

## COVID-19 ministerial powers need to be reined in

Briefing paper

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### Summary

The Australian Government's response to COVID-19 has devolved extensive decision making powers to individual Ministers, heightening the risk of corruption and poor decision making.

- Individual Ministers' have been given unchecked power over multi-billion dollar discretionary funds and wide reaching COVID-19 response packages.
- Claims of 'necessity' used to justify these powers are not legitimate.
- Accountability of Ministerial decisions is severely reduced with little or no effective measures when Parliament is not sitting.
- Risks of corruption and poor decision making are significant.
- Necessary accountability reforms include Parliament sitting throughout the COVID-19 crisis, independent enforcement of the Ministerial codes of conduct, improvement of formal consultation processes and a requirement that Ministers give a statement of reasons for major decisions.

### Concentration of executive power

The COVID-19 crisis has seen extraordinary powers being conferred upon individual Commonwealth Ministers. These include the power to allocate multi-billion dollar discretionary funds and set rules for large relief packages.

The Commonwealth Minister for Health Greg Hunt has 'human biosecurity emergency powers' including power to issue requirements necessary to prevent and control the spread of COVID-19 (e.g. social distancing rules; movement restrictions) under the *Biosecurity Act 2015* (Cth).

On the 23<sup>rd</sup> March Commonwealth Parliament passed a \$40 billion Advance to the Finance Minister under the *Appropriation Act (No 5) 2019-2020* (Cth) and the *Appropriation Act (No 6) 2019-2020* (Cth). The Commonwealth Minister for Finance Mathias Cormann has broad discretion to allocate this funding.

The Commonwealth Minister for Social Services Anne Ruston has been given the power to alter eligibility rules and payment rates for all social security payments under the *Coronavirus Economic Response Package Omnibus Act 2020* (Cth).

The Commonwealth Treasurer Josh Frydenberg has the power to set rules for the \$130 billion JobKeeper scheme under the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* (Cth).

The Commonwealth Minister for Industrial Relations Christian Porter has the power to exempt specified employers from provisions dealing with JobKeeper, enabling stand-down provisions under the *Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020* (Cth).

### **Illegitimate claims of “necessity”**

The coronavirus outbreak calls for decisive government action. Some increase in ministerial power is necessary to deal with the fast-moving crisis which has complex aspects, including the powers under the *Biosecurity Act*; and some discretionary funding to respond to the rapidly changing situation.

But the remarkable breadth of discretion is not necessary. The size of the Advance to the Finance Minister is unprecedented. The Henry VIII clause in the Omnibus Act gives the Minister for Social Services the power to override rules regarding eligibility and payment rates in the *Social Security Act 1991* (Cth).

The JobKeeper legislation provides only the shell of a scheme, and gives power to the Treasurer to decide on the details. But this was unnecessary, as the rules for JobKeeper were already determined and, in fact, promulgated on the same day as JobKeeper legislation was passed (*Coronavirus Economic Response Package (Payments and Benefits) Rules 2020*).

Removing Parliament from decision making and concentrating power in the Ministers' offices is not necessary for speed or efficiency. Parliament can act with sufficient speed and has demonstrated this on three occasions. The passage of two economic stimulus packages and the JobKeeper legislation were quickly assured on 23<sup>rd</sup> March and 8<sup>th</sup> April, and Parliament provided a mechanism for debate and amendments.<sup>1</sup>

Parliament can and ought to deal with many decisions encompassed by such ministerial discretion – decisions that ought to be legislated. Given the current context, Parliament can continue to meet online as demonstrated in England, Wales and Scotland where Statements and Question Time continue through the pandemic. Electronic voting is standard practice in Scotland and a similar model is being proposed in the UK Parliament.<sup>2</sup> Australia's Parliament is not making these decisions mainly because the government has adjourned Parliament until August

Hence, a false element of necessity has allowed the extraordinary expansion of ministerial power.

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<sup>1</sup> Australian Parliament, *Bills Assented to in Current Parliament*, accessed 16 April 2020, <https://www.aph.gov.au/Parliamentary%20Business/Bills%20Legislation/Assented%20Bills%20of%20the%20current%20Parliament>

<sup>2</sup> UK Parliament, 14<sup>th</sup> April 2020, *Speaker outlines virtual Parliament plans*, <https://www.parliament.uk/business/news/2020/april/speaker-outlines-virtual-chamber-plans/>

Not only has primary decision-making power been taken away but the power of either House to disallow legislative instruments issued by the various Ministers has also been suspended as delegated legislation (including legislative instruments) can only be disallowed when Parliament is sitting. In addition, the determinations of the Finance Minister in relation to the \$40 billion Advance and the requirements issued by the Minister for Health would not be disallowable even if Parliament were sitting. Nor are both subject to oversight by the parliamentary committees for the scrutiny of delegated legislation.<sup>3</sup>

### **Diminished accountability**

The transfer of decision-making from Parliament to individual Ministers will invariably mean less accountability and more opaque processes of deliberation. Accountability of Ministers is provided by a Statement of Ministerial Standards, the Prime Minister, Parliament, the media, stakeholders, civil society organisations, and to some degree their Party and the Department which they represent. Without public deliberation of legislation in Parliament, the public accountability mechanisms of Question Time, Senate and Budget estimates, committee inquiries, and scrutiny by stakeholders, civil society and the media are constrained.<sup>4</sup> The remaining mechanisms are largely internal, including the Statement of Ministerial Standards which is enforced by the Prime Minister.<sup>5</sup>

Deliberative processes are also constrained. The range of participants, direct and indirect, narrows: from Parliamentarians, their constituents, stakeholders, and civil society organisations to the Minister, ministerial staff, their department and those they choose to consult.

