

**Submission
No 15**

**INQUIRY INTO THE VICTORIAN GOVERNMENT'S RESPONSE TO THE
COVID-19 PANDEMIC**

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The right to movement and federalism in a pandemic environment – novel coronavirus and the Victorian Government's response

Introduction

The “new normal” is one way of describing the current situation that has arisen across Australia as a result of COVID-19.¹ Part of this peculiar normality is how freedom of movement disappeared almost instantaneously, both in terms of interstate and international travel ceasing, but even to the extent of restricting individuals from going outside unless strongly needed, like trips for grocery shopping.² These restrictions differ from state-to-state and the Commonwealth released their own restrictions, all with the aim to protect individuals and “flatten the curve” of infection rates.³ These differences allow for a unique perspective into the nature of federalism and the diverse nature of the Commonwealth government and state and territory governments in Australia.

The purpose of this paper is to discuss the federalist nature of this country and how, in the COVID-19-induced circumstances, this has resulted in an unclear, discordant response. It is also the aim of this paper to compare the current situation with what emerged following the Spanish Influenza in 1918 and to show how federalism has stagnated and does not currently engage with the innovation or ideas that it could in order to become a modernised version.

Ultimately, it is hoped that through this paper, the Inquiry will be able to see that although the Victorian government succeeded in some areas of its response to the COVID-19 issue of restricting citizen movement, it also failed in other areas. However, with this information, it is possible that there would be a more successful overall response by Victoria if another pandemic were to occur.

Overview on Federalism and COVID-19

The Australian federal system has existed since 1901 and allows for each level of government, whether that be local, State, Territory or Commonwealth, to be autonomous whilst also having different powers allocated between them.⁴ The powers that are available to the third level of government, the Commonwealth, is subject to sections 1, 51 and 52, whilst Chapter V of the Constitution legitimises the state parliaments and their constitutions.⁵

The Commonwealth's most crucial power comes from s61 of the Constitution, which allows the Commonwealth to have executive power and the ability to use that power for the “execution and maintenance of th[e] Constitution”.⁶ In *Williams v The Commonwealth*, French CJ expounded this to extend to the Commonwealth being the “inherent authority” as the national government of Australia.⁷ This is referred to as nationhood power and is implied from ss 51(xxxix) and 61 of the Constitution.⁸ This is particularly relevant for the current novel coronavirus pandemic as it gives the Commonwealth the power to “engage in enterprises and activities” that are necessary for the government to do as its status as a

¹ Kate Allman, ‘Police State or Safety Net? How NSW entered a strange ‘new normal’, April 2020, Law Society Journal, p32

² Allman, ‘Police State’, 32

³ Allman, ‘Police State’, 32

⁴ Robert French, ‘Federalism and the Constitution – An Update’, *Australasian Study of Parliament Group (WA Chapter)*, 20 September 2018, 6; Senate, ‘Chapter 1 – Overview of Australian federalism’, 17 June 2010.

⁵ *Commonwealth of Australia Constitution Act* (‘Constitution’), ss. 1, 51 & 52; Senate, ‘Chapter 1’, [1.10-11].

⁶ *Constitution*, s61.

⁷ *Williams v The Commonwealth* (2012) 248 CLR 156, [22].

⁸ *Constitution*, ss51(xxix) & 61.

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nation state and which “cannot otherwise be carried on for the benefit of the nation”.⁹ The unique status of this power allows the Commonwealth to respond to a crisis that is affecting the nation, whether that be “war, natural disaster or a financial crisis”.¹⁰ As such, the Commonwealth and in particular, its executive branch, are able to use this nationhood power for its authorised power, which means that they can lawfully act during the current COVID-19 crisis.¹¹ This overview of the federal system in Australia is crucial to understanding the current COVID-19 epidemic and how it has affected each level of governments’ ability to respond.

