

Where there's a will, there's a way: How to keep the Victorian Parliament running during the COVID-19 crisis



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Summary

The Victorian Government's response to the COVID-19 crisis has included the adjournment of Parliament and the declaration of both a state of emergency and – subsequently – a state of disaster. On Monday 24 August 2020 the State's Premier indicated that he will seek to extend the state of emergency, which allows the executive to take certain actions without Parliamentary approval, for another 12 months.

Though the Parliament's committees have continued to meet throughout the crisis,¹ the adjournment of its regular sittings means that its scrutiny function has been curtailed at a time when it is urgently needed: since March, 108 Directions significantly impacting the lives of Victorians and causing substantial hardship have been issued without parliamentary oversight.² In addition, the *Appropriation (Interim) Act 2020* (Vic) permits the Treasurer to access funds totalling more than \$60 billion before the end of the 2020,³ and as at 20 August 2020 the Government had already announced more than \$9.8 billion in COVID-related spending.⁴

At least fifteen parliaments around the world, from the UK to the Philippines, have adapted to meet the challenge presented by COVID-19 by adopting measures enabling them to meet and vote remotely. It appears that there is nothing in the Victorian Constitution to prevent the Victorian Parliament from performing its essential legislative, accountability and representative functions remotely, and this could be achieved through the amendment of the Parliament's Standing Orders and the adoption of appropriate technological solutions.

The Victorian context

The Victorian Parliament's sitting calendar has been severely impacted by the COVID-19 crisis, with the Parliament sitting for only seven days since 1 April 2020 (though the Legislative Council did sit for two additional days in August).⁵

On 3 August 2020 Chief Health Officer Brett Sutton advised the Presiding Officers that it would be prudent to postpone Parliament's return until appropriate safety measures

¹ Parliament of Victoria, "Committees" <https://www.parliament.vic.gov.au/sarc> accessed 24 August 2020.

² Parliament of Victoria, "Emergency powers, Public health and COVID-19" <https://www.parliament.vic.gov.au/publications/research-papers/download/36-research-papers/13962-emergency-powers-public-health-and-COVID-19> accessed 25 August 2020.

³ *Appropriation (Interim) Act 2020* (Vic).

⁴ Parliamentary Budget Office, "The COVID-19 Policy Tracker" https://pbo.vic.gov.au/Victorian_COVID-19_policy_tracker accessed 24 August 2020.

⁵ Parliament of Victoria, "About Parliament" https://www.parliament.vic.gov.au/about/daily-calendar/yearly-sitting-dates/yearly-sitting-dates-2020?showyear=2020§ion_id=453&cat_id=453 accessed 21 August 2020.

could be implemented;⁶ while both Houses are scheduled to next sit on 1 September 2020, the Presiding Officer may delay the sitting of his House on the basis of health advice.⁷

Though the resumption of Parliament in the time of COVID-19 undoubtedly presents logistical challenges, the Government's response to the crisis – which has seen a concentration of executive power and significant government expenditure – makes a compelling case for the importance of the Parliament being able to continue its scrutiny function.

Concentration of executive power

Pursuant to the declaration of a state of emergency by Victoria's Health Minister on 16 March 2020, Victoria's Chief Health Officer is empowered to exercise certain emergency powers under the *Public Health and Wellbeing Act 2008* (Vic). These powers include the issuing of Directions which are capable of regulating significant aspects of Victorians' lives:⁸ since the inception of the state of emergency, Directions have been issued in relation to mandatory quarantine for overseas arrivals; limitations on mass gatherings; access to and activities of aged care facilities, hospitals and businesses; self-isolation; a public housing 'hard lockdown'; mandatory masks, and the lockdown of metropolitan Melbourne and Mitchell Shire.⁹

On 2 August 2020 a state of disaster was declared for Victoria under the *Emergency Management Act 1986* (Vic). This declaration is due to expire on 2 September 2020, unless a further declaration is made. The powers granted to the Minister for Police under the declaration are substantial insofar as the Minister's directions prevail to the extent they are inconsistent with State laws, and the Minister also has power to suspend the operation of any State law (albeit in very limited circumstances).

Government expenditure

In lieu of the annual budget, in April the Victorian Parliament passed the *Appropriation (Interim) Act 2020* (Vic), permitting the Treasurer to access funds totalling more than \$60 billion until the end of the 2020.¹⁰

The Government has also established a debt facility worth \$24.5 billion that it can draw upon in order to fund its functions.¹¹

As at 24 August 2020, the Government had announced \$9.8 billion in COVID-related spending.¹²

⁶ Noel Towell, "Group of politicians defy lockdown to gather on Tuesday", *The Age* <https://www.theage.com.au/national/victoria/victorian-politicians-defy-lockdown-to-gather-on-tuesday-20200803-p55i7g.html> accessed 21 August 2020.

⁷ Parliament of Victoria, "Legislative Assembly" <https://www.parliament.vic.gov.au/assembly> accessed 21 August 2020.

