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AUSTRALIA – COVID-19 AND CONSTITUTIONAL LAW

Selena BATEMAN*
Adrienne STONE**

SUMMARY: I. *Introduction*. II. *State and Federal relations*. III. *Curtailment of fundamental rights*. IV. *Insufficient Parliamentary oversight of executive action*. V. *Role of the courts*.

I. INTRODUCTION

The Commonwealth of Australia is a *federal parliamentary democracy* established by the *Constitution* of 1901. For the most part this constitutional system has appeared to function well during the COVID-19 pandemic and the response has inspired some innovations which may prove to be permanent. However, the pandemic has placed stress on federal relations and revealed weaknesses notably in parliamentary oversight of the executive and, to some extent, in rights protection.

II. STATE AND FEDERAL RELATIONS

The federal balance is an omnipresent issue in Australian constitutional law and gives rise to various issues of legal and political significance. The dynamic social, economic and political situation created by the COVID-19 pandemic has demonstrated both ways in which Australia's federal system functions effectively and ineffectively.

* BA/LLB (Hons) (ANU), Research Association, Laureate Program on Comparative Constitutional Law, Melbourne Law School.
** Redmond Barry Distinguished Professor, Kathleen Fitzpatrick Australian Laureate Fellow, Melbourne Law School; President, International Association of Constitutional Law.
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1. *Examples of effective federal cooperation. Formation of National Cabinet and its role in decision-making during the crisis*

Perhaps the most significant constitutional innovation of the COVID-19 pandemic has been the creation of a 'National Cabinet'. The National Cabinet comprises the elected heads of each government in the federal polity: the Prime Minister, the Premiers of each State and of the Chief Ministers of the two mainland territories. It first met on 15 March 2020, early in the crisis, and has met on a regular basis (including on a daily basis) since that time. The National Cabinet is briefed by the Australian Health Protection Principal Committee – an expert public health body comprised of all Commonwealth, State and Territory Chief Health Officers.

Although styled as a 'Cabinet', a body with a distinct history and role within a Westminster parliamentary government like Australia's, the status of the National Cabinet is not entirely clear. When first established the National Cabinet appeared to be an intergovernmental cooperative body with no formal legal basis. The role of the body to date has been to generally coordinate jurisdictional responses to COVID-19 but there is no legal requirement for any of the jurisdictions to comply with the decisions reached by the National Cabinet. It is clear that in certain areas the decisions reached by the National Cabinet operate only as a framework or guideline with each jurisdiction having flexibility to determine how or if to implement the measure.

The National Cabinet is a very rare, perhaps sui generis, kind of intergovernmental body in Australia. Historically, select cabinets have been established by the Commonwealth government to deal with particular subject matters or events. The closest analogy to the National Cabinet is the War Cabinet established during the Second World War. However, the War Cabinet solely comprised of select Ministers of the federal government. The Advisory War Council (AWC) was a body that also operated during WWII as a quasi-cabinet committee and was comprised of both members of the War Cabinet and members of the opposition parties in the Commonwealth Parliament. The AWC operated throughout the War and reported directly to the Prime Minister and the Parliament but, again, none of its members were elected representatives of other polities in the federal system.

The Prime Minister of the Commonwealth government announced after the first National Cabinet meeting in March 2020 that the body had been given 'cabinet status' under the Commonwealth government's

cabinet guidelines, and as a result its deliberations and documents has the same confidentiality and freedom of information protections as the federal Cabinet.[1]

The National Cabinet has, as a general matter, been perceived as successful and efficient. As a result, on 29 May 2020 the Primer Minister announced that a new National Federation Reform Council (NFRC) would replace the existing Council of Australian Governments (COAG) meetings, with the National Cabinet to remain at the centre of the NRFC. The National Cabinet will continue to meet regularly, much more regularly than its predecessor COAG, and will be briefed by experts to inform its decision-making. During the COVID-19 pandemic the body will meet every two weeks, in the longer-term meetings will take place once a month.[2] While National Cabinet will continue to focus on other critical areas unrelated to COVID-19 it is clear that in the immediate term that will be its primary focus, especially Australia's economic response to the pandemic.[3]

2. *Sharing responsibilities over COVID-19 responses*

The Commonwealth and State polities have concurrent power to respond to the various health, economic and social issues created by COVID-19. While under the Australian Constitution the Commonwealth has enumerated legislative powers, these include various powers that extend to the relevant subject matter areas, including:

- Quarantine (s 51(ix));
- Implied nationhood power (s 51(xxxix) and s 61));
- Foreign and interstate trade and commerce power (s 51(i));
- External affairs power (treaty implementation limb and the externality limb) (s 51(xxxix);
- Aliens power (s 51(xix));
- Corporations power (s 51(xx));
- Territories power (s 122);
- Commonwealth places power (s 52(i));
- Sickness benefits power (s 51(xxiiiA).

