

A Submission to the Jackson Inquiry into the Covid-19 Pandemic

The ACT ALP Health Committee is the health policy committee of the Australian Labor Party (ACT Branch). The Committee has a membership that combines health economists, medical practitioners, and people with skills in nursing, from health unions and skills in health policy development.

We seek to make a submission in support of one new policy development – the implementation and development of an Australian Centre for Disease Control (ACDC). In addition to this written submission we would be happy to provide additional evidence should the Committee so desire.

The establishment of a CDC was also the *first* recommendation of the Senate Select Committee on Covid-19. Prior to last Federal Election, the ALP went to the election calling for the establishment of a CDC. In so calling for the establishment of an Australian CDC, the then Opposition noted that Australia was alone among OECD countries in not having a CDC-style national body. In keeping with this promise, the Federal Government has established an interim CDC, and is seeking input into the scope and functions of the CDC. On Friday 10 November 2023, Australian Health Ministers formally committed to supporting the establishment of the Australian Centre for Disease Control (CDC), and consideration is now being given to the scope of the new ACDC.

If we use the American CDC as a model, a ‘pro-rated’ Australian CDC would have a professional staff of about 1,000 people, a budget in excess of \$A1 billion, and would need a campus slightly smaller than the University of Canberra. A CDC similar to that which operates in the United States of America would have responsibilities that are currently filled by both National and State governments in Australia, as well as a variety of other State and Federal bodies.

Given the complexity of the Australian health system (involving both State and Federal governments), the need for enabling legislation to be managed through the Senate, and the existence of bodies such as the AIHW and the NHMRC, we believe that it is unrealistic to move directly to such a broad ranging body immediately. It is more realistic to envisage a modest ACDC with limited functions. This may be expanded in the future should the need dictate.

Further, it would be logical and appropriate for the proposed ACDC to move to fill obvious holes revealed by the Covid-19 Pandemic in the Australian health-care infra-structure.

The most obvious and glaring deficit revealed by the Covid-19 pandemic was the inability of the Commonwealth to discharge its obligations under Section 51 (ix) of the Australian constitution, which gives the Commonwealth the power and responsibility for quarantine. What is needed is a uniform system of quarantine that involves both the State and Territory governments, and the National Government.

In the Covid-19 Pandemic, the Commonwealth effectively declared that it did not have the ability to realistically discharge its duties under Section 51 (ix), and the States and Territories moved to fill the void. A system of quarantine was cobbled together by the various States and Territories, with a variety of solutions used throughout Australia. This system of quarantine proved to be of variable effectiveness, with Covid-19 infections leaking through the quarantine barrier. Eventually attempts at quarantine were abandoned.

The Covid-19 response can be contrasted to the Commonwealth’s response to the Influenza Pandemic of 1918-19 (often called ‘the Spanish Influenza’). In the 1918-19 Pandemic, the Commonwealth enforced a highly resourced system of quarantine, maintained by fully trained and dedicated quarantine medical officers and nursing staff, complete with quarantine hospitals. This

system of quarantine was remarkably successful, resulting in the complete prevention of pandemic influenza for many months. Many thousands of Australian lives were saved as a result of this quarantine.

In the century after the 1918-19 Pandemic, the system of human quarantine was allowed to atrophy. There was never any real attempt to implement a system of quarantine for air travel. As air travel grew after the Second World War, it became increasingly apparent that the infrastructure for maritime quarantine was becoming irrelevant, and it was allowed to fall into disuse, disrepair and eventual closure, under governments of a variety of political colours. In contrast, the Commonwealth has maintained an effective and comprehensive system of animal quarantine.

While Section 51 (ix) implies that quarantine is a responsibility of the Federal Government, in all Pandemics since Federation State and Territory Governments have imposed their own quarantine systems. In *Palmer* case, the High Court considered if such action violated Section 92 of the Constitution ('...intercourse between the States...shall be absolutely free'). The Court unanimously held (5:0) held that this was not so, and that the States did have the right to impose quarantine in the circumstances of a pandemic.

Thus, quarantine will remain an area of shared Commonwealth and State or Territory responsibility. This being so, we submit that consideration should be given for the proposed ACDC to be established under both Section 51 (xxxviii) of the Constitution ('States may refer powers to the Commonwealth'), and also under Section 51 (ix), which provides the Commonwealth with responsibility for quarantine. In return, the States would be given substantial powers within the proposed ACDC.

