

***‘Thick’ Accountability Mechanisms
and
Public Health Emergency Powers under COVID-19***

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1. Introduction

One of the primary obligations of democratic governments is the prevention and remediation of hazards which pose a risk to their populations¹. The global spread of SARS-CoV-2 in 2019 and 2020 is one such hazard. Even if it is accepted that non-state actors (including the private sector, civil society, individuals and communities) may have a critical role to play in addressing a hazard such as a COVID-19,² democratically elected governments have special responsibilities to their people at time such as this. In most countries, which have had a significant number of COVID-19 cases, there is hardly an aspect of life which is untouched by the pandemic. In response, parliaments in countries around the world are adopting legislation to deal with the grave health, social, economic, and legal consequences of COVID-19.³ Furthermore, the executive branch of governments is generally granted some form of powers under the constitution (in systems where there is one) and/or legislation to deal with public health emergencies such as COVID-19. In these emergency contexts, the powers generally authorise the executive to take action which would otherwise generally be unlawful, such as forcing the isolation of individuals, and requiring individuals to submit to interferences with their bodily integrity, such as through swabbing and other testing. Some of these powers are strictly limited by the terms of the legislation, but some are, not and confer broad discretions on executive decision-makers. In these extraordinary times, a prevalent concern, at times approximating concern about the underlying problem itself, is whether legislative and executive power is being properly exercised.

This paper considers some of the mechanisms used in Australia to ensure the proper exercise of legislative and executive power during COVID-19. It argues that, although traditional mechanisms for control of legislative and executive involving applications to the courts have an important role to play, their generally narrow focus in the Australian system on the legality of the legislative or executive conduct does not provide the type of ‘thick’ accountability which is needed in this context. In Australia, the High Court’s review of the constitutionality of Commonwealth legislation is primarily concerned with whether the legislation is within one of the heads of power of the Commonwealth parliament.⁴ Very few additional constitutional restrictions exist on the powers of the Commonwealth parliament. The situation is largely the same in relation to State legislative power.⁵ In terms of executive action, the courts, at the

¹ Michael Walzer, *Spheres of Justice* (1983).

² Lawrence Gostin, *Global Health Law* (Harvard University Press, 2014).

³ See, eg, *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic).

⁴ *Commonwealth Constitution* ss 51 and 52.

⁵ There are several constitutional challenges afoot in relation to decisions by the governments of the States of Queensland and Western Australia to close their borders: <https://www.abc.net.au/news/2020-06-10/coronavirus-queensland-border-closure-high-court-challenge/12331884>.

Commonwealth or State or Territory levels, supervise for the legality of decisions made pursuant to the executive's statutory (or prerogative powers) and do not generally scrutinise the 'merits' of executive action – whether the decision is fair or unfair, protective of rights or not, substantively correct or not.⁶ Legality is generally limited to reviewing for whether the decision-maker had power to act, a fair procedure was followed, the decision was made without bias, and an adequate process of reasoning was followed. In the States and Territories which have *Charters of Rights*, review of executive action may also look at whether there was consistency with these standards.⁷ Some very limited use of the courts has been made in Australia to challenge government measures in relation to COVID-19,⁸ compared to other countries where the courts have been looked to much more frequently.⁹

My argument is not that these forms of judicial accountability are not important. They are. But a more substantial form of accountability is also needed where the crisis has such extensive, lasting consequences, at both an individual and population level, across so many aspects of the society, especially its economy. The paper argues that essential to bringing adequate scrutiny to the conduct of government in relation to governance challenges raised by COVID-19 are two inquiry-based mechanisms: (1) the holding of parliamentary committee 'inquisitorial-style' inquiries; and (2) the conduct of systems-level inquiries by other 'integrity branch' actors in the Australian system, such as the Ombudsmen and Auditors-General. This thick form of accountability offers the opportunity for review of past and continuing conduct, but it also offers the greatest opportunity for recommending concrete changes to be made to improve the operation of government in these crisis situations for the future.