[1] Prime Minister, Scott Morrison, Transcript – Press Conference 15 March 2020 (*https://www.pm.gov.au/media/transcript-press-conference*).

[2] COAG becomes National Cabinet – Press Release – 2 June 2020 (*https://www.pmc.gov.au/news-centre/government/coag-becomes-national-cabinet*).

[3] *Ibid*.

Prior to the COVID-19 pandemic, the Commonwealth and each of the States and Territories had enacted legislation to address public health emergencies. Due to the Australian Constitution's override clause, s 109, any inconsistency between the Commonwealth measures and the States measures would result in the Commonwealth law prevailing. However the relevant Commonwealth law, the *Biosecurity Act*, has a concurrent operation clause, designed to allow State and Territory biosecurity laws to continue to operate to their fullest extent possible subject to the relevant constitutional limitations.

This legal framework has enabled the States and Territories to take on the lion share of regulating the public health response to COVID-19. It is State and Territory laws that have implemented the key public health measures like mandatory quarantine for all incoming overseas travelers, restrictions on public gatherings and social distancing. The vast majority of these public health measures have given legal force to the decisions made by the National Cabinet and the role of the Commonwealth government has been more confined, primarily providing enforcement support including from the Australian Defence Force.

3. *Examples of federal tensions*

While there has been a large degree of cooperation between the polities in relation to many aspects of Australia's response to COVID-19 there are a number of areas where the pandemic has brought to the fore federal tensions. There are two prominent examples.

The first is the decision regarding the closure of schools. From early in the crisis the Commonwealth government has consistently emphasized that the decision of the National Cabinet is that schools should remain open. Despite this, each State and Territory jurisdiction has taken a different approach to the issue, including some jurisdictions closing schools and moving to remote learning for a full school term. As the Commonwealth only has very limited constitutional power with respect to 'education', it could not override these decisions, but it did respond by announcing a possible withdrawal of funding to non-government schools, followed by offering early access to Commonwealth government funding to non-government schools if they agreed to reopen.[4]

[4] The Hon Dan Tehan MP, Minister for Education of the Commonwealth of Australia, Transcript Media Release 29 April 2020 *https://ministers.dese.gov.au/tehan/minister-education-dan-tehan-interview-michael-rowland-abc-news-breakfast*.

Another example is the States' decision to close their borders. The Commonwealth has generally opposed the closure of State borders stating that the public health advice does not support the measure and that it damages Australia's economic recovery. The Commonwealth government has been particularly critical of two States who have implemented strict border closures – Queensland and Western Australia. High Court proceedings were instituted in May 2020 by private litigants challenging the constitutionality of each of those States' border closures primarily arguing that they infringe the freedom of trade, commerce and intercourse under s 92 of the Constitution. The Commonwealth government quickly intervened in support of those challenges and is taking an active role in the proceedings.

III. Curtailment of fundamental rights

The Australian constitutional system is highly unusual in that there is no formal rights framework at a federal level – either statutory or constitutional - and only some of the State and Territories have formal rights framework.[5] The government restrictions imposed to address COVID-19, and in particular the enforcement of those restrictions, has highlighted some of the issues this causes.

1. *Black Lives Matter Protests in June 2020*

In early June 2020 there were many large protests organized throughout Australia in response to the Black Lives Matter movement and the death of George Floyd. In most States and Territories these protests occurred when the COVID-19 public health measures imposed serious restrictions on people's freedom of assembly. Because of the absence of a formal rights protection framework in most places these restrictions do not have to be balanced against other countervailing rights like freedom of speech.

