

## Inquiry into the Government's response to the Covid-19 pandemic

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### YOUR SUBMISSION

#### **Submission:**

Attached is an article I authored that was recently published in the international journal, *The Theory and Practice of Legislation*, entitled 'Governing in a pandemic: from parliamentary sovereignty to autocratic technocracy'. I also presented on the article as part of the prestigious Bingham Centre for the Rule of Law's webinar series on global legislative responses to the coronavirus -

<https://binghamcentre.biicl.org/events/1375/part-3-global-legislative-responses-to-coronavirus>.

The main points of the article are that -

Emergencies require governments to operate differently.

In Australia (and Victoria), the new governance arrangements have all the hall marks of an 'autocratic technocracy'. 'Autocratic' because political power has been concentrated in the hands of a small group of people (in this case, the executive) absent the checks and balances that normally control the exercise of that power. And 'technocracy' because of the dominant role played by medical-scientific experts. Extensive legislative and executive decision-making authority has been delegated to these experts.

There are advantages of an autocratic technocracy in times of emergency. It facilitates timely, decisive and evidence-based decision-making, and gives that decision-making a rational and apolitical character. By bringing politician and expert together, it minimises risks of miscommunication and misunderstanding, and by placing the expert at the forefront, clothes government decisions with the legitimacy of expertise and trust. It therefore makes sense that governments place medical-scientific experts at the centre of their public health emergency response plans.

But autocratic technocracies are not without their risks. Expertise is a very powerful resource - and more so when the expert transitions from adviser to decision-maker, and combines the reputation and trustworthiness of their profession with the authority and power of the state. The medical-scientists' expertise enables them to participate in public debate asymmetrically with other participants. Not only do they have a knowledge advantage, they also have a perceived purity of motives, especially when compared to political, business and commercial interests. It also can be difficult for governments to ignore the advice that comes from persons they have put forward as experts. All of this can combine to marginalise consideration of alternative views and solutions, freeze deliberation and locking-in certain policy directions.

Expert also can make errors. The nature of an emergency means that decisions are being made based on incomplete information in a rapidly changing environment. The data and modelling upon which experts base

their opinions and emergency measures is uncertain at best; some of their interventions experimental in nature. Yet the traditional checks that come from public consultation, parliamentary debate and considered intra-government review are absent.

Medical-scientific experts also can be overly narrow in focus. They tend to work within disciplinary and institutional communities of like-minded professionals who share their worldviews, and hold the same beliefs, expectations and hypotheses about the issue at hand. This can lead them to interpret evidence in ways that are partial to those existing beliefs, expectations or hypotheses; and to overvalue their expertise, and devalue others.

They also are susceptible to missionary bias (where their certainty in the moral and intellectual righteousness of their positions directs their judgement), and noble cause bias (where a desire to 'save others' creates an 'end justifies the means' mentality). This can result in them taking the position that public health trumps all other considerations, and failing to attribute appropriate weight to the economic and social dislocation and costs of their measures, or to their impact on human rights and personal freedoms.

Absent other voices, public health emergency response measures risk being overly prescriptive and unnecessarily wide reaching. One can only speculate as to whether (and if so, how) those measures might be different if the daily counts of infections and deaths were accompanied by daily counts of suicide, mental illness and domestic violence, and of businesses destroyed and jobs lost, as a result of those measures.

So, what to do? The answer lies in broadening the technocracy and reducing the autocracy. Deciding how best to manage a pandemic requires consideration of economic, social and civil liberty factors, in addition to health. The heavy reliance on medical-scientific experts does not reflect this. A broader suite of expertise needs to be involved in decision-making. Second, balancing these various factors is an inherently political decision. Emergency directions should be made by our elected representatives informed by a diversity of perspectives. And third, parliament's primacy as a check and balance on that decision-making needs to be restored. The making of emergency directions should trigger the automatic recall of parliament and/or the creation of a parliamentary committee to provide timely oversight of the government's use of its emergency powers.

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**Signature:**

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