The Royal Commission and the Australian Constitution

Dr Michael Eburn
Barrister, Honorary Associate Professor

ANU College of Law Canberra

Permissions information for use of this content can be found at https://knowledge.aidr.org.au/ajem

This paper reviews some recommendations from the 2020 *Royal Commission into National Natural Disaster Arrangements* (the Royal Commission). The Royal Commission delivered a nearly 600-page report that contained 80 recommendations. This paper does not review each of those recommendations but focuses on the constitutional and legislative considerations as they relate to recommendations about the proposed role of the Commonwealth in coordinating interstate resource sharing, the power of the Australian Government to declare a national state of emergency and the enhanced used of the Australian Defence Force (ADF) in disaster response.

Recommendation 3.6 Enhanced national preparedness and response entity

The Royal Commission was tasked with inquiring into, inter alia, 'the responsibilities of, and coordination between, the Commonwealth and State, Territory and local Governments relating to preparedness for, response to, resilience to, and recovery from, natural disasters…' (Hurley 2020). The commission recommended:

The Australian Government should enhance national preparedness for, and response to, natural disasters, building on the responsibilities of Emergency Management Australia, to include facilitating resource sharing decisions of governments and stress testing national disaster plans.

With respect to the sharing and coordination of resources during a response to an emergency, and in particular bushfires, the Royal Commission identified the role of the Australasian Fire and Emergency Services Authorities Council (AFAC) and, within AFAC, the Commissioners and Chief Officers Strategic Committee (CCOSC), the National Resource Sharing Centre (NRSC) and the National Aerial Firefighting Centre (NAFC). Up until now, it has been AFAC that has coordinated resource sharing and the movement of personnel and resources across interstate and international borders. The Royal Commission (2020, [3.70]) noted that:

Each of CCOSC, NRSC and NAFC has evolved and expanded to respond to emerging needs in emergency management, responding to gaps and the evolution of emergency response in the face of significant natural disasters. They have done so incrementally, with the objective of enhancing emergency management across Australia, noting AFAC's focus on a particular subset of disasters.

Note: The reference to a 'subset of disasters' related to the fact that AFAC and the CCOSC are made up of various fire agencies and State Emergency Services and so have a focus on the work of those agencies, being fires, floods and storms. AFAC does not play a coordinating role in any other type of disaster that has or may occur.

The Royal Commission (2020, [3.93]) noted that the Australian Government's coordinating body is the National Crisis Committee (NCC). The:

… NCC is recognised in the AGCMF [Australian Government Crisis Management Framework] as being the appropriate crisis committee to facilitate cooperation and coordination between the Australian Government and the relevant states and territory government(s) in response to domestic crises. The AGCMF, then, and now, recognises CCOSC but states that 'CCOSC's role in Australian Government crisis management arrangements is limited to information sharing on operational matters during significant events'.

Even so 'CCOSC appeared to function in lieu of the NCC during the 2019–2020 bushfires' ([3.94]) The CCOSC met at least 9 times whereas the NCC met only twice ([3.92]).

At [3.164] the Royal Commission said:

The Australian Government should assume, and make, standing arrangements for, the coordination and procurement functions of NAFC and NRSC.

With respect to the commissioners, their recommendation appears doctrinal with a view of the role of government and the Commonwealth rather than a clear exposition of why the Australian Government making 'standing arrangements for, the coordination and procurement functions of NAFC and NRSC' would work better than the arrangements currently in place, with state agencies working collaboratively with their interstate and, in the case of wildland fire, international colleagues. The rationale for their recommendation was ([3.109]–[3.110]):

Discussions and decisions that facilitate consideration of national policies and the sharing of government resources in natural disasters should fall within the clear auspices of governments.

The functions performed by NRSC and NAFC should be subject to public sector accountability and oversight, to provide greater public confidence.

And at [3.156] '… the Australian Government is well positioned to coordinate and integrate a greater range of resources beyond just fire and emergency service resources'.

The Australian Government could establish a body to perform the functions currently performed by the NRSC and NAFC but it is not clear why that would 'provide greater public confidence'. That outcome would require the public to have greater confidence in Australian Government bureaucrats, rather than fire and emergency chief officers. This is a proposition that, albeit without evidence, I suspect is controversial. Former NSW Rural Fire Service Commissioner Shane Fitzsimmons is the New South Wales 2021 Australian of the Year and Professor Brendan Murphy who initially led the Australian Government's response to the COVID19 pandemic, is the Australian Capital Territory 2021 Australian of the Year (National Australia Day Council 2020). This suggests no lack of confidence in operational leaders.