Each polity took a different approach to these protests. Some States publicly announced that they would do everything within their power to prevent the protests and in NSW the government declined to authorise the assembly under the relevant legislation. This decision was challenged in the courts and was overturned by the NSW Court of Appeal on the day of one of the largest protests in Sydney. The Court of Appeal empha-

[5] Victoria: *Charter of Human Rights and Responsibilities Act 2006* (Vic); Australian Capital Territory: *Human Rights Act 2004* (ACT); Queensland: *Human Rights Act 2019* (Qld).

sized that while the circumstances of the case potentially raised competing public interests of 'great importance' the Court's decision was limited to a narrow technical point about the operation of the *Summary Offences Act* applicable to public assemblies.[6]

2. *Privacy issues re COVIDSafe app*

One of the Commonwealth government's key responses to COVID-19 has been the roll out of a somewhat controversial mobile phone application called COVIDSafe that was intended to assist in contact tracing by recognizing other devices with the app and storing information about the date, time, distance and duration of contact with that other person's mobile phone. When the app was first rolled out in late April 2020 there was significant public controversy about the lack of privacy protections around it. In particular there were concerns that the information collected and stored could be used for collateral purposes, including by law enforcement. These concerns revealed deeper issues of distrust with governments in Australia management of data. The Commonwealth government swiftly enacted legislation designed to address the main privacy concerns.[7] While the right to privacy is expressly stated to be a concern of the legislation the absence of a formal right means that considerations of proportionality are largely absent from the public debate.

IV. Insufficient Parliamentary oversight of executive action

A live constitutional issue in Australia that has been brought to the fore by the executive's use of emergency powers and the reduction in Parliamentary sittings and the limited scrutiny of executive action.

By the end of February and into March 2020 as the pandemic worsened both in Australia and globally the State, Territory and Commonwealth governments restricted their parliamentary sittings. The Commonwealth Parliament sat for 1 day in April 2020 for an emergency sitting to pass the fiscal measures and special pairing arrangements were put in place in both the Senate and the House to enforce social distancing.

6 *Bassi v Commissioner of Police* [2020] NSWCA 109 at [7].

7 *Privacy Amendment (Public Health Contact Information) Act 2020* (Cth).

Throughout this period the National Cabinet dominated as de facto decision-making body without constitutional authority.

This diminution in the frequency of Parliamentary sittings has also led to a reduction in the effectiveness of parliamentary committees. These bodies play a significant role in scrutinizing primary and delegated legislation and holding the executive to account.[8] In part to remedy this lack of Parliamentary oversight, the Senate established a Select Committee on COVID-19 to inquire into the Commonwealth government's response to the pandemic.[9]

As well as the reduction in sittings the COVID-19 crisis has also generally led to less debate and scrutiny of executive action. This has coincided with an explosion in executive spending and in the substantial use of delegated legislation by the executive.

1. *Executive spending*

At the Commonwealth level the Parliament is supposed to retain some control over executive spending through the passage of annual appropriations laws[10] and, in significant areas, requiring express authorization of executive spending through legislation.[11] However, these principles operate differently in times of crisis, and the COVID-19 pandemic has once again demonstrated that Parliament essentially leaves executive spending unchecked during these times.

As at July 2020, the Commonwealth government has allocated $320 billion in financial support to address the economic crisis caused by COVID-19.[12] The two centerpieces of this fiscal package are programs known as

[8] Including the Senate Scrutiny of Bills Committee, the Senate Delegated Legislation Committee and the Parliamentary Joint Committee on Human Rights. Each of these Committees have resolved to meet regularly remotely by teleconference during the COVID-19 pandemic but their functions require them to table their reports in Parliament and to otherwise bring matters of concern to the attention of Parliament. These key accountability measures have been necessarily adversely impacted by the pandemic.

[9] *https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/COVID-19/COVID19/Terms_of_Reference*.

[10] Section 81 of the Constitution.

[11] *Williams v Commonwealth* (2012) 248 CLR 156.

[12] Hon Josh Frydenberg MP, Treasurer of the Commonwealth of Australia, Ministerial Statement on the Economy, Parliament House, Canberra (12 May 2020) *https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/speeches/ministerial-statement-economy-parliament-house-canberra*.

'Jobseeker' and 'Jobkeeper', the former a significant increase in social security payments and the classes of persons eligible for those payments and the latter a national wage subsidy. Notably, the Jobkeeper figures were originally miscalculated by the Commonwealth government by $60 billion – the largest accounting error in Australian history.

