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Multi-Level Government and COVID-19: Australia as a case study

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What form does multi-level government take in Australia?

Australia has a federal system with three levels of government: Commonwealth (also known as the federal government), State and local. There are six States and two self-governing territories – the Australian Capital Territory and the Northern Territory – which are largely treated the same as States for inter-governmental purposes.

The Commonwealth Constitution distributes legislative power, with specific powers being conferred upon the Commonwealth Parliament to legislate on particular subjects. The Commonwealth Parliament therefore requires a head of legislative power to support any legislation that it enacts.

The States, on the other hand, have residual legislative power and may legislate on any subject unless it has been withdrawn from their power by the Commonwealth Constitution (eg States have no power to impose taxes on goods). Each State has legislated to create a system of local government, which remains controlled by State legislation.

While there are a small number of exclusive Commonwealth powers, most of the Commonwealth Parliament's heads of legislative power may be exercised concurrently by the States. Where there is inconsistency between a Commonwealth law and a State law, the Commonwealth law prevails (s 109 of the Constitution).

What were the main mechanisms used to handle the COVID-19 challenges, both health and economic, in your country? How well did they work for the purpose?

At the Commonwealth level, the *Biosecurity Act 2015* (Cth) gives extensive powers to the Commonwealth Minister for Health to make orders during a biosecurity emergency to prevent or control the entry or spread of the disease in Australia. The Commonwealth Health Minister has made orders limiting entry into and exit from the country, limiting access to certain remote communities, prohibiting price gouging regarding essential goods and establishing an app for tracking and tracing persons who may have been exposed to COVID-19. The Commonwealth Parliament also approved of various economic measures, to support the unemployed, to support businesses to keep their employees employed, and to stimulate the economy.

At the State level, each State has its own public health legislation to deal with a pandemic. It also has emergency legislation to deal with emergencies, including a pandemic. The States have exercised their powers to impose lockdowns, prohibit mass gatherings, limit the movement of people, close down non-essential businesses, and close schools, libraries and public facilities. They also instituted public health measures, such as providing COVID-19 testing facilities, quarantining those afflicted with

COVID-19, instituting tracing and tracking procedures, issuing public health instructions regarding hygiene and safety, and in some cases requiring the use of masks in public.

Prior to the pandemic, there were a significant number of intergovernmental agreements, plans and frameworks in place to deal with emergencies, including a pandemic. These were intended to ensure appropriate levels of coordination and cooperation between governments. For example, the National Security Health Agreement 2008 deals with Commonwealth and State responsibilities concerning health emergencies and established a national coordination framework. There is also an 'Australian Health Management Plan for Pandemic Influenza' that was prepared in 2014 and updated in 2019 which was overtaken by the 'Australian Health Sector Emergency Response Plan for Novel Coronavirus (COVID-19)' in February 2020. In addition, there is an 'Australian Government Crisis Management Framework' established in 2017, under which the Australian Health Protection Principal Committee ('AHPPC'), comprised of the Chief Health Officers of the Commonwealth and the States, is the peak health emergency management committee.

While there had been a great deal of preparation for a pandemic, nothing can completely prepare for the exact situation that occurs. Further efforts were therefore required. In March 2020 a 'National Coordination Mechanism' was activated to coordinate a whole-of-government approach, including the States and Territories, to deal with the non-health issues arising from the pandemic, such as policing and public safety, education, energy, transport, food and logistics. On 13 March 2020, the Commonwealth and the States and Territories agreed to a new intergovernmental agreement, the 'National Partnership on COVID-19 Response', which among other things provides States and Territories with the funding necessary to respond to the pandemic.

At this stage it is hard to tell whether all these mechanisms have worked effectively. Certainly, problems arose, and are discussed below. But after the pandemic is over and there is a chance to review what happened within government, we will have a better idea of what worked and what did not. Overall, Australia has responded relatively effectively to the pandemic, so the systems in place appear to have been at least functional, if not optimal.

To what extent were responses to the pandemic influenced by multi-level government?

The pandemic was dealt with across both the Commonwealth and State levels of government. The Commonwealth has power to legislate with respect to quarantine, external affairs and the movement of people in and out of Australia. The Commonwealth has also assumed responsibility for the management of aged care, and has resources, such as the army, that can be deployed in an emergency to provide civil aid. On occasion, where the Commonwealth had no legislative head of power, it intervened by using its financial powers to make conditional grants. For example, it offered grants to private schools if they returned to face-to-face teaching, undermining the States in their regulation of education.

The States and Territories have primary responsibility for public health and hospitals, schools and law and order. They employ the health personnel that do COVID-19 testing and the police who have ensured compliance with lockdown laws and public health regulations. The States also ran the compulsory hotel quarantine process which was implemented for people entering the country from overseas. The States were offered some Commonwealth assistance, through the use of defence force personnel, to aid them in this function. A major political controversy arose in Victoria when the second wave of the pandemic was traced to failures in hotel quarantine, with allegations being made that it

was a consequence of the Victorian Government using private security guards, rather than defence force personnel.