Further, and with respect to the royal commissioners, it is not at all clear how this recommendation would work or what it would add, at least in the context of fire and floods. It is a fundamental principle of Australian constitutionalism that Australia is a federation made up of the states and a federal government. The states are independent entities, not created by nor subject to the Commonwealth, except as provided in the Australian Constitution (*Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, discussed in more detail below). It follows that even if the Australian Government establishes a federal coordinating body, it would have no power to compel the states and territories to work through that office.

Given that the states and territories are independent, the suggested arrangements will only work if the states and territories believe it will add value to existing arrangements. The commissioners did not suggest that 'the Australian Government (or another jurisdiction for that matter) should have the ability to command or requisition another state or territory government's resources' ([3.76] and the 'Australian Government would only facilitate interstate and international deployments after the Australian, state and territory governments make decisions about their own resources' ([3.160]). If the Australian Government cannot commandeer assets, even in 'the national interest', and will only get involved after states and territories have made their own decisions, which could include resource sharing decisions, it is unclear what the recommendation would add.

The Royal Commission also noted (at [3.106]–[3.107]) that 'AFAC and some state and territory government agencies' have concerns about the commission's recommendation. Further, the NSW Independent Inquiry into the 2019-2020 Bushfires expressed concerns, suggesting:

… that changes to this overarching structure would lead to greater bureaucratisation of AFAC functions, which in turn could have a negative impact on existing flexibility and responsiveness. The [NSW] Inquiry notes that NAFC and NRSC functions are largely operationally focussed, and that moving away from the current model may be perceived as contrary to the widely accepted principle that combat agencies are best placed to determine operational requirements.

And, while it may show a certain cynicism, it's not clear why a federal government authority would be better positioned to coordinate and integrate resources more than the people who own the resources and who have responsibility for actually deploying those resources on the ground. If one can draw an analogy, the situation is akin to wanting to borrow a hammer. You could go next door and ask your neighbour or go to the Hammer Sharing Office and ask the Hammer Coordination Officer to ask your neighbour if you can borrow their hammer. No matter how well-run the Hammer Sharing Office is, neighbours can still ask each other for what they want. And, in the emergency services sector, the agencies in AFAC have established relationships that are key to effective coordination.

The recommendations in Chapter 3 went well beyond resource sharing during operational times and looked at the entire spectrum from prevention to recovery and the development of resilience within the Australian community. This discussion

 © 2021 Australian Institute for Disaster Resilience

cannot do justice to the entire recommendations in that chapter, but it is argued that the recommendation that the Australian Government 'should assume, and make, standing arrangements for, the coordination and procurement functions of NAFC and NRSC' is controversial, constitutionally problematic and is not supported by evidence that during 2019–2020 there was any failing by NAFC or the NRSC or that the Australian Government would do a better job. Rather, that particular recommendation seems to be driven by a doctrinal belief in the role of government, and a federal government in particular. A claim that transferring decision-making during heightened operations from operational leaders to the Australian Government would 'provide greater public confidence' is, I suggest, at best optimistic.

'Make provision for a declaration of a state of emergency'

A government faced with an emergency of catastrophic proportions requires powers that allow it to take immediate and urgent action that may not be justified in the normal course of events (Fatovic 2009, p.4). The New Zealand Law Commission (1991, [4.12]) says:

Emergencies are likely to call for immediate and drastic action. It follows that legislation authorising an appropriate response should be in place in advance of the emergency itself. This factor, and the likelihood that the emergency response will involve interference with established rights, points to the desirability of preparing emergency legislation at leisure rather than under the pressure of an actual or imminent emergency.

The Australian states and territories have emergency management legislation in place. Some of that legislation, such as the Victorian Emergency Management Acts 1986 and 2013 are generic and can be applied to any type of emergency. Others, such as the *Public Health and Wellbeing Act 2008* (Victoria) are more limited and have application to only one type of emergency.