⁸ Grata Fund, "Victoria: COVID law monitor" https://www.gratafund.org.au/COVID_vic accessed 24 August 2020.

⁹ Parliament of Victoria, "Emergency powers, Public health and COVID-19" <https://www.parliament.vic.gov.au/publications/research-papers/download/36-research-papers/13962-emergency-powers-public-health-and-COVID-19> accessed 24 August 2020.

¹⁰ *Appropriation (Interim) Act 2020* (Vic).

¹¹ Parliament of Victoria, "Inquiry into the Victorian Government's response to the COVID-19 pandemic" https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19_Inquiry/Report/PAEC_59-07_Vic_Gov_response_COVID-19_Interim_report.pdf accessed 24 August 2020, p 50.

¹² Parliamentary Budget Office, "The COVID-19 Policy Tracker" https://pbo.vic.gov.au/Victorian_COVID-19_policy_tracker accessed 24 August 2020.

Constitutional issues

The Victorian Constitution makes provision for the holding of sittings of the Victorian Parliament. Our analysis of relevant sections does not appear to preclude virtual meetings:

- Section 8 of the Victorian Constitution allows the Governor to proclaim, vary and alter places within Victoria for the holding of every session of the Council and Assembly "in such manner as he thinks fit". This means that Parliament House is not fixed by the Victorian Constitution as the location for the holding of Council and Assembly sittings.
- Section 43(f) permits the amendment or variation of standing rules or orders regarding the conduct of all business and proceedings in both Houses. Presumably this means that any difficulties created by the current Standing Orders of either House in respect of procedural formalities, can be overcome as Sessional Orders could overcome either House's procedural formalities in Standing Orders.
- Sections 32 and 40 establish quorum requirements for the Legislative Council and the Assembly. Section 32 requires at least one-third of the members (inclusive of the President) to be present before the Council can proceed to the dispatch of business; section 40(1) requires at least 20 MPs (excluding the Speaker) to be present. There is nothing requiring this presence to be physical.
- References throughout the Constitution to "sitting" do not appear to preclude online rather than physical "sitting".

How Parliaments around the world are responding

As Parliaments around the world have demonstrated, the challenges presented by COVID-19 are not insuperable.

With no plans yet released about how Victoria's Parliament will resume sitting next week, a Working Group must be established to consider the various methods employed by countries already facilitating remote sittings and voting. This would permit Victoria to benefit from their experience, evaluate which means would be optimal for the Victorian Parliament and investigate the amendments required to Victoria's standing rules and procedures to facilitate this.

Canada, New Zealand and Victoria are amongst the many jurisdictions which have adopted measures to allow parliamentary committees to continue their oversight work through the crisis.¹³ Some jurisdictions have also allowed remote meetings of their Parliaments;¹⁴ others have gone further and adapted their procedures to permit parliamentarians to both sit and vote remotely, using a variety of teleconferencing and videoconferencing technologies. These include the EU Parliament, the UK, Wales, Belgium, the Isle of Man, Spain, Luxembourg, Romania, Latvia, Brazil, Argentina, Chile,

¹³ Inter-Parliamentary Union, "*Country compilation of parliamentary responses to the pandemic*" <https://www.ipu.org/country-compilation-parliamentary-responses-pandemic> accessed 21 August 2020; Parliament of Victoria, "*Committees*" <https://www.parliament.vic.gov.au/sarc> accessed 24 August 2020.

¹⁴ As in the case of France's National Assembly: Inter-Parliamentary Union, "*Country compilation of parliamentary responses to the pandemic*" <https://www.ipu.org/country-compilation-parliamentary-responses-pandemic> accessed 21 August 2020.

Tunisia, the Philippines and the Maldives.¹⁵ In the US, half of State legislatures have authorised remote voting or meetings.¹⁶

In Australia, the Federal Government made provision for some MPs to sit remotely when it resumed sitting in late August, and local council meetings in Victoria can now be conducted remotely (after the Victorian Parliament changed the requirements in respect of local council meeting attendance on 22 April 2020).¹⁷

Case study: the United Kingdom

In the UK, changes to the Parliament's Standing Orders and other procedures allowed the Parliament to use a bespoke Zoom platform to continue its work in both hybrid (with some members attending physically in the chamber and some attending by video conference) and virtual formats (with all members participating via video conference).¹⁸

On 12 May 2020 the UK's House of Commons voted remotely for the first time,¹⁹ using their existing online MemberHub (which requires multifactor authentication and single sign on to ensure it is secure).