2. Parliamentary Committees

At the federal, state and territory levels of government in Australia, there is a system of parliamentary committees which have the power to conduct inquiries into almost any aspect of Australian life which has implications for 'matters of policy or government administration or performance'.¹⁰ Over the years, there have been inquiries into Australia's banana export industry, the prevalence of foetal alcohol spectrum disorder in Australia, homelessness, the conduct of Australia's banking industry, and many more. These committees are constituted by members of parliament and usually include a group of members from the governing and opposition parties, as well as non-aligned members. Some are 'standing' committees and exist on an on-going basis. Others are ad hoc committees. The subject matter of the committees inquiries is based on a referral by the parliament, a Minister, or the committee itself. They have extensive powers, including the power to demand the attendance of witnesses and the provision

⁶ *Attorney-General (NSW) v Quin* (1990) 170 CLR 1

⁷ See, eg, *Charter of Rights and Responsibilities Act 2006* (Vic). Queensland and the Australian Capital Territory also have human rights legislation.

⁸ See, eg, *Mark Rowson v The Secretary, Department of Justice & Ors* (detention of prisoners); <https://pursuit.unimelb.edu.au/articles/detention-increases-covid-19-health-risk> (refugees).

⁹ See, eg, UK: <https://adminlawblog.org/2020/05/26/joe-tomlinson-jo-hynes-jack-maxwell-and-emma-marshall-judicial-review-during-the-covid-19-pandemic-part-i/>

¹⁰ https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/00_-_Infosheets/Infosheet_4_-_Committees

of documents or other information. The committees take submissions from any legal person (individual, corporate, organisation). They also generally conduct oral hearings to allow members of the committees to ask further questions of those who made written submissions or others. The content of the written and oral submissions inform the findings of the committees. The committees write reports, which make recommendations and which are laid before the parliament. The findings and recommendations of the committees often influence the direction of government policy or the shape of laws made by the parliament. They sometimes serve to bring to light social or economic problems, which have hitherto not been fully understood by the community, thereby serving as an impetus for further public advocacy to government.

The committees are one of the most important forms of parliamentary accountability in the Australian political system.¹¹ However, they are not without their limitations, which means that their potential to hold government to account sometimes goes unfulfilled. This might be because the Committee is formed from the lower house of parliament and it is dominated by members of parliament who are part of the government. It might also be because Ministers or other members of parliament might refuse to appear before the Committee or to hand over documents. There are also more reports of public servants, who should be independent of any political party, stalling Committee processes by not answering questions.¹² Despite these potential shortcomings, the Committees remain the best form of parliamentary accountability in Australia.

On 8 April 2020, the Senate passed a resolution to establish the Senate Select Committee on COVID-19 (COVID-19 Committee). The Senate is the upper house of Australia's bicameral parliament and, currently, is not controlled by the party (the Liberal Party) who controls the executive branch of government. (In Australia, the party who controls the lower house controls the executive branch of government.) The resolution of the Senate to establish the COVID-19 Committee represents an opportunity for the opposition parties and members to scrutinise the government's conduct in response to COVID-19. The terms of reference for the COVID-19 Committee are exceptionally broad, with the matter referred to it or inquiry being 'the Australian Government's response to the COVID-19 pandemic; and any related matters.'¹³ The Committee is due to report on 22 June 2020. It received 123 submissions from the public, including from individuals, government departments, universities, Amnesty International and other human rights groups, business organizations, medical groups, and trade unions. The submissions are published on the Committee's website and are freely available to the public.¹⁴ The Committee also held 14 days of oral hearings by digital means. These oral hearings are also open to public. The Committee took the chance in the oral hearings to question officials from various government departments, including Ministers, about key aspects of the government's policy response to COVID-19. This included understanding the government's

¹¹ Gabrielle Appleby, Alex Reilly, Laura Grenfell, *Australian Public Law* (OUP, 2014) 296-8.

¹² <https://theconversation.com/view-from-the-hill-senate-committees-are-one-of-the-few-bright-spots-in-the-battle-to-hold-government-to-account-140641>

¹³ https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/COVID-19/COVID19/Terms_of_Reference

¹⁴ https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/COVID-19/COVID19/Submissions

risk assessment, assessing whether the government acted quickly enough in response to information it had about COVID-19, assessing the appropriateness of Australia's travel restrictions, and interrogating the chronology of events and the shared responsibility of Commonwealth and State officials for the disembarkation of passengers from a cruise ship, *Ruby Princess*, which was the source of a major outbreak of the COVID-19 and several deaths.