The response to coronavirus has also led to significant influence of informal bodies such as the COVID-19 Coordination Commission and National Cabinet. These bodies are not established under statute, have unclear lines of accountability and lack independent appointment processes. Prime Minister Scott Morrison has foreshadowed the continued role of National Cabinet in the aftermath of the coronavirus crisis.<sup>6</sup>

### **The risk of corruption**

The risk of corruption is exacerbated where power is concentrated in the hands of individuals, large amounts of public money is being spent in a short time frame, and little oversight or accountability measures are in place.

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<sup>3</sup> Australian Senate Standing Committee for Scrutiny of Delegated Legislation, *Scrutiny of COD-19 Instruments*, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Scrutiny\\_of\\_Delegated\\_Legislation/Scrutiny\\_of\\_COVID-19\\_instruments](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Scrutiny_of_COVID-19_instruments)

<sup>4</sup> Goss, 5<sup>th</sup> December 2015, *How unwritten rules shape Ministerial accountability*, The Conversation, <https://theconversation.com/how-unwritten-rules-shape-ministerial-accountability-50515>

<sup>5</sup> Department of Prime Minister and Cabinet, *Statement of Ministerial Standards*, accessed 16<sup>th</sup> April 2020, <https://www.pmc.gov.au/resource-centre/government/statement-ministerial-standards>

<sup>6</sup> Farr, 17 April 2020, *Australia set to begin easing coronavirus restrictions in four weeks*, The Guardian, <https://www.theguardian.com/australia-news/2020/apr/16/australia-set-to-begin-easing-coronavirus-restrictions-in-four-weeks>

There is a particular risk of misuse of power for partisan gain with Advance to the Finance Minister. Unlike the other ministerial powers, the determinations are not directed at providing rules, and do not necessarily have to be directed to addressing the COVID-19 crisis. The size of the Advance provides additional risk – being 400 times the amount of the sports grant program administered by Senator Bridget McKenzie when she was Sports Minister.<sup>7</sup> The determinations in relation to this Advance are not disallowable and therefore not considered by the Scrutiny of Delegated Legislation Committee.

### **Danger of poor decision-making**

All of this raises the spectre of poor decision-making which in this crisis may be calamitous, even deadly. Principles of parliamentary decision-making and public accountability are not just essential for effecting popular sovereignty but integral to good decision-making.

Good decision-making in this time is especially important given the complex considerations involved; for example the balance to be struck between public health, economic and social well-being; and prioritising which group/s should be given limited resources.

It is likely that the crisis period will be protracted, meaning that decision making processes established now may be ongoing. We are currently at the early stages of the health crisis, which the Prime Minister warns will last at least six months. However the economic and social crises will extend beyond the health crisis; and there is the terrifyingly real prospect of rolling waves of infections globally.

The potential mis-spending of public funds is also likely to extend the period of austerity that will inevitably follow the COVID-19 health crisis given the size of public debt and the decline in government revenues – it compounds the ‘fiscal reckoning’ that will follow.<sup>8</sup>

The time-horizon underlying extraordinary ministerial powers appears crisis-bound – however what is needed at this time of crisis is to see beyond it to envision and plan for an Australia that is likely to be profoundly different from that prior to the COVID-19 outbreak.

### **Way forward**

Parliament should sit during the COVID-19 crisis. The scrutiny of legislation in public view is crucial to our democratic process.

Once Parliament has resumed, a key priority should be amending legislation to:

- lay down rules in legislation where practicable (e.g. JobKeeper scheme; social security payments);

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<sup>7</sup> The Guardian, 13<sup>th</sup> February 2020, *Sports Rorts: Almost half projects funded were ineligible*, <https://www.theguardian.com/australia-news/2020/feb/13/sports-rorts-almost-half-projects-funded-ineligible-audit-office-says>

<sup>8</sup> Sydney Morning Herald, 1<sup>st</sup> April 2020, *Government faces fiscal reckoning as taxes collapse and spending soars*, <https://www.smh.com.au/politics/federal/government-faces-fiscal-reckoning-as-taxes-collapse-and-spending-soars-20200331-p54fok.html>

- provide ministerial discretion as a fail-safe mechanism rather than as the primary source of decision-making;
- confine such discretion to addressing the COVID-19 crisis.

Greater transparency and accountability of ministerial decision-making is needed, including independent enforcement of the Statement of Ministerial Standards, better consultation processes, public statements of reasons for decisions, and an independent National Integrity Commission. The establishment of a National Integrity Commission will enable independent investigation of allegations of Ministerial corruption or misconduct.

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