The Australian Response to COVID-19: A Year in Review

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Australia's legal and political response to the outbreak of COVID-19 has been marked by the formation of a new intergovernmental forum, the National Cabinet, to lead a coordinated national response to the pandemic, and the declaration of successive states of emergency at the federal and state levels activating extraordinary executive powers, including limitations on movement and border closures. Australia's response has, to date, resulted in the successful curtailment of community transmission of COVID-19 in Australian States and Territories. However, the response to the pandemic has also involved the removal of existing mechanisms of executive accountability, suspensions of Parliament and little parliamentary scrutiny or other oversight of executive action. These democratic deficits present fresh challenges for Australia going forward, particularly as the National Cabinet structure becomes permanent and the states of emergency endure for the foreseeable future.

The threat posed to the nation's economy by the pandemic and its response initially prompted the Federal as well as and State and Territory governments to adopt major stimulus packages. Federal initiatives have included the JobKeeper Payment scheme as a subsidy for businesses significantly affected. The scheme will come to an end on the 28 of March 2021. At the State and Territory level, governments have enacted a variety of measures such as freezing household fees and charges and payroll tax exemptions for business. Some of these measures are renewed periodically while others have expired.

The Executive and Use of Powers in Response to Emergency

The National Cabinet

The National Cabinet was formed on 13 March 2020 as a new intergovernmental decision-making body to lead a unified and coordinated response to COVID-19 across Australia. The National Cabinet is comprised of the Prime Minister of Australia, the Premiers of the six Australian states and the Chief Ministers of the two territories. It has met 32 times from March to December 2020, and it is advised by the National Coordination Mechanism (NCM) on non-health aspects of the pandemic and by the Australian Health Protection Principal Committee (AHPPC) on medical issues.

Following its initial success in providing coordinated crisis leadership, in May 2020 the Prime Minister announced that the National Cabinet would become a permanent feature of the Australian political landscape. The National Cabinet now forms the core of the newly established National Federation Reform Council, which replaced the Council of Australian Governments (COAG). COAG, established in 1992, has long been regarded as an ineffective intergovernmental forum, and one dominated by Commonwealth interests. Whether the National Cabinet proves a superior alternative remains to be seen. A prime example of a measure stemming from the emergency that was crystalized into the institutional framework, the National Cabinet raises serious questions of transparency and accountability. Despite its relative initial success, it has also suffered major failures, such as its inability to secure a coordinated approach to interstate travel through a 'hotspot' identification approach. Internal border closures restricting movement between states and territories remain entirely at the whim of state and territory governments who have different definitions of 'hotspots'. This continues to generate confusion and alarm amongst Australians.

Successive 'states of emergency' and delegated legislation

To implement National Cabinet decisions and thwart the spread of COVID-19 on the continent, all Australian governments have relied on emergency

executive powers through delegated legislation. At the Federal level, successive states of emergency have been declared by the Governor General, acting on the advice of the Federal Executive Council, under the *Biosecurity Act 2015* (Cth). The first declaration of a 'human biosecurity emergency' was made on 18 March 2020, and human biosecurity emergency periods have been extended for a further 3 months on 14 May 2020, 3 September 2020, and 10 December 2020. The current period will conclude on 17 March 2021, unless extended. Following the declaration, the Minister of Health has been granted expansive powers under the *Biosecurity Act 2015* (Cth) to 'take any necessary measure to prevent and control COVID-19, and protect the health of all Australians'. The Minister has issued a number of Determinations, in particular to restrict cruise ship movement and limit outgoing international travel ('the overseas travel ban').

As responsibility for public health resides primarily with the States and Territories, all sub national governments have declared states of emergency under their respective public health laws and/or emergency legislation, enlivening extraordinary emergency powers. For example, in Western Australia, a State of Emergency was declared by the Minister for Emergency Services from 16 March 2020 under s 56 of the *Emergency Management Act 2005* (WA), and extended for 14 days ever since. Emergency powers activated by the state of emergency include electronic monitoring of persons in quarantine, directing the closure of premises and directing or prohibiting movement around emergency areas. A Public Health State of Emergency was also declared in Western Australia on 23 March 2020, by the Minister for Health under the *Public Health Act 2016* (WA), and has similarly been extended every 14 days thereafter. These declarations provide the executive with a wealth of powers, including medical directions to individuals and other measures relating to movement and quarantine.

The most significant emergency measure adopted in Western Australia has been the 'controlled border' affecting both international and domestic arrivals. These measures range from a new entry pass and health screen, to a 'hard interstate border' whereby entry is refused to travellers from other Australian jurisdictions except for those individually approved and meeting exemption criteria. What is more, these measures have been applied retrospectively: interstate travellers who entered Western Australia prior to the imposition of the border closing to their home state have been required to enter quarantine, despite having been in the community for some days. Other states that have experienced higher levels of community transmission have deployed other restrictive emergency measures, the most significant one being the 'stage 4' lockdown imposed in Melbourne under the State's *Public Health and Wellbeing Act 2008* (Vic) in August 2020. Both the Western Australian hard border and the Victorian lockdown have been subject to court challenges as discussed below.