As the pandemic affected matters that crossed Commonwealth and State/Territory areas of responsibility, increased levels of cooperation between governments were required. As noted above, there were detailed frameworks for cooperation between both levels of government.

Did emergency conditions change the normal arrangements for multi-level government?

Yes. While there had been many inter-governmental agreements and plans created in the past to deal with a future pandemic, it was found that when the pandemic hit, greater levels of inter-governmental cooperation and flexibility were needed to handle it.

Previously, top-level interaction of the political leaders of all jurisdictions had been held through the Council of Australian Governments (COAG). COAG was comprised of the Commonwealth Prime Minister, State Premiers, the Chief Ministers of the self-governing Territories and the President of the Australian Local Government Association. But the COAG mechanism had become too bogged down in bureaucracy to be able to respond quickly to the crisis.

When COVID-19 started taking hold in Australia, the Prime Minister, Premiers and Chief Ministers met and agreed to create a smaller body, called the 'National Cabinet' (which excluded the Australian Local Government Association), with a view to meeting more often, using video-conferencing technology, and with less formality. It met weekly during the most intense period of the pandemic. The informality of the meetings was to be supported by conventions of strict confidentiality, similar to a cabinet of government ministers.

The National Cabinet was also briefed weekly by the AHPPC, an expert body comprised of the Chief Health Officers of each jurisdiction, and it drew on this shared body of expert evidence in order to make informed policy decisions. The use of shared evidence and expertise was critical to achieving cooperative decision-making.

While the decisions of the National Cabinet were made collectively, it was agreed that each jurisdiction would be free to implement those decisions in the way most appropriate for it. Some States and Territories had high levels of infection and others had low levels. Some had highly vulnerable Indigenous populations in remote areas who needed particular protection. Some were able to diminish or exclude infection by shutting their borders (see below for more details). The National Cabinet process respected that while goals, principles and standards may be agreed collectively at the National Cabinet level, it was up to each jurisdiction to give effect to them according to local circumstances. For example, they could decide whether schools should close, and if so when, because each of the States and Territories have different school systems, different holiday periods and were facing different levels of risk. While there was some tension about this, overall, the principles of federalism were respected.

The success of the National Cabinet, at least during the first wave of the pandemic, led Commonwealth and State leaders to agree to the abolition of COAG and its permanent replacement by the National Cabinet. However, concerns have been expressed about the institutional architecture in which the National Cabinet is placed. Technically, it is a committee of the Commonwealth Cabinet, and under the complete control of the Prime Minister and the Commonwealth Cabinet. While this may have been a convenient mechanism to use in an emergency when the National Cabinet was first put in

place, it is not an appropriate basis for an inter-governmental body comprised of equals. Accordingly, there is ongoing debate about the basis for the National Cabinet and the federal-State architecture for continuing cooperation.[1]

Were both/all levels of government involved in responding to the pandemic?

The Commonwealth and the States and Territories were all heavily involved in responding to the pandemic. Local government was less involved, at least at the leadership level, having been cut out of the National Cabinet. However, local government areas were required to give effect to pandemic plans and ensure that relevant State or Territory laws and policies were given effect at the local level. This included closing playgrounds and sporting facilities and placing appropriate signage in public places to ensure compliance.

Did governments work together, separately, or both?

Both. While governments largely worked separately in dealing with their own responsibilities, they did so under the overall umbrella of cooperation through the National Cabinet and a myriad of inter-governmental agreements regarding health, emergencies and pandemics, which set up systems and structures for cooperation.

One area in which States worked separately, to the annoyance of the Commonwealth Government, was in relation to border closures. Some States and Territories, with little spread of COVID-19, shut their borders to visitors from other States, in order to prevent its spread. Tasmania, as an island, found it easiest to close its borders. (A headline on a Tasmanian newspaper read 'We have a moat, and we're not afraid to use it'!) Western Australia and the Northern Territory also proved effective in preventing the spread of COVID-19 within their jurisdictions, due to border closures. Queensland and South Australia found it more difficult due to the existence of border communities that were affected. They had some outbreaks but have so far managed them.

Border closures were not absolute – there were exemptions for health personnel, emergency workers, people transporting goods into and out of the jurisdiction, and exemptions based upon compassionate grounds. In some jurisdictions entry was allowed, but with compulsory 14 day quarantine. Some jurisdictions reduced hard border closures to more flexible ones, so that they only excluded persons who within the last 14 days had been within a COVID-19 'hot-spot'. A 'hot-spot' was a local government area that had been declared as such due to the spread of COVID-19 within it.

The consequence has been that most of the jurisdictions that shut their borders have been able to bring back many commercial businesses, such as cafes and restaurants, without the types of restrictions that apply in those States with a significant COVID-19 spread. This has had the benefit of improving the local economy, but to the detriment of businesses that rely on tourism or the interstate movement of people. As a consequence of border closures, most COVID-19 spread has been confined to Victoria and New South Wales – the two most populous States.

The Commonwealth Government has, for economic reasons, pressured States to re-open borders, to permit tourism and other business interactions. But most jurisdictions have placed the priority on protecting the health of their own residents. Section 92 of the Constitution says that 'intercourse among the States', meaning the movement of people across State borders, 'shall be absolutely free'.

