

The Senate

Procedure Committee

COVID-19 and the Senate

Second report of 2020

October 2020

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Procedure Committee

Second report of 2020

COVID-19 and the Senate

1.1 On 3 September 2020, the Senate agreed to the following resolution jointly moved by the Leader of the Government in the Senate (Senator Cormann) and the Leader of the Opposition in the Senate (Senator Wong):

That the Senate, in the spirit of mutual respect and working with other institutions, agencies and officials managing the COVID-19 pandemic:

- (a) notes that:
 - (i) the law of parliamentary privilege is intended to protect the ability of legislative houses, their members and committees, to exercise their authority and perform their duties without undue external interference, and
 - (ii) 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;
- (b) recognises the statement by the President of Monday, 24 August 2020 regarding the risk of COVID-19 measures constraining the ability of senators to undertake their duties;
- (c) affirms the right of the Senate to determine its own meetings, and in particular the sessions for the remainder of 2020 and the scheduled Budget Estimates hearings;
- (d) maintains the right of senators to attend parliamentary proceedings whether directly or by remote participation (if available);
- (e) calls on the executives and executive agencies of the Commonwealth, states and territories to have appropriate regard to these matters in devising and implementing public health measures and, wherever possible, to do so in consultation with representatives of the Senate; and
- (f) refers to the Procedure Committee for report to the Senate no later than 8 October 2020 any consequential matters arising from the above.

1.2 The committee makes this report pursuant to paragraph (f) of that resolution.

1.3 The committee has met several times during the year, including by tele- and video-conference, to address practical and procedural matters connected to the Senate and its committees meeting during the COVID-19 pandemic. The committee devised rules for remote participation in Senate proceedings,¹ which were adopted for the sittings of the Senate from 24 August to 3 September 2020.

1.4 In relation to the current matter, the committee noted the President's statement of 24 August 2020² and the full terms of the resolution of 3 September affirming the right of the Senate to determine its meetings, and meetings of its committees. The committee welcomed the resolution receiving the unanimous support of the Senate.

1.5 The committee endorsed the President formally providing the resolution to relevant state and territory executives and health officials to guide their interactions with the Senate. The committee noted correspondence from health officers in different states winding back quarantine requirements for senators returning home after attending Canberra for parliamentary business, as well as announcements from states and territories generally reducing or removing restrictions on people travelling from the ACT.

1.6 The committee identified its priority as ensuring that scheduled sittings and estimates hearings proceed safely, by continuing to apply and adapt COVID-safe measures. The committee endorsed the continued application of the rules for remote participation during the Budget sitting week. The President confirmed that Parliament House would be closed to the public during the estimates fortnight, which is also scheduled as a sitting fortnight for the House.

1.7 Protocols being developed for senators, staff and witnesses attending Parliament House for estimates hearings will be provided to ACT and Commonwealth health officers for comment ahead of the hearings. It was also expected that committees would make extensive use of participation by video link for both senators and witnesses. Final arrangements would be a matter for the committees themselves, particularly in relation to the attendance of witnesses.

1.8 The committee also noted that legislation committees would ideally consider prioritising agencies and programs. The committee endorsed the Chair's suggestion that a Chairs' Committee meeting consider arrangements for estimates at a meeting during Budget week.

1.9 The committee identified the following operational matters as critical to ensuring that the scheduled estimates hearings proceed in a safe manner:

- assurance on videoconferencing capacity for remote participation by senators and witnesses
- procedural and technical support for remote participation

¹ Senate Standing Committee on Procedure, [First Report of 2020](#)

² See Appendix A

- room capacity information, for senators and secretariat staff, and for witnesses
- COVID-safe arrangements for senators and secretariat staff, particularly when senators are moving in and out of hearing rooms
- COVID-safe arrangements for witness waiting spaces and movement in and out of hearing rooms.

1.10 Finally, non-government senators on the committee expressed their expectation that additional estimates days would be scheduled if the October hearings were interrupted.

1.11 The committee will continue to oversee the development of protocols for committee staff, committees and witnesses, and their implementation during the Budget estimates round. The committee will also maintain a watching brief on the other matters raised in the resolution of 3 September 2020.

Senator Sue Lines
Chair

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.