THE UNIVERSITY OF MELBOURNE

May 28, 2020

Committee Secretary
Senate Select Committee on COVID-19
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
By email: covid.sen@aph.gov.au

Re: ***SUBMISSION TO THE SENATE SELECT COMMITTEE ON COVID-19***

Dear Secretary,

Thank you for the opportunity to make a submission to this Committee.

We make this submission in our capacity as members of the Centre for Comparative Constitutional Studies ('CCCS') and the Laureate Program in Comparative Constitutional Law at the Melbourne Law School, University of Melbourne. We are solely responsible for its content.

This submission has been prepared on behalf of CCCS by Professor Michael Crommelin AO, Professor Kristen Rundle, Professor Cheryl Saunders AO, Professor Adrienne Stone, and with research assistance provided by Ms Selena Bateman. We acknowledge the support of the Australian Research Council through Professor Stone's Laureate Fellowship FL 160100136.

If you have any questions relating to the submission, or if we can be of any further assistance, please do not hesitate to contact us.

Yours sincerely,

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CENTRE FOR COMPARATIVE CONSTITUTIONAL STUDIES AND LAUREATE PROGRAM IN COMPARATIVE CONSTITUTIONAL LAW

SUBMISSION TO THE SENATE SELECT COMMITTEE ON COVID-19

28 May 2020

INTRODUCTION

The Centre for Comparative Constitutional Studies ('CCCS') is a research centre of Melbourne Law School at the University of Melbourne. CCCS undertakes research, teaching and engagement in relation to the Australian constitutional system as well as comparative constitutional law. The Laureate Program in Comparative Constitutional Law (LPCCL) at Melbourne Law School is funded by the Australian Research Council to pursue research relating to constitutionalism in liberal democracies.

We welcome the opportunity to make this submission to the Senate Select Committee Inquiry into COVID-19 ('the Committee'). We do so to assist the Committee to understand some of the constitutional issues that arise in association with the Government's COVID-19 response to this point, or which might be expected to arise as that response continues. We also seek to clarify and emphasise the constitutional principles that will apply to government action in the post-COVID-19 'emergency' period.

We accept that a system of constitutional government can accommodate 'emergency' measures in specific circumstances. However, in such a system these measures must necessarily be temporary, limited in nature and scope, and subject to careful and effective oversight.

Our submission is organised under the following headings:

1. The importance of Parliament
2. The role of legislation and delegated legislation
3. The role of the National Cabinet and other Intergovernmental Arrangements
4. Reliance on Executive power
5. COVID-19 'Coordination' mechanisms
6. Accountability and oversight mechanisms
7. Conclusion: Constitutional government after emergency

1. THE IMPORTANCE OF PARLIAMENT

The primary institution of constitutional government in Australia is the Parliament. Parliaments exist at both levels of government, but in responding to this Committee's terms of reference, our submission focusses on the Commonwealth Parliament alone.

The **roles of the Parliament** within the constitutional system are multiple. It is the forum for political representation and participation to give effect to the principles of representative democratic government. It is the forum for deliberation on the policy proposals of the government of the day. It is the forum through which actions of the government of the day are subject to scrutiny and held to account through the conventions of responsible government. And it is the forum in which the primary form of legal authority within a system of constitutional government – legislation – is passed.

The COVID-19 crisis has demonstrated that **a more structured approach to Parliament in times of crisis** is needed. Parliamentary sittings are presently ad hoc and their timetable is set by the Government. This situation is clearly unsatisfactory and Parliament should ensure that arrangements are put in place which would allow it to continue to discharge its constitutional functions in times of emergency. These arrangements may include provision for Parliament to sit remotely if a particular emergency so requires.

The **ad hoc nature of current parliamentary activities** carries significant implications for the capacity of the Government's COVID-19 response to be grounded appropriately in primary legislation. The consequences were seen, for example, in the delayed passage of the legislation authorising the COVID-Safe App. Current arrangements also limit the opportunity for adequate deliberation about policy and other implications of the Government's proposed response, and effectively remove the capacity of some parliamentary committees to discharge their legislative responsibilities. We elaborate upon these and related issues in more detail immediately below.