The State executives have a slightly different position, as they have plenary legislative power.¹² This means that they can confer executive power with more ease than the Commonwealth.¹³ A significant limitation is that any exceptional, emergency power that is given to the executive must be temporary, otherwise it may breach the fact that Parliaments cannot relinquish their legislative powers permanently.¹⁴

In Victoria, the ability of the executive branch to act in regard to the epidemic is mostly due to s198(1) of the *Public Health and Wellbeing Act* 2008 (‘Public Health Act’), which states that the Minister for Health may “declare a state of emergency, arising out of any circumstances causing a serious risk to public health”.¹⁵ The first such declaration by Minister Jenny Mikakos occurred on 16 March 2020, with extensions to the declaration being so that it currently remains in force until the 19 July 2020, with the ability to extend a state of emergency being allowed due to s198(7)(c).¹⁶ Furthermore, the Minister has to work according to the advice of the Chief Health Officer in order for a public health emergency to be declared and legitimated.

COVID-19 is the shortened name for novel coronavirus disease, which was first reported in Wuhan, in the Hubei province of China on 31 December 2019, after being linked to a seafood market from the city.¹⁷ The virus quickly spread and the first case of COVID-19 in Australia was confirmed by Victorian Health Authorities on 25 January 2020.¹⁸ Globally, there are currently 8,860,331 confirmed cases of COVID-19, including 465,740 deaths.¹⁹ As of today’s date, 22 June 2020, there have been 7,474 total cases across Australia, with Victoria having the third-most confirmed cases at 1,847.²⁰ It should be noted that Australia has significantly reduced numbers of confirmed cases compared to other countries, like the

⁹ *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338, [397]; Emrys Nekvapil et al., ‘Chapter 2: The Constitution’, *COVID-19 and the Law of Australia*, (online, last updated 15 May 2020), <<https://covid19-law.com.au/ch-2-constitution.html>>.

¹⁰ *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, [233].

¹¹ Emrys Nekvapil et al., ‘Chapter 2: The Constitution’, *COVID-19 and the Law of Australia*, (online, last updated 15 May 2020), <<https://covid19-law.com.au/ch-2-constitution.html>>.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Public Health and Wellbeing Act* 2008 (Victoria), s198(1)

¹⁶ Jenny Mikakos, ‘Extension of Declaration of State of Emergency’ (Online Document, 16 March 2020), <<https://www.dhhs.vic.gov.au/extension-state-emergency-22-june-2020-covid-19-doc>>; *Public Health and Wellbeing Act* 2008 (Victoria), s198(7)(c).

¹⁷ World Health Organisation, ‘Novel Coronavirus (2019-nCoV) Situation Report’, 21 January 2020, <https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200121-sitrep-1-2019-ncov.pdf?sfvrsn=20a99c10_4>.

¹⁸ Greg Hunt (MP), ‘First confirmed case of novel coronavirus in Australia’, (Online Media Statement, Federal Government of Australia, 25 January 2020), <<https://www.health.gov.au/ministers/the-hon-greg-hunt-mp/media/first-confirmed-case-of-novel-coronavirus-in-australia>>.

¹⁹ World Health Organisation, ‘WHO Coronavirus Disease (COVID-19) Dashboard’, (Web Page, accessed 23 June 2020), <<https://covid19.who.int/>>.

²⁰ Department of Health, ‘Coronavirus (COVID-19) current situation and case numbers’, (Web Page) <<https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/coronavirus-covid-19-current-situation-and-case-numbers>>.

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United States of America (2,241,178), Brazil (1,067,579), Russian Federation (592,280) and India (425,282).²¹

Restriction to Movement – Commonwealth and Victoria

One of the main restrictions that have been imposed on Australians during the coronavirus crisis has been the restriction of civilian movement, most of which have been made under the *Public Health Act*.²² For the purposes of this submission, the focus will primarily be on border restrictions, with some attention focused on general movement restrictions, such as restrictions on individuals leaving their premises.