[1] See further: https://law.unimelb.edu.au/__data/assets/pdf_file/0004/3444250/GDC-Policy-Brief-2_National-Cabinet_final01.07.2020.pdf.

But the High Court of Australia has previously recognized that such movement may be impeded for a legitimate purpose, such as the protection of public health, as long as the law is reasonably necessary to achieve that purpose. There is currently litigation before the courts contending that Western Australia's border closure breaches s 92. The Commonwealth initially intervened in the case, supporting the argument that the border closure was unconstitutional. It later withdrew its participation, as popular support for the border closure in Western Australia was very strong and the Commonwealth's intervention was proving too politically damaging for it within Western Australia. The case is proceeding and is likely to be heard by the High Court in October.

How effective was action by the centre? How effective was action by sub-state levels of government?

Overall, action at the national and sub-national level was effective. Australia was more successful than many countries at achieving control over the first wave of the pandemic, with proportionately fewer deaths and a manageable number of infections. However, some mistakes were made, including in relation to the quarantine of overseas arrivals, resulting in a serious second wave in Victoria, which eventually required harsher lockdown measures to get it under control. Other jurisdictions learnt from the Victorian experience and have so far prevented a second wave from getting out of control in their State or Territory.

There were some significant failures in appropriate levels of Commonwealth and State cooperation and taking of responsibility. One concerned officials letting people off a cruise ship, the Ruby Princess, without adequately testing for coronavirus or implementing quarantine measures. This resulted in a dispute about whether it was Commonwealth officials (with responsibility for border control and quarantine) or State officials (with responsibility for public health) who were responsible for this failure. It appears that there were failures at both levels of government,[2] and in particular a failure to accept responsibility.

Another area of failure has been preventing the spread of coronavirus in aged care facilities. While the Commonwealth has no direct head of legislative power with respect to aged care, it has power to provide pensions to the aged and the sick, and it has used its financial powers and resources to fund and regulate the provision of aged care in Australia. In Australia, most nursing homes for the aged are privately owned bodies – either not-for-profit institutions run by charities or local community organizations, or for-profit institutions run by corporations. The Commonwealth regulates these bodies by providing funding and placing conditions upon that funding. The States, on the other hand, are responsible for public health and the running of hospitals. So when nursing homes became infected with COVID-19, questions arose as to whether residents should be moved to hospitals, or treated in the nursing home, and who was responsible. After a number of crises in nursing homes, particularly during the second wave of the pandemic in Victoria, the Commonwealth and the State established the 'Victorian Aged Care Response Centre',[3] which includes representatives from Commonwealth and State health departments, the aged care regulator, State and Commonwealth emergency management bodies and the defence force. It is hoped that this cooperative body will be capable of dealing with crises in nursing homes better when they become infected. Other States may learn from the effectiveness of this model, if faced with the same problem.

[2] https://www.rubyprincessinquiry.nsw.gov.au/report/.
[3] https://www.health.gov.au/initiatives-and-programs/victorian-aged-care-response-centre.

On balance, was multi-level government a positive, negative, or neutral factor in responding to this emergency?

During the first wave of the pandemic, the general view of the public was that the federal system had worked well, with high levels of cooperation and leadership. That belief began to wane during the second wave in Victoria, when there were more significant disputes between the Commonwealth and Victorian Governments (which are run by opposing political parties) and there were considerable efforts at blame-shifting in relation to aged care and quarantine arrangements for people returning to Australia.

In my own view, multi-level government was a positive factor. The circumstances across Australia were very different, meaning that different responses were justified, including responses that prevented the spread of the disease to particular areas. A 'one-size-fits-all' approach by a central government would have been disastrous. While the Commonwealth was more concerned for the economy, the States were more concerned about the health of their residents. These opposing pressures resulted in a more moderate and appropriate outcome. If there had been no State Governments, Australia's response would probably have been more like that of the United Kingdom Government, resulting in much greater spread of COVID-19 and higher numbers of deaths.

Do you expect the experience of dealing with this emergency to have a longer-term effect on multi-level government?

Yes. The establishment of the National Cabinet, and the federal-state architecture in which it operates, will have a long-term effect on Australia's governance. There will also most likely be major reforms to legislation and inter-governmental agreements concerning dealing with emergencies and pandemics. The Commonwealth Government is currently holding a royal commission in relation to its emergency power as a consequence of the catastrophic bushfires earlier in the year.[4] It is likely that the Commonwealth will seek to centralize and increase its powers to act during national emergencies.

What positive or negative insights can be gained from experience with multi-level government during this emergency in this case?

On the positive side, it became apparent that where there was an urgent common goal, leaders were able to cooperate, without consideration of party-political agendas, to achieve that goal, while respecting the right of the States and Territories to implement common policies in different ways to suit their own circumstances.

On the negative side, when things went wrong, the tendency to seek to shift blame was apparent. Better practical coordination was needed to deal immediately with problems as they arose.

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[4] https://naturaldisaster.royalcommission.gov.au/.