2. THE ROLE OF LEGISLATION AND DELEGATED LEGISLATION

There are two different approaches to using legislation to authorise government action during an emergency. The first is having legislation already in place that sets out the framework for authorising government action in advance. The second is to wait until the emergency to enact legislation specific to it.[1]

We join many public lawyers and public law scholars in applauding the Commonwealth Parliament for having deliberated upon and enacted a scheme, in advance, through which the Government's response to the current public health crisis could proceed. Among the benefits of the ***Biosecurity Act 2015*** already being in place is that it has been possible to

[1] An example of this second approach is the response taken by the Parliament of the United Kingdom through the *Coronavirus Act 2020*, which commenced on 25 March 2020.

anticipate the kinds of measures that might be taken in response to the current health crisis. Most importantly, the considerable powers of the Minister for Health to respond to circumstances like the present through Ministerial 'determinations' and other forms of authority conferred by Parliament on the executive are defined by and limited to what is provided in this legislation.

That said, other measures, most notably the introduction of the **COVID-Safe App**, have seen legislation follow weeks after the measure itself came into effect through a delegated legislative instrument.[2] Within the commitments of our system of constitutional government, the intrusiveness of this measure would ordinarily warrant rigorous parliamentary deliberation before its authorisation. The absence of primary legislation providing specific authority for the COVID-Safe App at the time of its introduction is undesirable in principle. The Committee could usefully make some recommendations about the appropriate boundary between primary legislation and delegated authority in light of this example. In functional terms, the lack of primary legislation at the time the App was launched was not conducive to building public confidence in it.

We also draw attention, with concern, to the extensive **role played by delegated legislation** more generally within the Government's COVID-19 response. This role has been effected through a wide range of legislative instruments that fall within the meaning of that term in the *Legislation Act 2003.* The wide range of Ministerial determinations made pursuant to s 475 and s 477 of the *Biosecurity Act 2015* is the most prominent example of this practice.

In drawing the Committee's attention to this practice we acknowledge that the use delegated legislation is both **common and important in times of emergency**. Investing powers in a responsible Minister to make delegated legislation enables a more immediate response to the conditions at hand than might be possible through wider parliamentary involvement. This is true of emergencies generally, as well is in relation to what is specifically envisaged by the terms of the *Biosecurity Act 2015.*

However, within a system of constitutional government, careful scrutiny and oversight must be guaranteed in relation to any **significant shift in lawmaking authority from the Parliament to the Executive**. Extensive use of delegated legislation marks such a shift. The COVID-19 crisis has exposed substantial deficiencies in the existing mechanisms for parliamentary oversight of the conferral, nature, extent and exercise of delegated legislative authority. Parliament must itself be sitting if important and longstanding parliamentary

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[2] The original basis for the legal authority for the COVID-Safe app was a determination of the Minister for Health under s 477(1) of the *Biosecurity Act 2015*: the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements – Public Health Contact Information) Determination 2020*, dated 25 April 2020. This basis for the legal authority of the COVID-Safe app was superseded by the passage of the *Privacy Amendment (Public Health Contact Information) Act 2020* on 14 May 2020.

actors such as the Senate Standing Committee for the Scrutiny of Delegated Legislation are to discharge these oversight functions.

This concern about the absence of oversight is made greater still in relation to the considerable number of key instruments of the Government's COVID-19 response that are designated as **'non-disallowable instruments'**, and therefore exempt from the processes of parliamentary scrutiny ordinarily required by the *Legislation Act 2003.* We acknowledge that this 'non-disallowable' status has been provided by the relevant authorising provisions of the *Biosecurity Act 2015.* Nevertheless, we question the justification for this exemption. Furthermore, we submit that this exemption of the key legislative instruments that have provided the main legal authority for the Government's response to COVID-19 crisis so far from the ordinary channels of parliamentary scrutiny highlights the need for other effective mechanisms of scrutiny and oversight.

The extent of the use of delegated legislation in the Government's COVID-19 response so far occurs in the context of **increased use of delegated legislation** as the legal source of executive authority for a wide range of governmental activity generally. The constitutional concerns raised by this practice are therefore not specific to the current public health emergency. The present context does, however, give them a particular urgency. For example, delegated legislative instruments of the kind seen to support the introduction of the COVID-Safe App pending its further authorisation through legislation can now readily be withdrawn. Such instruments are therefore by definition an insecure basis for the legal authority of the kind of significant and intrusive measure reflected in the COVID-Safe App.

We intend to make a **further submission** on these and related matters to the current **Senate Standing Committee for the Scrutiny of Delegated Legislation Inquiry** into the increasing use of delegated legislation by the Government. For immediate purposes we would emphasise that the lesser and unpredictable role played by primary legislation within the Government's response to the COVID-19 pandemic to this point, and the comparably significant role played by executive lawmaking, runs against expectations of constitutional government. This unbalanced division of constitutional labour also contributes to problems of **opacity** in the regulatory response generally; an issue to which we return at multiple points below.