Due to the open nature of federalism in Australia, travellers can cross state lines easily, whether by driving or by plane.²³ However, with the COVID-19 crisis, some states, like South Australia, Queensland and Western Australia, have closed their borders and made state boundaries very clear in an effort to slow the spread of the virus.²⁴ Victoria currently has open borders, meaning that individuals are free to enter or leave the state as they please, however, there is emphasis on movement being restricted to essential travel only.²⁵ Recreational trips, like booking a holiday rental, skiing or staying at a caravan park, are also open to Victorians, but are subject to some restrictions, like maximum number of individuals at each place and increased screening to secure health safety to staff and guests.²⁶ Furthermore, there is no requirement for travellers to enter into quarantine when entering the state, which is different from the aforementioned closed states that require travellers to enter into quarantine for at least 14 days.²⁷

The main issue with Victoria having open borders is that there has been a continued, double-digit growth in cases, with 17 cases being reported on 23 June 2020.²⁸ This is despite the fact that many of the other states, including some with closed borders like Queensland and South Australia, have reported no new infections within the last 24 hours.²⁹ Some states, like Tasmania, the Australian Capital Territory (ACT) and the Northern Territory, have reported no new cases for a week, slightly longer or for more than six weeks respectively.³⁰ Although many of the Victorian cases have been from travellers returning from

²¹ World Health Organisation, 'WHO Coronavirus Disease (COVID-19) Dashboard', (Web Page, accessed 23 June 2020), <<https://covid19.who.int/>>.

²² Emrys Nekvapil et al., 'Chapter 3: Substantive Law, Topic 20: Quarantine', *COVID-19 and the Law of Australia*, (online, last updated 15 May 2020), <<https://covid19-law.com.au/20-quarantine.html>>.

²³ Jonathan Pearlman, 'Coronavirus: State border closures leave Australia's federal model in a strange territory', *The Straits Times* (online, 29 March 2020), <<https://www.straitstimes.com/asia/australianz/coronavirus-state-border-closures-leave-australias-federal-model-in-strange>>.

²⁴ *Ibid.*

²⁵ Health and Human Services, 'Travel', Victorian State Government (Web Page, 21 June 2020), <<https://www.dhhs.vic.gov.au/travel-restrictions-covid-19#can-i-travel-within-australia-nbsp>>; Australian Interstate Quarantine, 'State and territory border closures', (Web Page, accessed 23 June 2020), <<https://www.interstatequarantine.org.au/state-and-territory-border-closures/>>.

²⁶ Health and Human Services, 'Travel', Victorian State Government (Web Page, 21 June 2020), <<https://www.dhhs.vic.gov.au/travel-restrictions-covid-19>>.

²⁷ *Ibid.*; Australian Interstate Quarantine, 'State and territory border closures', (Web Page, accessed 23 June 2020), <<https://www.interstatequarantine.org.au/state-and-territory-border-closures/>>.

²⁸ Health and Human Services, 'Coronavirus update for Victoria – 23 June 2020', Victorian State Government (Web Page, 23 June 2020), <<https://www.dhhs.vic.gov.au/coronavirus-update-victoria-23-june-2020>>.

²⁹ Department of Health, 'Coronavirus (COVID-19) current situation and case numbers', (Web Page) <<https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/coronavirus-covid-19-current-situation-and-case-numbers>>.

³⁰ ABC News, 'The number of new confirmed coronavirus cases in Australia is bigger this week compared to last. Here's why.' (online, updated 20 June 2020), <<https://www.abc.net.au/news/2020-06-19/coronavirus-australia-why-more-cases-this-week-travellers/12370342>>.

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overseas, many have been linked to either known outbreaks of the virus, or from community transmission, which means that no known source for the infection can be located.³¹

However, it could have been likely that Victoria would not have as many cases if the borders had closed, alongside an emphasis on individuals to self-quarantine and maintain social safety standards, like distance between individuals and practising good hygiene. This is crucial, because Victoria relaxed movement and social gathering restrictions, meaning that individuals who experience “social distancing ‘fatigue’” were potentially being infected from such gatherings.³² Social distancing fatigue refers to where individuals disengage with social distancing practices, whether this be due to not seeing a reason to continue doing so, or because they actually are fatigued from doing such practices.³³ As such, where there is the likelihood of infection or community transmission to occur during gatherings or individuals enjoying the chance to freely move, it is increased by social distancing fatigue and can account for the increase in cases from an unknown source.