This model would envisage that the ACDC was a statutory body, with members appointed by the Governor-General, established under Commonwealth legislation, but with complementary legislation from each State and Territory. It would have the power to make all determinations in relation to quarantine. However, in the case of quarantine within a State or Territory or part of a State or Territory, or between States or Territories, such a determination could only be made with the agreement of the relevant State or Territory, or, in the case quarantine between a State and a Territory, either of the relevant governments.

The ACDC would be making determinations for quarantine in a manner similar to that which the Federal, State or Territory Government would be making themselves. The advantage would be that there would be but one system of quarantine, with one body making regulations relating to quarantine, exercising both Federal and State power. This system would be giving greater clarity, a firmer legislative and constitutional basis for the exercise of quarantine powers in Australia, and shared understanding of roles and responsibilities within the system that has de facto arisen in Australia. The proposed system would also make it clear that the exercise of quarantine powers was to be made by an expert body specifically appointed for that purpose, and make it also clear the ways and means by which political actors could play a role in the process, as outlined below.

Self-evidently, such a system would need the agreement of both the Commonwealth Parliament and the agreement of all eight State and Territory Parliaments. This is achievable – in the health sphere, for example, the operation of AHPRA followed this model.

We envisage that the ACDC would have powers to make interim determinations, while simultaneously undertaking investigations into a matter. In any given quarantine emergency, the ACDC would probably make an interim determination, while also launching an investigation, seeking input from the community, before making more final determinations.

It is further envisaged that the determinations of the ACDC would be disallowable instruments, that is, a resolution of either House of the Federal Parliament could revoke an ACDC determination. The lack of the Parliamentary ability to oversee the delegated legislative power under current legislation was the subject of adverse comment from the Standing Committee on Delegated Legislation, which recommended and proposed changes before the last Parliament was dissolved. The ACDC, while making determinations on the basis of science and evidence, would need to be sensitive to the views of the elected representatives of the people and the States, and broader community concerns.

The governing legislation for the ACDC would establish that the ACDC would function on the basis of evidence and science. It should also establish that the ACDC should be guided by a principle of caution. In the quarantine field, a cautionary principle mandates prompt and firm action; sometimes quarantine action is taken where it is eventually established that the emergency was not as great as first envisaged.

Consideration might also be given to providing a mechanism to appeal, based on a merit review. There would also be a basis for appeal to the courts on the interpretation of the law, and on the process followed by the ACDC. It would be prudent for the enabling legislation to specifically outline the mechanisms and processes to facilitate this judicial and merit review.

Allowing determinations to be disallowed, providing mechanisms for investigation and for public involvement in those investigations and providing appeals mechanisms would have substantial advantages. In our view, executive actions that are subject to appropriate review and which are made in consultation with the community are innately superior to those that are not. Moreover, such appeal and review mechanisms would provide for productive mechanisms for the venting of community concerns, which during the Covid-19 pandemic led to frustration and a drift towards extremes by some in the community.

If the underlying legislative and constitutional basis for the ACDC was on a co-operative federal basis, then we believe that it is much more likely that there will be a mutual provision of the physical infrastructure by both national and state and territory governments that could support an effective system of Australian quarantine.

In the 1918-19 Pandemic, an area where there was significantly better State-Federal co-operation was Tasmania. In part this was an accident of geography – the Commonwealth supported maritime quarantine, and as an island State, so did Tasmania. But it also came about because Tasmania and the Commonwealth had co-jointly appointed the same people to implement their respective regimes of quarantine. At the coal-face of quarantine, it was the same people who had quarantine power from both levels of government. This may serve as a productive model for the future – that State public health officers might also be conjointly appointed to positions within the Federal ACDC, and in a future pandemic, the coal-face of quarantine would have a single face, exercising power derived from both levels of government, and supports the viability of a single system of quarantine.

The Commonwealth should also encourage academic interest in pandemic planning, by supporting the development of such things as Masters Degrees and graduate diplomas in pandemic medicine, and maintaining a dedicated research funding for pandemic planning.

It is also, in the longer term, in the interest of the Australian nation that the Head Office of the ACDC should be located in Canberra, where they could have immediate physical access to relevant Commonwealth officials, and to the national Parliament and its staff.