



13 September 2021

Committee Secretary
Senate Finance and Public Administration Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By electronic submission

Dear Committee,

Inquiry into the COAG Legislation Amendment Bill 2021

The Australian Human Rights Commission (the Commission) welcomes the opportunity to make a submission to the Senate Finance and Public Administration Committee on the COAG Legislation Amendment Bill 2021 (The Bill).

This brief submission is concerned with Schedule 3 of the Bill, which will 'make clear that where Commonwealth legislation makes provisions to protect from disclosure the deliberations and decisions of the Cabinet and its committees, these provisions apply to the deliberations and decisions of the National Cabinet'.¹ Among other amendments, the Bill will enable Ministers to issue certificates that prevent the disclosure of National Cabinet material;² and will amend the definition of 'Cabinet' in the *Freedom of Information Act* (FOI Act) so that that documents of the National Cabinet and its committees are subject to the existing Cabinet documents exemption in section 34 of the FOI Act.³

COAG materials were accessible via FOI requests.⁴ The COAG Handbook included requirements that key decisions and outcomes were made available publicly within one week of a meeting, along with the publication of core work where required.⁵ COAG members could comment openly on COAG decisions, as long as they made clear that their commentary was representing the view of COAG or of individual COAG members.⁶

The Commission notes that the National Cabinet is the replacement for COAG and is *not a Cabinet body*. The use of the term 'cabinet' is misleading and

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obfuscates the nature of the body. The National Cabinet is an intergovernmental forum, made up of representatives of jurisdictions with sovereign powers, and the Prime Minister is the only member accountable to Federal Parliament.

In its report on *Secrecy Laws and Open Government in Australia*, the Australian Law Reform Commission observed that a key principle of open government is accountability, which is interwoven with transparency and is 'an indispensable check to be imposed on those entrusted with public power'.⁷ The Commission is concerned that bringing the National Cabinet under the remit of Cabinet secrecy rules will reduce transparency and accountability, and may implicate the right to freedom of expression by unnecessarily restricting the open communication of information to, and by, the public.

Australians should be able to be informed about the nature of the decisions made by their representatives, especially in times of emergency where governments enact extraordinary measures that affect their lives and rights in significant ways. Constitutional expert George Williams recently commented that:

National cabinet was a worthwhile invention but if we're looking at making some these changes permanent we need to think more deeply about the long-term implications and make sure it includes the normal rules of governance - transparency, serving the public good, accountability.⁸

COVID-19 has instigated potentially transformational changes to government operations in Australia. It is important to ensure that Executive power is not unnecessarily or permanently expanded through related administrative efficiency measures, as this would have negative implications for democratic principles and the rule of law. For these reasons, the Commission recommends that Schedule 3 of the Bill **not** be enacted.

Yours faithfully

Emeritus Professor Rosalind Croucher AM
President

¹ Explanatory Memorandum, COAG Legislation Amendment Bill 2021, 1; COAG Legislation Amendment Bill 2021, sch 3.

² Explanatory Memorandum, COAG Legislation Amendment Bill 2021, Attachment: Statement of Compatibility with Human Rights, 2; COAG Legislation Amendment Bill 2021, sch 3.

³ COAG Legislation Amendment Bill 2021, sch 3, cl 14.

⁴ Department of Prime Minister and Cabinet, *Handbook for COAG council secretariats: A best practice guide* (November 2019) 20. Note: the Handbook is no longer available on online Government platforms. Accessed through the 'Wayback Machine': <<https://web.archive.org/web/20200315071301/https://www.coag.gov.au/sites/default/files/files/coag-council-secretariats-handbook.pdf>>.

⁵ Ibid 17-18.

⁶ Ibid 17.

⁷ Australian Law Reform Commission, *Secrecy, Laws and Open Government in Australia* (Report 112, December 2009) [2.13] citing *Report of the Royal Commission into Commercial Activities of Government and Other Matters* (1992), pt II, [3.1.1].

⁸ Kirsten Lawson, 'COAG abolished, national cabinet here to stay' *The Canberra Times* (29 May 2020) <<https://www.canberratimes.com.au/story/6774742/coag-abolished-national-cabinet-here-to-stay/>>.