While the Victorian lockdown was a strong reaction to an ongoing outbreak, most recently Queensland has imposed a 'hard lockdown' for a period of three days to break the potential chain of infections from a single known case of the so-called 'UK variant' of the SARS-CoV-2 virus. As it transpires, States and Territories are following different approaches involving different types of measures.

The Effectiveness of Judicial and Legislative Scrutiny and Oversight

The National Cabinet

The National Cabinet raises serious questions of transparency and accountability. To start with, it is called a 'cabinet', which in Australia is the primary decision-making organ of executive government. A cabinet is subject to two important aspects of the convention of responsible government ensuring executive accountability to Parliament: cabinet *confidentiality* and *solidarity*. *Confidentiality* protects internal discussions and documents from disclosure. Cabinet documents and deliberations are thus classified as exempt documents under the *Freedom of Information Act 1982* (Cth) and shielded from freedom of information (FOI) requests.National Cabinet documents, and by extension AHPPC documents, are therefore regarded by the government as confidential. Interestingly, COAG documents were not automatically exempt

from FOI. This has raised the ire of Senator Rex Patrick of South Australia, who was denied on three occasions access to National Cabinet and AHPPC documents under FOI legislation. Senator Patrick has now applied to the FOI Division of the Administrative Appeals Tribunal (AAT) to review the decision. The matter is still before the AAT, and will have significant ramifications for the workings of the National Cabinet.

The principle of cabinet *solidarity* entails public support of Cabinet decisions by all its members, regardless of their individual views. Additionally, Westminster style cabinets are accountable through collective cabinet *responsibility* to the Parliament from which the Cabinet is drawn. However, because the National Cabinet is an intergovernmental and not inter-parliamentary body, its members are not collectively responsible to one Parliament, but individually responsible to nine separate parliaments. The principles of collective responsibility and solidarity are therefore ineffective in this context. Additionally, the limited oversight of federal and state parliaments alike of their respective executive governments in the course of this crisis further reduces avenues of accountability as discussed below.

Delegated legislation and parliamentary scrutiny in states of emergency

The 'front line' of accountability of executive action taken under successive states of emergency across Australia is delegated legislation. As at 8 December 2020, the Commonwealth Senate Standing Committee for the Scrutiny of Delegated Legislation (SCSDL) reports 385 legislative instruments made in response to COVID-19, 48 of which (12%) were exempt from disallowance. This means that these instruments are protected from parliamentary scrutiny. The SCSDL, in its interim report into the exemption of delegated legislation from parliamentary oversight, observedthat between 1 January and 31 July 2020, when the bulk of emergency measures were introduced, 20% of all instruments were exempt from disallowance, the majority of these under the *Biosecurity Act 2015* (Cth). The SCSDL formed the view that emergency-related delegated legislation engaging individual rights and liberties should not be quarantined from parliamentary scrutiny and oversight, including through disallowance procedures.

Parliamentary oversight and scrutiny have been further impacted by suspensions in parliamentary sittings. The Commonwealth Parliament suspended sittings from 23 March to 11 August 2020, although both Houses of Parliament returned to consider legislation related COVID-19 on 8 April and 12 to 14 May. This meant that the House of Representatives sat 18 days fewer and the Senate 15 days fewer than originally agreed for 2020. Reportedly, this far exceeds the number of sitting days cancelled in Canada, France, Germany, New Zealand, Spain, the UK and US despite the incomparably lower impact of the pandemic in Australia. The SCSDL reports that all states and territories of Australia, with the exception of Western Australia and South Australia, also cancelled sitting days due to the pandemic.

At the federal level, the exemption of legislative instruments from disallowance has flow on effects for scrutiny pursuant to the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). In 2011, Australia adopted a parliamentary scrutiny model of human rights protection, pursuant to which bills and delegated legislation are scrutinised for their compliance with human rights contained in 7 international instruments identified in s 3(1). However, the Act excludes from the requirement of a statement of compatibility with relevant human rights any legislative instrument exempt from disallowance. Notwithstanding, under s 7 the Parliamentary Joint Committee on Human Rights (PJCHRs) is to examine legislative instruments before either House of Parliament for compatibility with human rights and report to Parliament on the issue. The PJCHRs has taken this function seriously, examining and reporting on the instruments exempt from disallowance under the *Biosecurity Act 2015* (Cth). However, the legislative exemption from provision of a statement of compatibility for exempt instruments has hamstrung their role – leaving unanswerable 'whether all of the measures are reasonable, necessary and proportionate'.