Through one set of questioning, the Committee discovered that a major error in the government's estimate of the number of people it was assisting with a special social security payment for those who have lost their income because of COVID-19 ('Jobkeeper Scheme'). The questioning also revealed that the cost of the Jobkeeper Scheme would only be \$70 billion (USD48 billion), not \$130 billion (USD88 billion). The information was vital to evaluating the adequacy of the government's economic response to the crisis, the adequacy of its support to affected persons (there have been many exemptions from the Jobkeeper Scheme which has seen people plunged into poverty), and the appropriateness of the government's decision to end the JobKeeper scheme as at a certain date.

The topics traversed by the Committee in its hearings have been wide-ranging and it is expected that its report will be similar. The report will be exceptionally important in starting the process of reflecting on Australia's preparedness for COVID-19, its conduct during the height of the pandemic, the measures required as Australia moves into the stand-down phase, and the changes needed for future crises, whether of a pandemic nature or otherwise. There are similar Committee processes occurring at the State and Territory levels in Australia,¹⁵ and the Senate COVID-19 Committee is unlikely to be the last Commonwealth parliamentary inquiry into the pandemic.

3. Other Integrity Officers: Auditors-General and Ombudsmen

Australia also has a range of other offices and organizations which, along with parliament and the courts, form the 'integrity branch'¹⁶ of government. These officers are often established by parliament and form part of the parliament (as independent and not elected officers) or part of the executive. In both instances, these officers and organizations are subject to a range of protective measures which successfully insulate them from interference by the executive. Two such offices of significance to accountability of the government during COVID-19 are: (a) the ombudsman and (b) the auditors-general at the Commonwealth, State and Territory levels.

a. Ombudsmen Schemes

The Ombudsman schemes were established in Australian jurisdictions in the 1970s and 1980s as a part of a widespread package of administrative law reforms, which responded to findings about the lack of transparency and accountability of Australian's executive arm of government, and the resulting lawlessness, injustice and inefficiency arising from the conduct of this branch of government.¹⁷ Taking the Commonwealth Ombudsman as an example, the Ombudsman has

¹⁵ See, eg, Inquiry into the Victorian Government's Response to the COVID-19 Pandemic <<https://www.parliament.vic.gov.au/paec/inquiries/inquiry/1000>>.

¹⁶ JJ Spiegelman, 'The Integrity Branch of Government' (2004) 78 *Australian Law Journal* 724.

¹⁷ Administrative Review Council, *Judicial Review in Australia* (April 2011).

powers to investigate complaints received, as well as to initiate investigations of his or her own motion, in relation to ‘administrative action’. The Commonwealth Ombudsman has a range of coercive powers, which resemble the powers of royal commissions in Australia, and which include being able to make requests for evidence. The Ombudsman makes findings about the administrative action under review, which extends far beyond those which are open to courts or tribunals in Australia. These include that the administrative action: was contrary to law; was unreasonable or unjust; was in accordance with law but the law itself is unjust; was based on a mistake of fact or law; was otherwise wrong.¹⁸ The Ombudsman, however, does not have the power to make binding orders against those subject to adverse findings. The Ombudsman issues a report to the relevant government department (and the associated Minister) about his or her findings, along with recommendations about corrective action to be taken.¹⁹ The Ombudsman may ask the relevant government department to report on action they propose to take in response to his or her findings and recommendations.²⁰ If the Ombudsman considers that action taken in response to its findings or recommendations are inadequate, he or she may report to the Prime Minister,²¹ and then present a copy of his or her report to the parliament.²² The parliament is then expected to use the mechanisms available to it (including Question Time and the parliamentary committees discussed above) to pursue the issues raised in the Ombudsman’s report.

Following a complaint by the Public Interest Advocacy Centre on behalf of 13 men in migration detention, the Commonwealth Ombudsman, Michael Malthorpe, has announced an investigation into ‘how detention facilities in Australia have acted to protect asylum seekers, refugees and others being held during the coronavirus pandemic, and whether any detainees should be released on health grounds.’²³ The complaints relates to the crowded conditions under which the men are detained, including the use of shared facilities and the impossibility of social distancing in these circumstances.²⁴ All 13 men are at heightened risk of contracting coronavirus because of their underlying health conditions.²⁵ As part of the investigation, staff of the Ombudsman are making visits to migration detention centres around the country to ‘observe the way in which the Department of Home Affairs and its contracted providers are implementing their respective COVID-19 plans.’²⁶ The Ombudsman is due to report in June 2020 with a statement of its findings from the visits and recommendations for improvements.