The Commonwealth of Australia did not have generic emergency management legislation even though the argument for pre-established powers and authority has been made many times. Following Cyclone Tracy's devastation of Darwin in 1974, Major General Alan Stretton commandeered property and restricted the movement of people without clear legal authority (Stretton 1976). Notwithstanding his ability to rely on de facto authority and goodwill, he recommended that legal authority was required to allow a coordinator to operate in a disaster (Stretton 1978). Lee (1984, p.192) notes that following the bombing of the Sydney Hilton Hotel in 1978, the then Leader of the Opposition (and later, Governor-General) Mr Hayden argued for Commonwealth emergency legislation:

… not so much in order to confer sweeping new powers but rather to circumscribe, confine and define their exercise, and to remove some of the extraordinary uncertainties which now prevail.

Others, including the author of this paper (Eburn 2011) continued the argument that the Commonwealth should have standing emergency management legislation in place to allow the Australian Government to set aside 'business as usual' in order to respond with flexibility and agility to an event that is 'beyond knowledge, skills, experience and imagination' (Crosweller 2015, p.50; see also Department of Home Affairs 2018, p.5 definition of 'Severe to catastrophic disaster').

The Royal Commission also recommended that the Australian Government should have power to declare a national emergency. The commissioners said (Royal Commission 2020, [5.3]–[5.4]):

To better assist states and territories in responding to and recovering from such disasters, the Australian Government should create a legislative mechanism for the making of a declaration of a state of national emergency.

A declaration would signal to communities the severity of a disaster early, act as a marshalling call for the early provision of Australian Government assistance when requested, facilitate coordination with state and territory emergency management frameworks, and, in very limited circumstances, allow the Australian Government to act without a request from a state or territory.

The value of signalling should not be overlooked. During the 2009 Black Saturday bushfires, there was no formal disaster declaration. The 2009 Victorian Bushfires Royal Commission (2010 [2.5.1]) notes:

The Commission considers that declaring a state of disaster would offer benefits beyond the grant of additional powers. First, it would provide symbolic recognition of the gravity of a situation—a recognition that … might have sharpened the focus of emergency services agencies on community safety factors such as warnings. Second, it would place the State's political leaders firmly in charge of the emergency, reassuring the public that their government had the situation in hand and facilitating rapid mobilisation of Cabinet and high-level government attention if required.

There is no doubt that the Australian Government has the power to introduce emergency management legislation that would include a power to declare a national emergency or disaster (Royal Commission 2020, [5.48]–[5.56]). What may be controversial is the recommendation that 'in very limited circumstances, [the legislation should] allow the Australian Government to act without a request from a state or territory'. However, that too is clearly within power as may be shown with an analogy with the Commonwealth's defence power.

The Australian Government can act on its own initiative when required to defend the Commonwealth or the 'several states' (*Australian Constitution s* 51(vi)) or on the state's request when the state requires help to deal with domestic violence (*Australian Constitution s* 119). Where the ADF is called out to protect Australia's interests, the permission of the states or territories is not required (*Defence Act 1903* (Cth) ss 33 and 35). If, for

example, there was an attack on a foreign mission in Sydney, by virtue of its responsibility for external affairs and its obligation to protect foreign diplomats, the Australian Government could deploy the ADF without first obtaining a request from the NSW Government. If, however, an equivalent protest was directed at a NSW Government building because of anger about the behaviour of a NSW Government agency, the ADF could only be used if there was a request from NSW. If the state was being attacked by foreign forces, the Australian Government could act under its authority to defend both the Commonwealth and the states, even if the state did not ask for that assistance.

There are parallels with the Australian Government's role in natural disasters. Given the terms of the *Australian Constitution*, there are 3 scenarios that could be said to constitute a national emergency or disaster (Eburn, Gissing & Moore 2019):

1. The need to use emergency powers to manage the Australian Government's response where a disaster is having impacts on areas allocated to Australian Government responsibility by the *Australian Constitution*. For example, the need for emergency powers to allow the Australian Government to exercise its powers with respect to external affairs and quarantine and to manage and coordinate international assistance.
2. The need to use emergency powers in a catastrophic disaster where an event is so large that it overwhelms the ability of state governments to function. If a state government effectively collapsed, it would self-evidently be beyond its power to restore itself. Restoring the government would be a legitimate exercise of Commonwealth executive power, which 'extends to the execution and maintenance of this Constitution' (*Australian Constitution s* 61) because:

   The foundation of the Constitution is the conception of a central government and a number of State governments separately organized. The Constitution predicates their continued existence as independent entities (Melbourne Corporation v Commonwealth (1947) 74 CLR 31).