3. THE ROLE OF THE NATIONAL CABINET AND OTHER INTERGOVERNMENTAL ARRANGEMENTS

The advent of the National Cabinet has been a major achievement in managing the pandemic. Significantly, it has achieved **genuine collaboration** between the levels of government, balancing the advantages of co-ordination with those of local responsiveness, in ways that intergovernmental arrangements typically have not achieved in the past. Australians have benefitted from this approach.

All intergovernmental arrangements concentrate power in the executive branch and tend to be opaque, unless measures to limit these traits are deliberately adopted. In some respects the National Cabinet **has worked better in this regard** than, for example, COAG: the mode of operation of the National Cabinet has enabled members to discuss their position with their own Cabinets. The regular media conferences by Premiers, as well as the Prime Minister and health officials, have given the public considerable information about the decisions the National Cabinet has made.

Nevertheless, there is **more that could be done** in this regard, without affecting the efficacy of the body. It would be useful for both Parliaments and the public to understand the core working principles of the National Cabinet and, in particular, what criteria determine the issues that go to National Cabinet and those that do not. While there are necessary limits to transparency with a body of this kind, members are nevertheless responsible to their own Parliaments and the people in their own jurisdictions for the positions that they take and the decisions to which they subscribe through the operation of the National Cabinet mechanism.

Understanding of the National Cabinet processes by Parliaments, people and the media **may be hindered by the name**. Clearly this is not a 'Cabinet' in the way the term usually is used in a system of responsible government, denoting a policy making body all of whose members are drawn from the same Parliament to whom they are, ultimately, accountable. Nor is it helpful, in terms of structure, public understanding and the principles of federal democracy, to describe the National Cabinet as linked to the federal Cabinet processes. To the extent that this was initially deemed useful as a way of discouraging **freedom of information applications**, this issue should be tackled directly by a tailored amendment to the Freedom of Information legislation. If a 'National Cabinet' process continues in the future, as has been suggested and as may well be beneficial for Australia, attention should be paid to these issues, in the interests of accommodating it effectively in the Australian constitutional system.

4. RELIANCE ON EXECUTIVE POWER

Section 61 of the Constitution provides that Commonwealth executive power 'extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.' The extent to which the Commonwealth has relied upon each category of executive power, non-statutory and statutory, is not entirely clear.

As noted in section 1, the primary lawmaking institution of constitutional government in Australia is the Parliament. The circumstances in which resort to non-statutory executive power rather than use of ordinary legislative processes is appropriate goes to the heart of controversies about the division of constitutional authority within our system of government.

The first question relates to the apparent **use of non-statutory executive power as the sole basis for legal authority** in relation to a particular government action. An example is the effort of the Commonwealth Government to provide incentives to private schools to return to face-to-face teaching earlier than the strategy being pursued by State and Territory governments with respect to schools generally, even if such action on the part of private schools would have been unlawful in the relevant State or Territory. The decisions of the High Court in the *School Chaplaincy cases*[3] suggest strongly that the non-statutory executive power of the Commonwealth does not authorise this effort.

The next question concerns the **relationship between statutory executive power and legislative powers** operating in the same context. An example is the power given to the Minister for Health in section 478 of the *Biosecurity Act 2015* to 'give directions' during a declared 'emergency period'. This power to 'give directions' is in addition to the power provided in section 477 to 'determine emergency requirements' through the specific legislative instrument of a 'determination'. The power in section 477 to make such 'determinations' is given considerable structure and content, especially with respect to the conditions in which such determinations may lawfully be made. By contrast, the power vested in the Minister by section 478 to 'give directions' during a human biosecurity emergency period is comparatively broad.

A final question about reliance on executive power concerns the possibility of **conferral of Commonwealth executive power (whether non-statutory or statutory) upon States**. It is far from clear whether any attempt to do so has been made in the response to the COVID-19 crisis so far. Such an arrangement might be useful in at least some instances, but the constitutionality of any such conferral would be doubtful.

The lack of clarity about the precise role of Commonwealth executive power within the Government's COVID-19 response is therefore **troubling on a number of fronts**. Opacity with respect to this issue makes it hard to understand whether some decisions have legislative support or not: and if not, why not. Those that do not have such legislative support are presumably reliant, at the Commonwealth level, on non-statutory executive power. Questions as important as by what legal authority government action proceeds, in an emergency or otherwise, should not be left to unguided guesswork of this kind, least of all in a constitutional system committed to the primacy of Parliament.

