

# Cooperative Federalism, Soft Governance and Hard Laws in Australia's State of Emergency

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2020-04-10T09:45:08

[To date](#), in Australia, there have been over 5,350 confirmed COVID-19 cases, 26 deaths and over 275,000 tests conducted. The [majority of the confirmed cases were acquired overseas](#). Australia is a Federation with a national government and state and territory governments. This adds complexity to responding to a national crisis. So far, Australia's response has been characterised by cooperative federalism, at least nominally, primarily through a newly formed National Cabinet. There has been a staged ratcheting up of border controls and executive powers to prevent and control the spread of COVID-19, and a 'hibernation' approach to the conduct of business and exercise of fundamental rights. In this post, we discuss the governance model through the National Cabinet, the hard law response at Federal and State and Territory level and the extensive economic interventions.

## 1. 'Soft Governance' – the National Cabinet: Coordinated, Intergovernmental Crisis Leadership

Australia's response to the outbreak of COVID-19 has been led by a newly established [National Cabinet](#), comprised of the Prime Minister of Australia, the Premiers of the six Australian states and the Chief Ministers of the two Australian territories. Formed at a Council of Australian Governments ([COAG](#)) meeting on 13 March, the National Cabinet is a decision-making body to ensure a unified and coordinated response to COVID-19 across the federation. The National Cabinet is advised by the Department of Home Affairs' National Coordination Mechanism ([NCM](#)) and the Australian Health Protection Principal Committee ([AHPPC](#)) which is a body chaired by the Australian Chief Medical Officer, and comprised of Chief Health Officers of each state and territory, and relevant departmental officials.

This new cooperative political institution has thus far been a relatively effective intergovernmental forum providing much needed coordinated crisis leadership. However, its institution and the instruments at its disposal present a new set of accountability challenges.

Although called a 'cabinet', and [reported](#) to have been established under the Australian Government's [Cabinet Handbook](#), this newly formed intergovernmental institution bears little resemblance to a cabinet in the Westminster tradition. Described in the media as a '[war cabinet](#),' it also departs from the war cabinet formed during World War II which comprised government and opposition members of the Federal Parliament.

A Westminster-style cabinet, as exists at the national and state levels in the Australian federation, is the primary decision making organ of executive government. It is a product of constitutional convention and practice, subject to strict rules of *cabinet confidentiality*, governed by the principle of *cabinet solidarity* and held to account through *collective cabinet responsibility* to the Parliament. The confidentiality of cabinet documents and deliberations are protected by law and exempted from freedom of information requests, protecting robust discussion within Cabinet. The principle of solidarity provides that once a decision is made in Cabinet, all members publicly support the decision irrespective of whether they were present during deliberations, or supportive of the decision.

The new National Cabinet, by contrast, is bipartisan, and comprised of members of nine separate governments (the federal government and eight state and territory governments). As an [intergovernmental](#) body, its members are not collectively responsible to one Parliament, but individually responsible to nine separate parliaments. The principle of collective responsibility cannot apply in the usual way. Similarly, cabinet solidarity cannot be enforced, leading, as we have already seen, to public dissention by members of the National Cabinet. Following the National Cabinet meeting on 22 March, the Premiers of New South Wales (NSW) and Victoria (Vic) and the Chief Minister of the Australian Capital Territory (ACT) broke ranks to unilaterally recommend that parents keep their school-aged children home from school and institute a range of lockdowns, while the Federal Government maintained that schools were safe to attend and should remain open.

On 13 March, alongside the establishment of the National Cabinet, COAG adopted a [National Partnership on COVID-19 Response](#) and a [National Partnership of Disaster Risk Reduction](#). These are agreements between the Federal Government and the States and Territories. These agreements discuss and set out plans to address the financial impact of COVID-19 and future ‘disasters associated with natural hazards’. Both make reference to the [Australian Health Sector Emergency Response Plan for Novel Coronavirus \(COVID-19\)](#) as the strategic document inspiring executive action for the mitigation and response to the crisis. Interestingly, none of these documents is legally binding. The resulting emergency governance architecture is based on ‘soft’ governance instruments, which goes a long way in explaining some structural ambiguities in the messaging to the public and the varying measures adopted at different levels of government. This is particularly evident in the example of school opening or closure discussed above.