3. Where the Australian Government is required to intervene because the event is truly national in character or effect so that it is 'peculiarly within the capacity and resources of the Commonwealth Government' (*Pape v Commissioner for Taxation* (2009) 238 CLR 1, 63).

Responding to any of those scenarios would not require either a state request or state permission but there could be controversy if a federal government determined either that a state had failed to function, or the event was so large that it was only the Australian Government that could manage the response. The potential for political conflict where, for example, a state government is not responding as the Australian Government would like it too. The Australian Government may be tempted to declare that the recalcitrant state is 'unable' to cope rather than it is choosing to cope in a way that the Australian Government does not prefer. To that end, the Royal Commission (2020 [5.57]) did recommend:

The introduction of a declaration should be supported by legislation. Legislating for a declaration model would provide clarity of the circumstances in which a declaration may be made and the actions that the Australian Government could take in support of states and territories. It would also better define the role of the Australian Government in relation to that of the states and territories.

Setting out, in advance, what constitutes a national emergency and when and how the Australian Government would react would allow the processes of government to develop cooperative legislation and would avoid states and territories being surprised by unilateral and an unexpected Australian Government response. We will return to that issue when discussing the role of the ADF.

The Commonwealth has indeed responded to this recommendation by passing the *National Emergency Declaration Act 2020* (Cth). This Act meets the Commission's recommendations in name, if not in substance. The Act allows the Governor-General to make a disaster declaration in the sort of circumstances listed, above. What is disappointing is the limited effect of any such declaration. It allows ministers to amend or suspend Commonwealth legislation where compliance would hinder the response or recovery effort.

The Act, as passed, says nothing about Commonwealth power to manage an emergency nor does it appoint a federal coordinating officer to coordinate the entire Commonwealth government response. There is no link between the declaration and natural disaster relief and recovery funding or the use of the ADF as provided for by the *Defence Legislation Amendment (Enhancement of Defence Force Response to Emergencies) Act 2020* (Cth). The Act does not empower the Commonwealth to take the lead in the response or direct the states how to manage the emergency occurring in their jurisdiction.

This is a very conservative Act that does not meet the recommendations of the Royal Commission. It allows the government to make a public declaration but does little to 'mobilise and activate Australian Government agencies quickly'. It does not provide for the Commonwealth a power to 'take action' to deal with an emergency other than to modify legislative requirements with respect to 'a relevant matter'.

The role of the Australian Defence Force

The ADF played a significant role in the response to the 2019–2020 bushfire season. However, expectations were great including unrealistic expectations that the ADF could 'assist in every aspect and was always readily available' (Royal Commission 2020, [7.7] and [7.8], Barber 2020).

The Prime Minister originally answered questions about the Australian Government response consistent with the

 © 2021 Australian Institute for Disaster Resilience

Commonwealth Disaster Plan (COMDISPLAN). This is, that the Australian Government provided support in response to requests from the states and territories (Davidson 2020). Even though the Australian Government was acting in accordance with pre-arranged plans, the demand for a more visible response led the Australian Government to take the extraordinary step of calling reserve soldiers to full-time duty. The call-up gave the Australian Government access to resources but did not change the position that the ADF would wait for a request before moving in (Eburn 2020). In response, the Prime Minister said he wanted the Australian Government to move:

… from a respond to request posture, to a move and integrate posture. Which means the defence force moving in and then coming in and working with the local effort without requests, without any instigation at a state level… (Spiers 2020)

The Royal Commission considered the role of the ADF in providing Defence Aid to the Civil Community (DACC). There was a number of recommendations including better incorporation of the ADF in disaster planning and taking steps to improve understanding of ADF capabilities. Importantly, the Royal Commission recommended (at [7.56]) that the 'use of the ADF should remain dependent on a request from a state or territory, except in the limited circumstances proposed in Chapter 5: Declaration of national emergency' (discussed above). There were recommendations regarding the thresholds that must be met before states and territories can call upon the ADF, legal protection for ADF members when tasked to respond to natural disasters and updating the DACC manual that governs ADF operations when providing assistance to the states.