The Commonwealth has subsequently introduced the ‘Australian Health Sector Emergency Response Plan for Novel Coronavirus (the COVID-19 Plan)’, which aims to “guide the Australian health sector response”.³⁴ The document extrapolates on the Commonwealth’s response to the pandemic, much of which places it as being the main communicator and facilitator of communication between state and territory governments, the health sector industry and the community. This is primarily shown through the stages of their COVID-19 plan, which states that the Commonwealth will “provide information to support best practice health care and to empower the community” and “confirm and support effective governance arrangements” in order to reduce the spread of coronavirus.³⁵ This exemplifies the nature of federalism in Australia, where the Commonwealth, as the larger and top-tier government, aims to facilitate and help the lower tiers in gaining necessary information or legitimating state and territory restriction agreements concerning COVID-19.

However, what actually has happened between the Commonwealth and state and territory governments has been quite different. In the early days of the coronavirus outbreak, there had been confusion on whether Commonwealth rules or state and territory rules apply to things like whether schools were open for students and how the two-person rule imposed by the Prime Minister was to be interpreted and implemented.³⁶ Concerning the two-person rule, states differed on whether they would strictly enforce the rule, with the Northern Territory and South Australia stating that they would not strictly enforce the rule or that they were still deciding on whether to enforce it respectively.³⁷ On the other hand, the eastern

³¹ Will Jackson & Leonie Thorne, ‘Why is Victoria experiencing an increase in coronavirus cases and other states aren’t?’ ABC News (online, updated 20 June 2020), < <https://www.abc.net.au/news/2020-06-18/why-is-victoria-experiencing-an-increase-in-cases/12366884>>.

³² Will Jackson & Leonie Thorne, ‘Why is Victoria experiencing an increase in coronavirus cases and other states aren’t?’ ABC News (online, updated 20 June 2020), < <https://www.abc.net.au/news/2020-06-18/why-is-victoria-experiencing-an-increase-in-cases/12366884>>.

³³ *Ibid.*

³⁴ Department of Health, Federal Government of Australia, *Australian Health Sector Emergency Response Plan for Novel Coronavirus*, (Online document, updated 23 April 2020), <https://www.health.gov.au/sites/default/files/documents/2020/02/australian-health-sector-emergency-response-plan-for-novel-coronavirus-covid-19_2.pdf>, 2.

³⁵ *Ibid.*

³⁶ ABC News, ‘Coronavirus rules: How different states in Australia are implementing new restrictions and what the penalties are’ (online, 31 March 2020), < <https://www.abc.net.au/news/2020-03-31/how-australian-states-are-enforcing-coronavirus-measures/12106774>>; Paul Karp, ‘Are schools open or closed for term 2 as coronavirus spread slows in Australia? State-by-state guide’, The Guardian (online, 24 April 2020), < <https://www.theguardian.com/australia-news/2020/apr/13/are-schools-open-closed-term-2-australia-coronavirus-easter-holidays>>.

³⁷ ABC News, ‘Coronavirus rules: How different states in Australia are implementing new restrictions and what the penalties are’ (online, 31 March 2020), < <https://www.abc.net.au/news/2020-03-31/how-australian-states-are-enforcing-coronavirus-measures/12106774>>

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states of New South Wales, Victoria and Queensland stated that they would firmly enforce the Commonwealth's rule and impose hefty fines on individuals or corporations found to be breaking the rule.³⁸ Victoria in particular gave police the power to issue on-the-spot fines to individuals found flouting social distancing measures.³⁹ With education, the Commonwealth wanted "all schools to open", but states differed on whether schools would remain open for pupils or would transition fully to remote or at-home learning.⁴⁰ The Victorian government advised schools to engage in remote or at-home learning, in order to slow the spread of the virus, with onsite learning only being available to children whose parents could not work from home and students who did not have a "suitable learning environment".⁴¹