¹⁸ *Ombudsman Act 1976* (Cth) s 15(1).

¹⁹ *Ibid* s 15(2).

²⁰ *Ibid* s 15(3).

²¹ *Ibid* s 16(1).

²² *Ibid* s 17(1).

²³ <https://piac.asn.au/2020/06/03/commonwealth-ombudsman-to-report-on-covid-19-responses-in-detention-facilities/>

²⁴ <https://piac.asn.au/2020/05/07/covid-19-group-complaint-for-asylum-seekers-at-risk-in-immigration-detention-calls-for-urgent-investigation/>

²⁵ <https://piac.asn.au/2020/05/07/covid-19-group-complaint-for-asylum-seekers-at-risk-in-immigration-detention-calls-for-urgent-investigation/>

²⁶ <https://piac.asn.au/2020/06/03/commonwealth-ombudsman-to-report-on-covid-19-responses-in-detention-facilities/>

The Ombudsman mechanism is exceptionally important for understanding state practices around the prevention of COVID-19 in closed settings such as migration detention centres. The fact that the Ombudsman is able to access places of detention and perform site visits enables him to provide a more fulsome picture of the conditions in detention and the conduct of the government than courts are generally able to do in litigation-based challenges. The jurisdiction of the Ombudsman also extends to investigation of the conduct of ‘service providers’ of the Commonwealth, which opens up for scrutiny the conduct of private contractors who operate migration detention centres or provides services within those detention centres under contracts with the Commonwealth.²⁷ This investigation also adds to the increased scrutiny of Australia’s treatment of persons in closed settings over the last few years, in recognition of Australia having ratified the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* with its obligations coming into effect in December 2020.²⁸ Furthermore, the failure to care for vulnerable groups is a common occurrence during pandemics,²⁹ and investigations such as those by the Ombudsman shine a light on whether Australian governments have, despite their formal commitments, made any substantive progress in protecting the rights and interests of persons in these groups.

b. Auditors-General

The position of the Auditor-General was one of the first statutory offices created at the time of Australia’s federation in 1901. There are now Auditors-General at the Commonwealth level and in each of the States and Territories. The Auditor-General is described as an ‘independent and impartial public official who could scrutinise Commonwealth administration and give true assessments on the state of the public accounts without intimidation by government or other vested interests. The role of the Auditor-General was seen as fundamental to good government.’³⁰ Similar to the role of the Ombudsman,³¹ the Auditor-General has an impressive range of powers which enable them to obtain information critical to their performance of their statutory functions. There are various types of audits which may be conducted by the Auditor-General, with one being a ‘review or examination of a particular aspect of the operations of the whole or part of the Commonwealth public sector’.³² At the conclusion of such a review, the Auditor-General must give copies of the review to parliament, the relevant Minister, and other government agencies.³³ The Auditor-General may also give copies to other interested parties, which could include the media.³⁴ The office of the Auditor-General has been very important in recent years in shedding light on sub-standard executive conduct. Although the Auditor-General’s focus is on financial matters (a matter important in itself), his investigations have exposed serious deficits in executive conduct, including Ministerial interference in the

²⁷ *Ombudsman Act 1976* (Cth) ss 3BA and 8.

²⁸ <https://www.ombudsman.vic.gov.au/our-impact/news/unlawful-and-wrong-solitary-confinement-and-isolation-of-young-people-in-victorian-prison-and-youth-justice-centres-ombudsman/>

²⁹ Belinda Bennett and Terry Carney, ‘Planning for Pandemics: Lessons From the Past Decade’ (2015) 12 *Journal of Bioethical Inquiry* 419-29.

³⁰ <https://www.anao.gov.au/about/the-auditor-general>

³¹ *Auditor-General Act 1977* (Cth).

³² *Ibid* s 18(1).

³³ *Ibid* s 18(2).