None of these are controversial, at least from a constitutional perspective. It is the Australian Government that operates and governs the ADF, so all of those matters are clearly within the area of Commonwealth legislative responsibility. As noted, the Royal Commission did not recommend the use of the ADF without a specific request from the states or territories except in the case of a declared national emergency.

Unfortunately, the Australian Government did not wait for the Royal Commission's report before introducing and passing the *Defence Legislation Amendment (Enhancement of Defence Force Response to Emergencies) Act 2020* (the Act). The Act adds a new s 123AA to the *Defence Act 1903* (Cth) that says:

1. A protected person (see subsection (3)) is not subject to any liability (whether civil or criminal) in respect of anything the protected person does or omits to do, in good faith, in the performance or purported performance of the protected person's duties, if:

> *a. the duties are in respect of the provision of assistance, by or on behalf of the ADF or the Department, to:*
>
> > *i. the Commonwealth or a State or Territory, or a Commonwealth, State or Territory authority or agency;*
> >
> > *ii. members of the community; and*
>
> *b. the assistance is provided to prepare for a natural disaster or other emergency that is imminent, or to respond to one that is occurring or recover from one that occurred recently; and*
>
> *c. the assistance is provided at the direction of the Minister under subsection (2).*

2. The Minister may, in writing, direct the provision of assistance in relation to a natural disaster or other emergency if the Minister is satisfied of either or both of the following:

> *a. the nature or scale of the natural disaster or other emergency makes it necessary, for the benefit of the nation, for the Commonwealth, through use of the ADF's or Department's special capabilities or available resources, to provide the assistance;*
>
> *b. the assistance is necessary for the protection of Commonwealth agencies, Commonwealth personnel or Commonwealth property.*

The provision of legal indemnity *per se* is not an issue as it provides legal protection for members of the ADF that is similar to the protection provided to the members of the emergency services under state legislation (but cf Dingwall 2020). The issue is the circumstances when that assistance may be provided. That is where the Australian Government believes it is in the best interests of the nation (s 2(a)) to provide assistance to 'members of the community' (s 1(a)(ii)). This is an authority to respond the ADF without a request from the state or territory in circumstances where there is as yet no definition of what constitutes a national emergency. In short, the Act goes further than the Royal Commission's recommendations that the use of the ADF should still depend on a request from the affected state or territory and that the time when the Australian Government should act unilaterally should be narrow and defined in legislation.

The risk is that a minister, faced with public demand, may deploy the ADF without consulting with or effectively incorporating that response into a jurisdiction's emergency management arrangements. We may see the ADF as de facto 'spontaneous volunteers'; an organisation (albeit well trained and resourced) that turns up in an emergency area with its own priorities and command arrangements.

Conclusion

The Royal Commission into National Natural Disaster Arrangements delivered a 600-page report with 80 recommendations. Some of those recommendations were directed to state and territory governments, some to the non-government and civil society sectors and some towards the Australian Government. Recommendations covered the entire spectrum of emergency management from prevention to response and the development of national resilience. Not all, or even most, raised constitutional issue.

This brief review cannot do justice to the report or all of its recommendations. It has focused on 3 that deal with emergency response. The recommendations subject of this review were:

1. that the Australian Government 'assume, and make, standing arrangements for, the coordination and procurement functions of NAFC and NRSC'
2. that the Australian Government legislate to provide for a national emergency declaration
3. that the Australian Government review arrangements for the provision of DACC.

It has been argued that the recommendations identified as (2) and (3), above, are clearly within the Australia Government's power and remit and the Commonwealth has now passed relevant legislation. The legislation that has been passed, however, fails in many ways to implement the Commission's recommendations.

Recommendation (1) seems to extend the Australian Government's power. With respect to the commissioners, the justification for that recommendation is not well set out and it will be up to the states and territories to determine whether they want to work with a national office or continue to coordinate their own arrangements.

Dr Michael Eburn is a well-known commentator on the law as it relates to emergency management. This article was commissioned by the Australian Institute for Disaster Resilience to give readers the benefit of his views on aspects of the Royal Commission into National Natural Disaster Arrangements.