Many of these spending measures have been authorized by very broadly drafted primary legislation, passed during emergency sittings in Parliament,[13] which authorizes the executive to determine by delegated legislation or by the exercise of broad discretionary powers the terms of the payments, including the eligibility requirements. This means that the key parts of Jobseeker and Jobkeeper programmes are determined by the executive and can be varied by the executive without any effective Parliamentary oversight.

2. *Increase in use of delegated legislation*

Another significant accountability concern is the increased and inappropriate use of delegated legislation by the executive since the start of the COVID-19 pandemic. This significant use of delegated legislation, including instruments that are not able to be disallowed by Parliament, hinders the capacity of Parliament to perform its property constitutional function.

This is not a new phenomenon, there has been increasing concern about the overuse of delegated legislation by Australian executives for some years,[14] but during the COVID-19 pandemic the majority of legal instruments authorizing government action at a Commonwealth level have been sourced in delegated rather than primary legislation.[15] In addition a large proportion of those instruments have been expressly exempted from the usual disallowance procedures.[16] Constitutionally the overuse of these

[13] As at July 2020 the key economic responses to the COVID-19 pandemic were passed by the Commonwealth government in 2 sittings days of Parliament. These included thousands of pages of legislation which included amendments to the existing tax administration laws and social security laws. As the COVID-19 pandemic delayed the delivery of the annual federal Budget (usually delivered in May) the Parliament also passed appropriations act and supply acts.

[14] Senate Standing Committee on Regulations and Ordinances, *Parliamentary Scrutiny of Delegated Legislation*, (June 2019).

[15] See for example, the Special Measures in Response to COVID-19 implemented by the Federal Court of Australia: *https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes*.

[16] *https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Scrutiny_News*. As at 18 June 2020 19.1% of the instruments were not subject to Parliamentary disallowance.

mechanisms, particularly in circumstances where the Parliament is not sitting regularly, is contrary to constitutional principle as it fundamentally undermines the ability of Parliament to control the use of delegated legislation through the mechanisms of tabling and disallowance.

Relatedly, many of the measures enacted during the COVID-19 crisis have used Henry VIII clauses (a provision that enables delegated legislation to amend or modify primary legislation).[17] There are significant accountability concerns with the use of such clauses as they essentially allow the executive to override the operation of primary legislation enacted by the democratically elected Houses of Parliament.

V. Role of the courts

In comparison with the very prominent role played by Australia's executive governments, and the, albeit diminished, but still important role played by the Parliaments at least to authorise executive action, the Australian judiciary has thus far played a fairly limited role in the early part of the pandemic. This is perhaps reflective of the reactive nature of the judiciary as an institution and the dynamic and quickly evolving nature of the COVID-19 pandemic.

Like the Parliaments, the courts have been affected by the pandemic by having a reduced number of hearings. By the end of March 2020 many of the courts had swiftly implemented online hearings to allow for the continued operation of the court to mitigate significant delays in hearings and to prioritise the health and safety of the community. Such measures while evidently prioritizing very significant concerns clearly limit the capacity of those institutions to give effect to the open court principle that courts sit in public and in open view, which is central to Australia's judicial system.[18]

In terms of COVID-19 related issues being litigated in the courts. There have been cases commenced in lower courts and the High Court of Australia (Australia's apex Court) challenging the constitutionality of the emergency legislation placing restrictions on jury trials in the Australian Capital Territory, but these cases are, at present, inactive due to the very low number of COVID-19 cases in that jurisdiction meaning the legislation is not being relied upon by the Courts.[19]

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[17] Including key changes made to the *Corporations Act 2001* (Cth) and social security legislation.

[18] *Hogan v Hinch* (2011) 243 CLR 506 at [20]; *Russell v Russell* (1976) 134 CLR 495 at 520 (Gibbs J).

[19] *R v UD (No 3)* [2020] ACTSC 139.

There have also been cases challenging the constitutionality of the border closures (referred to above). The dynamic nature of the virus in Australia has meant that since those cases have commenced at various points they could have been rendered moot by the States deciding to reopen their borders either fully or partially. It remains possible that this issue may not be finally determined by the High Court because of changes on the ground. If that occurs, the debate over the 'correctness' of these measures will play out only on the political stage.

Finally, the lack of formal rights' frameworks in the majority of Australian jurisdictions and a rights' protection culture means that there are very limited means to bring constitutional challenges to other aspects of COVID-19 restrictions. To the extent that the courts can police executive or legislative action this is much more likely to be done through administrative law challenges.