made by the Legislative Council, with amendments in the government-controlled Legislative Assembly usually limited to technical amendments. For the 11 bills considered in this study, only one amendment was moved in the Legislative Assembly, being an opposition amendment.

19 Western Australia, *Parliamentary Debates*, Legislative Assembly, 1 April 2020, 1979 (Peter Katsambanis, Member for Hillarys).

In the Legislative Council, amendments were moved to five of 11 bills. The government moved a single amendment to three of these bills, in each case seemingly for policy rather than technical reasons, as they were in similar terms to amendments proposed by other parties. For two bills relating to tenancy law, the government moved a substantial number of amendments. While many of these amendments were seemingly to address concerns with the policy of the bill as expressed by the House, some of the amendments were technical in nature and introduced new concepts into technical bills. These amendments were moved and circulated while the bills were being considered by the House, which severely limited the time in which members could ensure that the amendments were technically sound within the legislative framework.

The House of Representatives in the Commonwealth Parliament dealt with all amendments from a political grouping en bloc, pursuant to resolutions of the House. As a number of bills were moved as a package, this meant that a range of bills were being amended through the consideration of a single question before the House. In the senate, amendments were dealt with individually but could relate to the range of bills being considered at once. The government moved 12 amendments to one of the 15 bills passed in the relevant period. The government did not provide an explanation as to why it was moving the amendments to the bill, so it is difficult to assess whether the amendments were to correct technical deficiencies or to amend policy measures.

III Principle Three – To Provide Interested Bodies and Affected Organizations With the Opportunity to Influence the Legislative Process

It is unclear from the parliamentary debates how much consultation occurred with interested bodies in relation to the bills in Western Australia. However, the debates do reveal the limited time that elapsed between work commencing on the bills and the time that they were introduced to parliament. Drafting on several bills commenced less than a week before they were introduced into parliament.²⁰

The limited consultation was acknowledged by the government in relation to some bills. When amending guardianship legislation, which sought to permit medical research on those under guardianship orders, the minister acknowledged, “[T]he State Government recognizes that due to the urgency presented by the coronavirus, consultation on the bill has not been as comprehensive as we would like” and tabled some letters from prominent stakeholders relating to the bill and committed to post-enactment review by parliamentary committee.²¹

There is no discussion in the Commonwealth Hansard about engagement with stakeholder groups or industry bodies. Further, the bills were exempt from a regulatory impact process that would require consultations on the measures contained in the bills.

20 *E.g. the Emergency Management Amendment (COVID-19 Response) Bill 2020 (WA), the Criminal Code Amendment (COVID-19 Response) Bill 2020 (WA), Family Violence Legislation Reform (COVID-19 Response) Bill 2020 (WA) and Guardianship and Administration Amendment (Medical Research) Bill 2020 (WA).*

21 Western Australia, *Parliamentary Debates*, Legislative Assembly, 1 April 2020, 1977 (Hon Roger Cook, Minister for Health).

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IV Principle Four – To Ensure That the Legislation Is Proportionate, Justified and Appropriate in Response to the Issue at Hand and That It Does Not Jeopardize Fundamental Constitutional Rights and Principles

Western Australia does not have a bill of rights. When bills are scrutinized by parliamentary committees, they are often measured against fundamental legislative principles as set out in the *Legislative Standards Act 1992* (Qld). These standards consider matters such as whether a bill has sufficient regard to the rights and liberties of individuals, including common law rights, delegating administrative power appropriately or has regard to the institution of parliament.

Several of the 11 Western Australian bills would offend against fundamental legislative principles, including the retrospective application of laws and limits to personal freedoms. Indeed, it was the explicit intent of the legislation to infringe on these rights, such as freedom of movement. This caused some discomfort for legislators who recognized the need to implement severe measures to control the pandemic in Western Australia but were also concerned about civil liberties. Each of the laws that would impact on a personal freedom was subject to a sunset clause, with the exception of one law, which permitted electronic monitoring of domestic violence perpetrators.

A member introducing a bill to the Commonwealth Parliament must present a statement of compatibility, which contains an assessment of whether a bill is compatible with certain human rights.²² Some bills passed by the Commonwealth Parliament did have aspects that were incompatible with human rights, including the right to freedom of movement, right to work and the right to privacy.

V Principle Five – To Maintain Transparency

Both the Commonwealth Parliament and the Western Australian Parliament were closed to all but essential staff during the relevant period. This meant that public galleries were closed, and in the case of the Commonwealth, the media gallery was restricted to four people at a time.

However, parliamentary proceedings were broadcast via the Internet. Both parliaments maintained their online presence, including webpages on the progress of bills, provision of Hansard and social media.

VI Review

The approach to review by the Western Australian and Commonwealth Parliaments was very different.

