

Appendix A

STATEMENT BY THE PRESIDENT COVID-19: Parliamentary Procedure

Monday 24 August 2020

The PRESIDENT (10:07): In my statement of 6 August, when announcements were made specifically impacting senators and members from Victoria, I flagged that, when we next met, I would raise the issue of the effective controls on the movement of senators undertaking parliamentary business in the Senate. Let me say at the outset: this should not be seen in any way as a criticism of health officials with whom I, and many others, have worked over this period. I would like to express my personal and professional thanks to them for the assistance they have provided to senators and officials during this challenging time. A very difficult situation, dealing with the unique work of senators, has been made more manageable by their professionalism and understanding. I would particularly like to thank the officials in the ACT and Commonwealth health departments with whom a number of us have worked very closely.

However, these controls on movement raise, and occasionally challenge, an important principle, and I feel a responsibility to bring this directly to the Senate. It does not necessarily need to be addressed immediately, but to let it pass without mention risks a precedent being established through simple inertia or acceptance. The restrictions on movements currently in place under various state and territory health orders due to the COVID-19 pandemic are now clearly impacting the ability of senators to undertake parliamentary work and even, in some cases, attend parliamentary proceedings.

Earlier this year, there was an order in place in South Australia that affected South Australian senators by imposing requirements for quarantine upon their return from the sitting of parliament. This directly impacted the ability of parliamentarians and office holders to undertake their work—in some cases, directly related to parliamentary proceedings. This was imposed by officials of the government of South Australia—that is, the executive. As part of our ongoing work to resolve this, legal advice was sought, but the issue was resolved after productive informal discussions without the need for the Speaker and myself to formally intervene.

The recent announcement that, as a condition of attending parliament, Victorian parliamentarians and, in some cases, their families will be required to undergo a period of quarantine and testing represented a new imposition—notably, one I am not aware has any precedent at the Commonwealth level. Again, this was an imposition of the executive—in this case, at both the Commonwealth and ACT levels.

We have now seen officials of the executives of two states, Queensland and Tasmania, effectively impose new quarantine requirements upon senators returning from a sitting of parliament through the removal of exemptions or classifications previously in place. The Western Australian government has also removed a broad based exemption applying to members of the Commonwealth parliament, although placing less onerous restrictions on returning parliamentarians than Queensland or Tasmania imposed. These quarantine requirements do not prevent travel to attend a subsequent sitting of parliament, but they do restrict various other activities parliamentarians may undertake.

I also table the letter I received from the Queensland Chief Health Officer which I circulated to senators last week and copies of the letters sent by the Tasmanian State Controller to senators for Tasmania, and the Western Australian State of Emergency Coordinator to senators for Western Australia, both of which had been forwarded to me. These letters outline the changed arrangements for senators from those states.

These are not normal times. We have both imposed and accepted controls placed on citizens that are unique in our own lifetimes. So many of our fellow Australians have had to find new ways to work. But, even in my home town of Melbourne, under stage 4 lockdown at the moment, it is accepted that some people must travel to work. There is an element of the work of parliament and parliamentarians that is unique and cannot entirely be replicated remotely. While some elements of this can now be addressed through remote attendance and participation, at this stage, that is a limited facility in that a vote cannot be exercised, and, surely, exercising a vote is a key and fundamental element of participating as a member of parliament.

The right of those elected to attend and participate in parliament is an ancient one. For good reason the ability of others, including the executive, to restrict this has always been limited. The powers and immunities that enable and secure the work of the two Commonwealth houses belong to the houses themselves by constitutional design—a design which ensures that the Senate, in particular, can undertake its functions with an appropriate degree of independence. The ability to scrutinise the executive and participate in legislative activity is unarguably even more critical in times of crisis due to the extraordinary powers being delegated, granted and exercised by officials and the executive.

In the current pandemic, an important principle is at stake: notably, the ability of the executive or its officers, no matter the jurisdiction, to control attendance at parliament or constrain the work of members of parliament when it's directly related to parliamentary proceedings. A further complicating factor is the claimed ability, in some cases, to use discretion to determine which senators or members are allowed to attend parliament or have burdens placed upon them. In the case of the ACT, permits were granted to ministers to attend events prior to the sitting of parliament, but the attendance of senators and members to a session of parliament on the same basis was denied and claimed to be prohibited.

In the case of Tasmania, the correspondence from the State Controller outlines consideration of exemption from the quarantine requirements on a case-by-case basis. This claimed discretion is particularly problematic on the grounds of differential treatment of members of the executive in the first instance and lack of transparency around the equality of treatment of senators in the second instance. The explanation that the medical risk posed by the entry of a single minister is lower and therefore allowable as opposed to a group attending an actual session of parliament is a circular one with a dangerous consequence in that it establishes a preference for members of the executive attending events not directly related to parliamentary proceedings but then effectively claims the power to control or prohibit parliamentarians' attendance at actual parliamentary proceedings.

Unilateral action by executives—whether Commonwealth, state or territory—that impede the performance of Commonwealth parliamentary functions are problematic from a constitutional perspective. This remains the case even where, as is the case with border restrictions and quarantine requirements imposed at a state and territory level, that action is founded on or in aid of genuine public health advice and goals. However, these problems may be largely avoided where the requisite action, in this case a response to the public health advice, is developed cooperatively by the institutions concerned.

The approach taken during this public health crisis will doubtless set precedents that will be looked to in the future. We all know and, indeed, support the public health messages that outline the need for caution, as this pandemic will likely be with us for some time, but the national parliament is a critical part of government, which we are relying on through various agencies and experts to manage our response and care for the health and interests of our fellow Australians. In my view, simple acquiescence to these new assertions of control by officials of the executive of the Commonwealth, state or territories—including, somewhat extraordinarily, the territory established as the seat of government that we are constitutionally required to assemble in—poses a risk in that we cannot envisage how it may be used, or potentially even misused, at a future time in circumstances we cannot imagine. I doubt any of us imagined the current circumstances only a year ago.

Principles not defended in difficult times are in effect mere customs or conveniences. As I said earlier, this issue does not need to be addressed immediately, but, in my view as your President, I must bring this issue to your attention so as not to inadvertently allow a precedent to be established by default. I lay the matter before the Senate for its consideration at a time of its choosing.