It appears that, despite its attempt to centralise and streamline decision-making, the National Cabinet adds what [Warhurst](#) describes as ‘a new link in the chain of political accountability, which is already stretched.’

## **2. ‘Hard Laws’: States of Emergency, Border Closures, Restrictions on Public Gatherings**

Alongside the initiatives of the National Cabinet, much of the Federal response to the outbreak of COVID-19 in Australia finds legal ground in the [Biosecurity Act 2015](#)

(Cth). Following the declaration of a human biosecurity emergency on 18 March 2020, the Minister of Health has, for the first time, been granted expansive powers to take action to prevent and control the spread of the virus in Australia. This includes preventing the movement of people within and between areas (*Biosecurity Act 2015* (Cth), s 477(3)(b)). This power has been formally exercised on two occasions by the Health Minister for the purpose of securing the external borders of the country. On 18 March the Minister issued a Determination to [forbid cruise ships from entering Australian ports](#) before April 15, and, on 25 March, the Minister instituted a generalised [overseas travel ban](#) for Australian citizens and permanent residents.

Similarly, at the State and Territory level, all governments have declared states of emergency under state public health laws (e.g. [Public Health Act 2016 \(WA\)](#)) and/or existing emergency legislation (e.g. [Emergency Management Act 2005 \(WA\)](#)) to activate broad executive powers to respond to the evolving threat posed by COVID-19 and to implement National Cabinet decisions.

Many measures at both the federal and state and territory levels aim to control the spread of COVID-19 by restricting freedom of movement and association. The National Cabinet, for example, has agreed to limit public gatherings to a maximum of [two people](#) and requires people arriving from overseas to self-isolate for 14 days. The National Cabinet also agreed on a series of [restrictions from opening](#) between 23 and 26 March, affecting a number of businesses and public places such as pubs, restaurants, gyms, personal services, recreational venues (indoor and outdoor), markets, etc. Each State and Territory has introduced their own measures implementing these decisions (see e.g. Queensland's [Non-essential business, activity and undertaking Closure Direction \(No.4\)](#)).

This cooperative model has, however, led to some [confusion](#). At the State and Territory level, we have seen the rapid introduction of (evolving) executive directives and orders under public health and emergency laws which introduce broadly similar restrictions but vary in detail, severity and penalties across Australia. In NSW, for example, there are prohibitions on leaving one's place of residence without a reasonable excuse such as obtaining food, exercising, or for medical or caring reasons pursuant to the [Public Health \(COVID-19 Restrictions on Gathering and Movement\) Order 2020 \(NSW\)](#) made under the *Public Health Act 2010* (NSW). Breaches attract a maximum penalty of imprisonment for 6 months or a fine of up to \$11,000 (or both) and a further \$5,500 fine each day the offence continues, and fines of \$55,000 for Corporations and \$27,500 each day the offence continues. In Western Australia (WA), a [Criminal Code Amendment \(COVID-19 Response\) Bill 2020 \(WA\)](#) has passed Parliament to specify, for a period of 12 months, that the offence of serious assault of a public officer is aggravated by an offender having COVID-19 or creating fear or suspicion of having it, and is punishable by a 10 year jail term.

Aboriginal and Torres Strait Islander communities and people living in remote communities are at greater risk of negative outcomes if exposed to COVID-19 due to pre-existing health issues, lack of accessible healthcare, and high rates of mobility and travel. The Australian and State governments have acted together to restrict access to these areas. Areas such as the Kimberley region in WA have

been designated and restrictions have been placed on entering designated areas as outlined in the [Biosecurity \(Human Biosecurity Emergency\) \(Human Coronavirus with Pandemic Potential\) \(Emergency Requirements for Remote Communities\) Determination 2020](#) made under the *Biosecurity Act 2015 (Cth)*, s 477(1). WA has introduced [further restrictions](#) on travelling to regional areas, with particular protections for [some regional areas](#). The penalties here are significant – up to \$50,000 for individuals and up to \$250,000 for bodies corporate. Further, given the potential benefit of WA’s geographical isolation for containing transmission, WA will, for the first time ever on Sunday 5 April, [close its border](#) to prevent people entering WA, effectively creating an internal border in Australia.