While the House of Commons has since returned to in-chamber meetings (with social distancing measures), the structures are now in place should hybrid and remote formats be required again in the future.²⁰

Case study: the Isle of Man

As in the case of Victoria, the Isle of Man has no law requiring its Parliament (known as the Tynwald) to meet physically in a designated place.²¹

In response to the COVID-19 crisis the Tynwald began conducting meetings via videoconferencing, using a basic version of Microsoft Teams for audio and video streaming. Sittings were based in the Legislative Council Chamber, and audio quality optimised by members wearing headsets with built-in microphones and keeping their audio off unless it was their turn to speak.²²

The Tynwald implemented simple, common-sense solutions to the difficulties presented by remote meetings, with the software's chat box being used both for voting

¹⁵ In the Maldives, sittings have been held with only the Speaker present in the People's Majlis and parliamentarians being able to take part in debates and cast votes online: Microsoft, "Keeping legislative wheels turning during COVID-19" <https://news.microsoft.com/apac/2020/04/14/keeping-legislative-wheels-turning-during-COVID-19/> accessed 21 August 2020.

¹⁶ House of Commons Library, "Coronavirus: How are parliaments worldwide working during the pandemic?" <https://commonslibrary.parliament.uk/parliament-and-elections/coronavirus-how-are-parliaments-worldwide-working-during-the-pandemic/> accessed 24 August 2020; National Conference of State Legislatures, "COVID-19: State actions related to legislative operations" <https://www.ncsl.org/research/about-state-legislatures/COVID-19-state-actions-related-to-legislative-operations.aspx> accessed 25 August 2020.

¹⁷ These changes were effected via changes to the *Local Government Act 2020* (Vic) by the *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic)

¹⁸ Inter-Parliamentary Union, "Country compilation of parliamentary responses to the pandemic" <https://www.ipu.org/country-compilation-parliamentary-responses-pandemic> accessed 21 August 2020.

¹⁹ UK Parliament, "MPs cast first ever remote vote in Commons Chamber" <https://www.parliament.uk/business/news/2020/may/mps-cast-first-ever-remote-votes-in-commons-chamber/> accessed 21 August 2020.

²⁰ Inter-Parliamentary Union, "Country compilation of parliamentary responses to the pandemic" <https://www.ipu.org/country-compilation-parliamentary-responses-pandemic> accessed 21 August 2020.

²¹ Electoral Reform Society, "Isle of Man: World's oldest Parliament goes online" <https://www.electoral-reform.org.uk/isle-of-man-worlds-oldest-parliament-goes-online/> accessed 24 August 2020.

²² Electoral Reform Society, "Isle of Man: World's oldest Parliament goes online" <https://www.electoral-reform.org.uk/isle-of-man-worlds-oldest-parliament-goes-online/> accessed 24 August 2020.

(members type 'yes' or 'no') and for members to indicate when they wish to speak, which helped maintain discipline.²³

Case study: New Jersey

On 19 March 2020, New Jersey's legislature enacted measures allowing for certain government business and legislative sessions to be conducted using "any technology or electronic means" during a period of emergency.²⁴

On 25 March 202 the Legislature held its first remote voting session: members phoned in, and the Clerk called each of the members individually by name in order to gather their votes.²⁵

Way forward

The case studies presented in this paper demonstrate that with the will to overcome the challenges presented by COVID-19, there is a way for Parliaments of all sizes to resume their critically important legislative, representative and accountability functions.

The duration and path of the COVID-19 pandemic in Victoria are unknown; even in the case that the Parliament can sit as scheduled on 1 September, social distancing measures will presumably continue to impact upon its ability to function normally for many months to come. In addition, Chief Medical Officer Brett Sutton has advised against regional MPs travelling to Melbourne for Parliamentary sittings. Provision urgently needs to be made for the Parliament's business to be conducted remotely when it cannot sit physically:

- The Victorian Constitution appears not to pose an obstacle to Parliament functioning remotely and the Parliament's Standing Orders could be amended as required to facilitate remote sitting and voting.
- The introduction of hybrid and virtual sittings as adopted by the UK should be considered in Victoria, and, if these formats are determined to be appropriate, they should be made available for implementation on an as-needs basis.
- Should the switch to online proceedings need to be staggered, priority should be given to Question Time to enable the Parliament to resume its scrutiny function as soon as possible.
- Teleconferencing and videoconferencing software options to facilitate both sitting and voting (such as Zoom and Microsoft Teams) should be evaluated for their suitability, in light of the success with which they have been deployed in other jurisdictions.
- The implementation of secure platforms similar to the UK's MemberHub, which permits voting and the tabling of parliamentary questions, should be considered in Victoria.

²³ The small size of the Tynwald means managing online meetings presents fewer challenges.

²⁴ Lexis Nexis StateNet, "2020 NJ A 3852"

http://custom.statenet.com/public/resources.cgi?id=ID:bill:NJ2020000A3852&ciq=ncsl&client_md=0b1185e7bb37b250543f4806f77e191d&mode=current_text accessed 24 August 2020.

²⁵ Stacey Barchenger, "NJ Assembly makes history with first ever phone-in voting session to pass coronavirus relief", North Jersey, <https://www.northjersey.com/story/news/new-jersey/2020/03/25/first-ever-phone-vote-nj-assembly-coronavirus-relief/5080933002/> accessed 24 August 2020.