What is shown here is that mass confusion erupted during the early period of the coronavirus crisis, as each level of government stated their own desires and ways of trying to slow the spread of the virus in their own states. Even when the Commonwealth, as the federal government, stated their own impositions on what individuals must do, confusion mounted due to the different responses from each state and territory. The ongoing coronavirus situation has exemplified the weakness of federalism that comes from one of its strengths; that is, that the autonomous nature of all governments mean that they can each have their own advice or rules for the community to abide by. As such, this heightens the confusion for the community on what rules to follow, especially if they are citizens at the border or ones who are stuck in one state or territory when they are from another.

To be successful in the next crisis that faces the country or Victoria in particular, there needs to be more direct communication facilitated between the states by the Commonwealth, with the Commonwealth working more closely with state and territory governments. In doing so, the Commonwealth can take a role more in line with that of a supervisor to ensure that states and territories are following the same advice so that community confusion can be alleviated. Although there may be some pushback from the states and territories, this can also be assuaged by the fact that such an overt show of power by the Commonwealth would only occur during exceptional circumstances. As such, this would be an example of the nationhood power that the Commonwealth wields and extends to a crisis like that of coronavirus.⁴²

Lessons from a past pandemic – 1919 Spanish Influenza and Victoria

The 1919 influenza parallels the current coronavirus crisis in many ways, but most particularly through its extensive spread and death toll.⁴³ For the nation, which had become federated less than two decades earlier, the influenza threatened its stability, as it came after what had arguably helped to strengthen the country; war.⁴⁴ War helped to strengthen the bonds between the states and territories, particularly that of Gallipoli and the formation of the ANZACs.⁴⁵ In regards to the current crisis, federalism has stagnated since its inception and the influenza crisis, as it has remained largely the same as it was in those days. However, both crises gave rise to issues that the federated nation had to overcome, which is that of working cooperatively with each other.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ Paul Karp, 'Are schools open or closed for term 2 as coronavirus spread slows in Australia? State-by-state guide', *The Guardian* (online, 24 April 2020), < <https://www.theguardian.com/australia-news/2020/apr/13/are-schools-open-closed-term-2-australia-coronavirus-easter-holidays> >.

⁴¹ Paul Karp, 'Are schools open or closed for term 2 as coronavirus spread slows in Australia? State-by-state guide', *The Guardian* (online, 24 April 2020), < <https://www.theguardian.com/australia-news/2020/apr/13/are-schools-open-closed-term-2-australia-coronavirus-easter-holidays> >.

⁴² *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, [233].

⁴³ Frank Bongiorno, 'How Australia's response to the Spanish flu of 1919 sounds warnings on dealing with coronavirus', *The Conversation* (online, 22 March 2020), < <https://theconversation.com/how-australias-response-to-the-spanish-flu-of-1919-sounds-warnings-on-dealing-with-coronavirus-134017> >.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

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In the early period of influenza, some of the states agreed to cooperate with each other so that the spread could be curbed. However, this agreement had been built on the back of a previously negotiated agreement between State Ministers of Health, their Directors-General, and British Medical Association (BMA) Branch Presidents met with the Commonwealth Minister for Trade and Customs and his Director of Quarantine at a conference.⁴⁶ They all agreed to a plan of action concerning the epidemic and quarantine procedures. One point concerning such procedures entailed a state informing the Commonwealth of infection via their Chief Health Officer and surrounding states would have their borders subsequently closed to travellers unless they also suffered from influenza cases.⁴⁷

Power was entirely held by the Commonwealth concerning interstate travel and revoking the infection status.⁴⁸ However, this agreement was revoked by a disagreement concerning Victoria and New South Wales, as the former had refused to officially disclose that they had influenza cases until the latter had reported and had their borders closed after a soldier, who had travelled from Melbourne into New South Wales, was the state's first case.⁴⁹ Consequently, state and territory mistrust and tensions increased, meaning that any prior inclination to working with each other to prevent the spread of influenza had diminished entirely.⁵⁰ Subsequently, the states, territories and Commonwealth were left in a situation that mirrors the current COVID-19 situation, with each government having their own stance on border restrictions. The main aim by each state and territory was that of self-preservation whilst the Commonwealth was left in a position of trying to assert its authority but being forced into a position where it could only threaten or cajole states and territories into abiding by quarantine restrictions.⁵¹