Judicial and other independent forms of oversight

So far, the measures adopted by both federal and state governments have attracted little litigation. There have been three main court challenges to pandemic executive measures, which have all seen the defendant government emerge victorious. The first challenge was brought to the High Court by mining magnate Clive Palmer against Western Australia's hard interstate border closure. Palmer claimed that the restriction violated s 92 of the *Constitution* that provides 'trade, commerce, and intercourse among the states … shall be absolutely free'. The High Court dismissed the claim on the basis that a public health emergency, such as the outbreak of an epidemic, empowers a state to close its border. The second challenge was brought to the High Court by a hotel owner in Melbourne, against a direction of the Victorian government that limited the movement of individuals to 25km from their home. The central argument was that the *Constitution* provides for an impliedfreedom of movement of residents within a state, allegedly contravened by the direction. The Court however was not satisfied that such an implication could be drawn from the text and structure of the *Constitution* and dismissed the case. Finally, a challenge was brought in the Victorian Supreme Court by a cafe owner in Melbourne. Amongst other grounds, she argued that curfews imposed in Victoria breached the *Charter of Human Rights and Responsibilities Act 2006* (Vic) – particularly the rights to freedom of movement and liberty. While acknowledging that measures such as curfews represent major restriction of individual rights, the Court dismissed the claim on the basis that the measures were proportionate to the protection of public health, restating that emergencies allow governments to take proportionate measures that curtail such rights.

Leading constitutional lawyer Prof. George Williams has observed that Australia has 'a long record of deferring to government at a time of national crisis'. In the context of the pandemic, this has translated into a very significant margin of manoeuvre left to State and Territory governments in the absence of an agreed national containment strategy – as exemplified by the vibrant disagreements on the definition (and consequential failed implementation) of a 'hotspot' system mentioned above.

It is important to note that the Victorian Ombudsman has conducted a thorough investigation into the detention and treatment of public housing residents in the course of a COVID-19 'hard lockdown' in July 2020 in Melbourne. This measure preceded the 'stage 4' restrictions imposed on the entire metropolitan area later in August and was specifically aimed at the residents of nine public housing towers in an inner-suburb of Melbourne. The investigation made a number of distressing findings showing how the implementation of the targeted lockdown was wholly disproportionate and prejudicial to the affected residents. In particular, it was oblivious of health and wellbeing issues, as well as of cultural and linguistic diversity, both of which should have been a prime concern given the nature of the premises. The Victorian government is considering the findings and recommendations of the report, and it remains unclear what, if any, material consequences will ensue.

2021 Outlook

Australia enters 2021 in peculiar position. It has so far kept the virus at bay, particularly in comparison to every other major Western Democracy with the exception of New Zealand. This is a major success, which must not be understated or dismissed. However, the country has done so at the cost of isolating itself internationally and significantly disrupting its internal free movement. The inability to agree upon a national approach to contain the spread of the virus has been a most significant failure of the National Cabinet. The current fragmented field, with states taking individual initiatives to respond to outbreaks within their borders or in other states, is not a sustainable proposition moving forward. With vaccination still to be rolled out in Australia (and with all the uncertainty surrounding first-generation COVID-19 vaccines), we see the main challenges for the country broadly as follows:

1. Interstate border control measures need to be rationalised nationally as the constant change in rules between states is a source of increasing confusion and frustration for affected citizens.

2. While understandable at the apex of an emergency, sidelining of legislatures cannot become the norm through a crystallization of the new *status quo*. The National Cabinet and its most recent offshoots thus require careful clarification and regulation lest their ambiguity normalises a structural lack of accountability of the executive to parliament.
3. Emergency-related delegated legislation that engages individual rights and liberties should be subject to parliamentary scrutiny and oversight, including through disallowance procedures and human rights scrutiny, as put forward by the SCSDL.
4. In the absence of an Australian Bill or Charter of Human Rights, and in a climate of historical judicial deference to executive power during emergencies, integrity agencies have an increasingly significant role to play in executive accountability. It is critical that independent reviews investigating the proportionality of emergency executive measures are appropriately safeguarded and resourced, and receive due level of consideration by governments.

Postscript

Since drafting this post there have been two developments worth noting:

Internally, two more states have adopted the Queensland approach of imposing short-term hard lockdowns. Western Australia imposed a 5 day lockdown in response to one local positive case of the UK variant. This was a security guard in one the hotel hosting international travelers in mandatory quarantine. This case has raised a number of questions regarding the inadequacy of the regulatory regime governing quarantine facilities, where security officers are mostly precarious workers. Victoria also imposed a 5 day 'circuit breaker' lockdown but in this case the goal was containing a small outbreak (13 positives at the time the lockdown was called). A degree of variation remains in the absence of clear national guidance, although the trend goes in the direction of strong early response with a short timeframe.

Internationally, tensions have arisen between Australia and New Zealand as a result of theAustralian government closing the border to New Zealand in response to a small outbreak in Auckland early in the year. This move was considered disproportionate by New Zealand authorities and undermining the ratio of the so-called 'Trans-Tasman Travel Bubble' – an agreement between Australia and New Zealand to facilitate travel between the two countries, which are both essentially COVID-free.

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