³⁴ *Ibid* s 18(3).

decision-making of independent statutory agencies, the spending of government money on party political purposes,³⁵ and failings in the conduct of government contractors and of the Commonwealth in their supervision.³⁶

The Commonwealth Auditor-General has announced several reviews and audits in relation to government expenditure on its response to COVID-19.³⁷ Australia, like many countries, has invested in huge stimulus packages as part of its response to COVID-19. The Commonwealth Auditor-General says that his audit program ‘will focus on providing Parliament with transparency and assurance on management of the response.’³⁸ One aspect of the government’s response under scrutiny by the Auditor-General includes the provision of ‘advances’ to the Finance Minister to fund COVID-19 response activities (AUD40 billion/USD27 billion) to spend from 1 July without approval by parliament.³⁹ The activities of the Auditor-General promise to expose for public scrutiny the propriety of the conduct of the executive connected with the expenditure by government, and the effectiveness of such spending in the recovery of the society from COVID-19. These reviews are significant because some of the new legislation passed by parliament confers broad ‘zones of administrative freedom’ on members of the executive government to set the rules for eligibility for social security payments and the like.⁴⁰ The breadth of the discretion makes it problematic for courts to engage in review of the legality of decisions made pursuant to such powers. Yet, the focus of the Auditor-General on the propriety of spending related to the such social security schemes opens up the possibility of accountability for executive conduct.

4. Conclusion

Australian governments seem to have performed reasonably in protecting their populations from the worst of COVID-19. There have been a low number of deaths and few very new cases each day.⁴¹ Australia was able, through the imposition of strong border controls, population-level restrictions on movement and activity, and now extensive community testing, avert some of the death and suffering which has afflicted other countries, and which have resulted in agonising conflicts about the allocation of scarce medical resources.⁴² Even so, there remain

³⁵ <https://www.theguardian.com/australia-news/2020/feb/13/sports-rorts-almost-half-projects-funded-ineligible-audit-office-says>

³⁶ <https://www.theguardian.com/australia-news/2020/may/28/auditor-general-criticises-home-affairs-over-745m-manus-island-contracts>; <https://www.theguardian.com/australia-news/2017/feb/16/immigration-healthcare-provider-failed-to-run-police-checks-on-staff-on-manus>

³⁷ <https://www.anao.gov.au/work/request/the-australian-government-economic-response-to-covid-19>. Requests for audits have been made to Auditors-General in other Australian jurisdictions: <https://www.theage.com.au/national/victoria/victorian-liberals-demand-audit-of-state-s-covid-spending-20200602-p54yuf.html>

³⁸ <https://www.anao.gov.au/work/request/the-australian-government-economic-response-to-covid-19>

³⁹ <https://www.abc.net.au/news/2020-03-23/coronavirus-economic-stimulus-passes-parliament/12080388>

⁴⁰ <https://www.canberratimes.com.au/story/6732299/covid-19-ministerial-powers-need-to-be-reined-in/>

⁴¹ https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200614-covid-19-sitrep-146.pdf?sfvrsn=5b89bdad_4

⁴² Julian Savulescu and Dominic Wilkinson, ‘Who gets the ventilator in the coronavirus pandemic? These are the ethical approaches to allocating medical care’, *ABC News* (online, 18 March 2020) < <https://www.abc.net.au/news/2020-03-18/ethics-of-medical-care-ventilator-in-the-coronavirus-pandemic/12063536>>.]

questions about whether more could have been done earlier or at certain stages to prevent some of the COVID-19-related harm that Australia experienced. Furthermore, there are severe, interconnected social, economic, physical and mental consequences for individuals and the society arising from the approaches taken – and continuing to be taken – by Commonwealth, State and Territory governments. The ‘thick’ accountability mechanisms discussed in this paper – parliamentary committee inquiries, Ombudsmen investigations and Auditor-General reviews – have the benefit of being able to broadly and deeply interrogate the propriety of government action during COVID-19. Their jurisdiction is broad, and their inquiries and the focus can go beyond those which can be undertaken by courts. It is through these mechanisms that more penetrating scrutiny is possible. Such scrutiny offers up findings and recommendations for reflection by governments and their constituents about how we should be governed in these times of emergency. Because although *ex post facto* mechanisms are exceptionally important, the current crisis points to the need to deeply embed systems of good government. In times when accountability mechanisms are suspended, delayed or otherwise compromised, there must be a culture and infrastructure for governing well, which persists despite and beyond the crisis conditions.