From what has been discussed in regard to both pandemics, the core issue concerning federalism seems to be the struggle to mobilise cooperation between all governments. This results in each government adopting their own stance and the Commonwealth being stuck in a position where they can only offer advice and cannot reconcile the differences between states. The stagnant nature of Australia's federal structure is also made more apparent with the lack of differences between the responses to the two different epidemics. This highlights that federalism must be improved, by engaging in methods that help to facilitate communication between all levels of governments and for the Commonwealth to engage in its nationhood power in order to be the supreme authority in exceptional circumstances like a public health emergency.

Conclusion – what can be learnt from Victoria's response to novel coronavirus

Through this submission to the Victorian Inquiry, it is hoped that a clear connection has been made between the Australian federal structure and the Victorian government's mixed response to the coronavirus pandemic. The Victorian government response often mirrored the other eastern states, particularly by enforcing the Commonwealth's two-person social distancing rule earlier in the year. This strict adherence to the rules meant that for a period of time, Victoria had decreased confirmed cases of the virus. However, as was discussed earlier, the relaxation of civilian movement and social gathering

⁴⁶ Humphrey McQueen, 'The 'Spanish' Influenza Pandemic in Australia, 1912-19', Australian Society for the Study of Labour History (Web Page, accessed 24 June 2020), <<https://labourhistorycanberra.org/2018/06/the-spanish-influenza-pandemic-in-australia-1912-19/>>.

⁴⁷ *Ibid.*

⁴⁸ Humphrey McQueen, 'The 'Spanish' Influenza Pandemic in Australia, 1912-19', Australian Society for the Study of Labour History (Web Page, accessed 24 June 2020), <<https://labourhistorycanberra.org/2018/06/the-spanish-influenza-pandemic-in-australia-1912-19/>>.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

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restrictions has resulted in an increase in Victorian cases, including another death from COVID-19 within the last 24 hours of writing.⁵²

What can be extrapolated from the actions by the Victorian government is that primarily, restrictions should have been stricter for travellers, to ensure that 14-day quarantine should have been mandatory and stayed mandatory until Victoria had no new cases for longer, or until Australia reported no new cases of coronavirus for at least two weeks or longer. It would have been likely that any new cases would be from any travellers engaging in the quarantine period and little to no chance of any new cases resulting from community transmission or unknown sources. Victoria should have followed other states that have had no new cases reported in closing their borders and extending travel or recreational restrictions until such a period of time had passed with no new cases. If this had been implemented, then Victoria would not face the current dilemma of resurging infection rates in the community.

Looking beyond Victoria, the Commonwealth should have engaged with their exceptional powers more firmly in order to bring the states and territory governments to one shared view concerning what should be done to prevent or slow the spread of novel coronavirus. This could potentially be done through a conglomeration of all levels of government to ensure that communication, resources, and aid was distributed effectively. Furthermore, this power would only be temporary and only operate in exceptional circumstances, meaning that states and territories should not feel threatened by the Commonwealth's power in such a situation. In doing so, miscommunication and states and territories operating on their own would be prevented, and a more united, federated system would be in operation to help the country survive and succeed in the face of an epidemic.

Total: 2999 words

⁵² Craig Butt, 'Coronavirus updates LIVE: Victorian government requests ADF to enforce hotel quarantine as Victoria records 20 new COVID-19 cases, Australian death toll stands at 103', The Sydney Morning Herald (online, updated 24 June 2020), <<https://www.smh.com.au/national/coronavirus-updates-live-novak-djokovic-tests-positive-for-covid-19-worldwide-cases-pass-9-1-million-20200624-p555j0.html>>.

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