



Australian Government

Department of Health

Secretary

Senator Katy Gallagher
Chair
The Senate Select Committee on COVID-19
Parliament House
Canberra ACT 2600

Dear Senator Gallagher

Thank you for your letter of 23 September 2021 requesting the modelling that underpins the work being undertaken by the Commonwealth, states and territories in relation to health system capacity for managing COVID-19 cases and outstanding Questions on Notice (QoNs) directed to the Department.

The Australian Government maintains the view that deliberations of National Cabinet should remain confidential. This includes information received by the National Cabinet. This is consistent with longstanding practice on Cabinet confidentiality.

The Department continues to work through QoNs received from the Committee, despite our focus on the national response to the pandemic. I note 83 of the 677 QoNs received remain outstanding. We will make every effort to have the outstanding responses returned to the Committee as quickly as possible.

Yours sincerely

A handwritten signature in black ink, appearing to read 'B Murphy'.

Dr Brendan Murphy

27 September 2021

Conclusive certificates act as a bar to someone seeking access to a document under FOI. The effect of a Minister placing a conclusive certificate on a document is to limit the capacity for Administrative Appeals Tribunal (the AAT) to review the exemption claim underlying the certificate. Under the current Act, where a conclusive certificate applies, the AAT's jurisdiction is limited to determining if reasonable grounds exist for the exemption claim. But even if the AAT were to find that no reasonable grounds exist for the exemption claim, a Minister may continue to refuse to allow access to the document.

Those limitations on external review should not be preserved ...

207. The Tribunal should keep this history in mind when considering the deference to be given to opinions of the present kind, when those submissions do not concern matters over which the deponents have any particular skill or experience.
208. In my view, the attempt by the respondent to have the Tribunal rely, in relation to the question of whether the National Cabinet is a committee of the Cabinet, on statements in the authorities concerning the value of statements of "responsible representatives" in the evaluation of claims for public interest immunity is misplaced. Specifically, I am not satisfied, with due respect to the respondent and Ms McGregor, that either has a relevant expertise or experience which can assist the Tribunal in the determination of this question. The weight to be given to their evidence in relation to s 47B and s 11A will be considered separately.
209. This conclusion makes it unnecessary for the Tribunal to address the submissions of counsel for the applicant concerning the non-compliance by the respondent and Ms McGregor with the Tribunal guidelines entitled "Persons Giving Expert and Opinion Evidence".

Conclusion concerning the Cabinet documents exemption

210. Having addressed several matters bearing on the question of whether the National Cabinet is a committee of the Cabinet, I have then sought to consider their collective effect. In my view, taken together they point persuasively against the National Cabinet being a committee of the Cabinet within the meaning of the statutory expression. At the very least, I am satisfied that the respondent has not discharged the onus of establishing that Mr Hupalo's decisions about these matters were justified or that the Tribunal should give a decision which is adverse to the applicant.