One of the royal commissioners, Professor Andrew Macintosh, is a close colleague at the ANU College of Law.

This article was authored prior to legislation being passed on 20 December 2020. Subsequent information is at https://emergencylaw.wordpress.com/2020/12/15/federal-parliament-passes-the-national-emergency-declaration-bill-2020/ as well as https://emergencylaw.wordpress.com/2020/12/15/federal-parliament-passes-the-defence-legislation-amendment-enhancement-of-defence-force-response-to-emergencies-bill-2020/.

References

2009 Victorian Bushfires Royal Commission 2010, *Final Report (Government of Victoria).*

Australian Constitution. At: www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Constitution [21 November 2020].

Barber C 2020, *My mother in law. Joy Robin. At: www.facebook.com/watch/?v=767542753742663 [21 November 2020].*

Crosweller M 2015, *How a change in thinking might change the inevitability in disasters, Australian Journal of Emergency Management, vol. 30, no. 3, pp.48–55.*

Davidson H 2020), *Scott Morrison rejects calls for more bushfire help, saying volunteer firefighters 'want to be there', The Guardian (online) 10 December 2019. At: www.theguardian.com/australia-news/2019/dec/10/scott-morrison-rejects-calls-for-more-help-saying-volunteer-firefighters-want-to-be-there accessed [21 November 2020].*

Department of Home Affairs 2018, *Australian Disaster Preparedness Framework. At: www.homeaffairs.gov.au/emergency/files/australian-disaster-preparedness-framework.pdf.*

Dingwall D 2020, *Defence emergency aid bill 'fails to address uncertainty', The Canberra Times (online) November 4, 2020. At: www.canberratimes.com.au/story/6984416/defence-emergency-aid-bill-fails-to-address-uncertainty/?cs=14350&mc_cid=32e7acb6ae&mc_eid=cfad4ab082 [21 November 2020].*

Eburn M 2011, *Responding to catastrophic natural disasters and the need for Commonwealth legislation, Canberra Law Review, vol. 10, no. 3, pp.81–102.*

Eburn M 2020, *Calling out the troops (January 5, 2020), Australian Emergency Law Blog. At: https://emergencylaw.wordpress.com/2020/01/05/calling-out-the-troops/ [21 November 2020].*

Eburn M, Gissing A & Moore C 2019, *Potential Role of the Commonwealth in Responding to Catastrophic Disasters: Report No. 530.2019, Bushfire and Natural Hazards Cooperative Research Centre, Melbourne.*

Fatovic C 2009, *Outside the Law: Emergency and Executive Power, John Hopkins University Press.*

Henderson A & Hitch G 2020, *Federal Government responds to bushfire royal commission, will create national state of emergency, ABC News (online) 13 November 2020. At: www.abc.net.au/news/2020-11-13/government-response-bushfire-royal-commission-recommendations/12879862 [15 November 2020].*

Hurley, The Honourable David AC DSC (Retd), Governor-General of the Commonwealth of Australia 2020, *Commonwealth Letters Patent 20 February 2020, Commonwealth of Australia.*

Lee HP 1984, *Emergency powers, First ed, Law Book Co. Sydney.*

Melbourne Corporation v Commonwealth 1947, *74 Commonwealth Law Reports 31.*

National Australia Day Council 2020, *Australian of the Year Awards: 2021 Awards. At: www.australianoftheyear.org.au/recipients/listing/2021/ [21 November 2020].*

New Zealand Law Commission 1991, *Final Report on Emergencies, Government of New Zealand.*

Pape v Commissioner for Taxation 2009, *238 Commonwealth Law Reports 1.*

Commonwealth of Australia 2020, *Royal Commission into National Natural Disaster Arrangements Report. At: https://naturaldisaster.royalcommission.gov.au/#:~:text=The%20Royal%20Commission%20into%20National,General%20on%2028%20October%202020.*

Spiers D 2020, *Interview with the Hon. Scott Morrison, Prime Minister of Australia, ABC Insiders, 12 January 2020. At: www.pm.gov.au/media/interview-david-speers-abc-insiders [21 November 2020].*

Stretton A 1976, *The Furious Days: The Relief of Darwin, Collins.*

Stretton A 1978, *Soldier in a Storm: An Autobiography, Collins.*

 © 2021 Australian Institute for Disaster Resilience