5. COVID-19 'COORDINATION' MECHANISMS

In addition to the novel mechanism of the National Cabinet, the COVID-19 pandemic has seen the advent a number of **novel mechanisms to aid coordination of the Government's response** to the crisis. Like many other aspects of the Government's response, there is

[3] [3] *Williams v Commonwealth* [2012] HCA 23; (2012) 248 CLR 156, and *Williams v Commonwealth (No.2)* [2014] HCA 23; (2014) 252 CLR 416.

presently a problem of opacity with respect to various features of these mechanisms, including the basis of their authority, the functions they are to perform, reasons for the choice of their personnel, and their relationship to existing government institutions.

The need for clarity on these questions is especially acute in relation to the new **COVID-19 Coordination Commission**. According to information provided on the Commission's website (https://www.pmc.gov.au/nccc), its role in relation to the Government's response is twofold: first, to 'help minimise and mitigate the impact of the COVID-19 on jobs and businesses', and second, to 'facilitate the fastest possible recovery of lives and livelihoods'.

This information offers very limited insight into to work being done, or envisaged to be done, by the Commission. Moreover, it is unclear under what authority the Commission is acting, how its decisions are being used in shaping Government policy, why its members have been chosen for their respective roles, or what its relationship is to the National Cabinet or the federal Cabinet. The availability and efficacy of oversight of the Commission's activities is equally unclear.

Many of the same questions as those just listed also arise in relation to the **National Coordinating Mechanism** within the **Department of Home Affairs**. The nature and extent of any overlap between the functions of the two mechanisms is presently unclear.

We urge the Committee to achieve greater clarity on these questions as part of its overall inquiry into the Government's response to COVID-19.

6. ACCOUNTABILITY AND OVERSIGHT: GENERAL CONCERNS

We have highlighted our concerns about **opacity in the regulatory framework** governing the Government's COVID-19 response across each of the specific points elaborated above. Here we wish to raise concerns about the adequacy of **accountability and oversight mechanisms** in relation to different aspects of the Government's response. The adequacy and efficacy of such mechanisms will obviously be shaped by problems of opacity in the regulatory framework generally.

We note that other jurisdictions have sought to address both concerns through innovative measures designed to gain public trust in the governmental response to COVID-19, especially in circumstances where parliamentary activity has been reduced. The initiative taken by **New Zealand** to publish the decisions of Cabinet during the emergency period provides a leading example.

We earlier noted our concerns about the delay in providing a legislative foundation to the introduction of the **COVID-Safe App**. Here we wish to highlight an additional concern about the adequacy of the **oversight mechanisms** governing the operation of the COVID-Safe App. As we understand the legislation passed on 14 May 2020 that amends the *Privacy Act* to

make provision for the operation of the COVID-Safe App, the oversight mechanisms currently envisaged for the operation of the App are limited to those already operating through Commonwealth and State privacy agencies of the relevant executive governments. We therefore join with our colleagues from the University of New South Wales, Katharine Kemp and Graham Greenleaf, in urging for the need for a fully independent **National Privacy Advisory Council** to monitor and address issues arising in relation to the operation of the COVID-Safe App.[4]

7. CONCLUSION: CONSTITUTIONAL GOVERNMENT AFTER EMERGENCY

We appreciate that this Committee's terms of reference relate to the Government's response to the COVID-19 public health crisis to this point. We equally appreciate that the response as it continues to unfold will raise new questions. We therefore urge the Committee to recommend that Parliament:

- ensure that arrangements are put in place which would allow it to continue to discharge its constitutional functions in a time of emergency;
- identify and rectify deficiencies exposed by the COVID-19 crisis in existing mechanisms for its oversight of the conferral, nature, extent and exercise of delegated legislative authority;
- inquire into the use (if any) of non-statutory executive power in response to the COVID-19 process; and
- in consultation with its State and Territory counterparts, develop a set of principles and practices applicable to the operation of the National Cabinet (by whatever name) in the aftermath of the COVID-19 crisis.

We look forward to any further opportunity to assist in identifying and upholding the constitutional commitments that define our system of government.

[4] See G Greenleaf and K Kemp, 'Australia's COVIDSafe Experiment, Phase III: Legislation for Trust in Contact Tracing (2020) UNSW Law Research Series, SSRN: https://ssrn.com/abstract=3601730, especially section 10.4.