Although Australians are currently experiencing restrictions to their human rights (such as freedom of movement), Australia is the only Western democracy lacking a constitutional or statutory bill of rights at a national level, although in recent years, state and territory level charters of rights have begun to emerge. There are some protections scattered through the Australian Constitution, including [s 117](#) which prevents a State from imposing any “disability or discrimination” on residents of another State by reason of their interstate residence. It is because of this provision that WA’s hard border applies equally to everyone in Australia, including residents of WA.

Since 2011, all new federal Bills and legislative instruments must be accompanied by a statement of compatibility with the International Covenant on Civil and Political Rights ([ICCPR](#)) and six other human rights treaties to which Australia is party, under the [Human Rights \(Parliamentary Scrutiny\) Act 2011 \(Cth\)](#). This statement should set out permissible limitations on rights, such as public health limitations to the freedom of movement under s12(3) of the ICCPR, and explain how this restriction is reasonable, necessary and proportionate. The effectiveness of the parliamentary scrutiny regime, and its suitability to times of real or perceived emergency, has been [questioned](#). Although the Act does covers legislative instruments, it is limited to those that are disallowable and therefore excludes the Declarations made under the *Biosecurity Act 2015 (Cth)*. Furthermore, the Act only applies to Bills and legislative instruments in the Federal Parliament, with processes for assessing human rights compatibility existing at the sub-national level only in those jurisdictions with charters of rights.

The expansive power of the National Cabinet restricting freedoms and closing businesses occurs outside of the normal accountability mechanism of *collective cabinet responsibility* to one Parliament of a Westminster-style cabinet. Meanwhile, the [Federal Parliament is suspended](#) in light of COVID-19, as are most of the State and Territory Parliaments. The suspension of parliamentary oversight during a period where extensive powers could be exercised is of concern, and it has been [argued](#) that virtual sittings of the Australian Parliament are possible under the Australian Constitution. The ‘hibernation’ approach adopted by Australian governments does however provide some protection. The measures introduced to respond to COVID-19 are temporary and limited to the duration of the declared states of emergency or, like the WA aggravated serious assault offence, to a defined period.

### 3. Economic Intervention

To face the unprecedented threat to the nation's economy, both the Federal Government and State and Territory governments have adopted massive stimulus packages to avoid economic collapse. Federal initiatives have included a [\\$130 billion JobKeeper Payment](#) to provide wage subsidies to businesses significantly affected by the pandemic; a subsidy to small businesses seeking [apprentices and trainees](#) to cover up to 50% of their wages; and a significant relief package to keep [early childhood education and care centres open](#) free of charge for a period of six months. At the State and Territory level, governments have enacted a variety of measures such as freezing household fees and charges, payroll tax exemptions for business and extended paid leave for COVID-19.

### 4. Conclusion

COVID-19 presents challenges for all nations and Australia has been no exception. Governance by way of a newly formed National Cabinet has provided useful coordinated crisis leadership, and a measure of consistency in the approach formulated by individual States and Territories. However, an emergency governance architecture based on non-legally binding arrangements invariably leads to ambiguities in the messaging to the public and distinctions in measures implemented across the Federation. At the same time, the National Cabinet presents a fresh set of accountability challenges, and the widespread powers to restrict movement introduced under biosecurity, emergency, and public health laws, while limited in duration, brings Australia's lack of national human rights protections into sharp focus.

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Postscript:

On Wednesday 8 April, the Australian Senate established a seven-member [Select Committee on COVID-19](#) to scrutinise the government's response to COVID-19 and expenditure. The Select Committee will be chaired by opposition Labor Senator, Katy Gallagher, and will table its report in Parliament on or before June 30, 2022.'