Almost all of the bills presented to the Western Australian Parliament contained a sunset clause that covered the whole or part of the bill. One bill, the *Guardianship and Administration Amendment (Medical Research) Bill 2020* (WA), did not contain a sunset clause. After debate in the Legislative Council, a sunset clause was included in the bill along with transitional provisions that would result in the sunset clause not impacting on medical research that was under way. The impact of these sunset clauses, some in as soon as 12 months, is that the parliament will have the opportunity to review the need for these emergency laws

²² *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), s. 8.

and scrutinize them with the benefit of time prior to their possible re-enactment. It is noted that many of these laws will expire in the period between the current and the next parliament. If the laws are required going forward, action will need to be taken prior to November 2020 to ensure the powers continue.

Only one of the bills contained an executive-led review clause. After this bill was passed, the Legislative Council resolved to send the act to a parliamentary committee for parliament-led post-legislative scrutiny.

By contrast, none of the bills passed by the Commonwealth contained a sunset clause, possibly because most of the bills passed by it were economic measures rather than measures that temporarily increased the powers of the state or infringed personal freedoms. Despite none of these bills being sunsetted, the Commonwealth has a robust committee review system. Each bill was subsequently considered by the Parliamentary Joint Committee on Human Rights and Senate Standing Committee for the Scrutiny of Bills. These committees considered each bill's compatibility with human rights and key legislative principles, respectively. Both committees produced comprehensive reports on some bills passed during the relevant period, including inviting comment from the relevant minister and a committee view.

I Observations

Comparatively, the Western Australian Parliament spent more time considering bills during the relevant period, despite abridged debate times. This time was mostly used for consideration of the bills in detail, which places some material on the public record of the way that sections of the bills are to be interpreted and an opportunity for ministers to provide undertakings to provide further information to the parliament at a later time. The Commonwealth Parliament spent very little time considering its bills during the relevant period with only a handful of hours across both Houses to scrutinize 15 bills.

Given the speed at which legislative proposals were implemented, it is unlikely that either parliament had the opportunity to engage stakeholders meaningfully and specifically in relation to the bills. This was particularly the case as some bills were not ready until immediately prior to introduction. The lack of amendments indicates some technical rigour in the bills but could also be interpreted as parliamentarians having little opportunity to adequately find the technical deficiencies.

While there was far less scrutiny of bills than there would be in non-COVID circumstances, the Western Australian government identified the need for subsequent review of extraordinary measures and included sunset clauses in most of the bills.

The Commonwealth Parliament has a more robust committee system, where all bills receive scrutiny by multiple parliamentary committees and, where appropriate, a report. These reports likely prove useful for legislators when delivered prior to a bill's passage but when produced after a bill's passage do no more than capture key learnings. They cannot produce any change to the law. The

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Western Australian Parliament does not have an automatic process for all bills to be scrutinized by committee. As a result, any information on the impact and implementation of the laws will come from the executive. This may present some difficulties if the government seeks to renew the laws that are due to sunset. With only three months remaining in the current parliament, opportunities to refer any bills to extend these powers to a committee for review and scrutiny will be limited. Consequently, the use of sunset clauses may not result in the level of procedural scrutiny highlighted by Ip.

The stark contrast between the Commonwealth Parliament, which has information about the impact and technical quality of bills but no power to change them, and the Western Australian Parliament, which has little information about the impact and technical quality of the bills but power to change them, is noteworthy.

J Legislative Scrutiny During Emergencies Into the Future

A primary driver of the speedy passage of bills was concerns that the parliament would need to shut down and would be unable to pass requisite legislation during a severe pandemic. Parliaments have responded to this threat by rapidly adopting new ways of working to provide transparency.

Since the commencement of the pandemic, several assemblies have moved to full or partially online sittings.²³ While audiovisual participation in parliamentary committees in Australia has been commonplace for a number of years, Australian parliaments have been cautious in adopting this way of working for plenary debates.

One reason for this cautious approach are constitutional questions such as the requirement of the 'presence' of a number of members of parliament to constitute a quorum.²⁴ While 'presence' is not defined in constitutional documents, under modern Australian statutory interpretation laws are considered to be 'always speaking', and the term 'presence' could be read in a modern context to include 'online presence'. These issues are not unique to Australia.²⁵ Small steps were recently made by the House of Representatives and the Australian senate, which agreed to allow some member participation in plenary debates via videoconferencing.

K Conclusion

In times of crisis, citizens look to their governments and parliaments for solutions. These institutions play a powerful role in demonstrating that some

23 *E.g.* the States Assembly, the Welsh Parliament and the House of Commons and House of Lords.

24 *Commonwealth of Australia Constitution Act* (Cth), ss. 22 & 39.

25 Standing Committee on Procedure and House Affairs, House of Commons (Canada), *Carrying Out Members' Parliamentary Duties: The Challenges of Voting During the COVID-19 Pandemic* (2020).

aspects of life continue on. In times where trust in parliaments and governments has declined, the COVID-19 response provides an opportunity for these institutions to carefully cradle the trust placed in them by society when it is most vulnerable and deliver a response that is temporary and proportionate. In delivering this response, parliaments must adapt in the way they work to ensure that they are transparent and that they take the time to ensure that legislative measures are fit for purpose. Now that the initial emergency is over, and parliaments have had time to prepare to do their work differently, citizens may be less forgiving of speedy responses that do not undergo the usual scrutiny mechanisms.