THE UNIVERSITY OF SYDNEY

21 September 2021

Professor Anne Twomey
Professor of Constitutional Law

Senator Chandler
Chair,
Senate Standing Committee on Finance and Public Administration
PO Box 6100
Parliament House
Canberra, ACT 2600

Dear Senator,

COAG Legislation Amendment Bill 2021

Please accept this submission for the Committee's inquiry into the *COAG Legislation Amendment Bill 2021*.

Schedule 1

Schedule 1 of the Bill simply re-names the COAG Reform Fund (which is a fund through which amounts from various other funds, such as the Medical Research Future Fund and the Future Drought Fund, are channelled to the States). It will instead be named the Federation Reform Fund, with legislative amendments being made accordingly. There is nothing objectionable about such changes and they have no substantive effect.

Schedule 2

Schedule 2 replaces specific references in legislation to COAG with a more genericised description of 'First Ministers' Council' and substitutes 'Ministerial Council' for specifically named ministerial bodies. This will avoid future need to amend legislation to update the names of particular councils and appears to be appropriate (although I have not examined each provision in detail).

Schedule 3

The objectionable part of the Bill is Schedule 3. It amends various Acts to assert that 'the committee known as the National Cabinet' is a 'committee of the [Commonwealth] Cabinet' and falls within any reference to 'Cabinet'. It also includes within the definition of 'Cabinet' any 'committee (however described) of the National Cabinet'. It remains unclear as to whether such a committee of the National Cabinet is classified as a committee or sub-committee of the Commonwealth Cabinet.

Faculty of Law
New Law Building F10
Eastern Avenue
The University of Sydney
NSW, 2006
Australia

T +61 2 9351 0237
F +61 2 9351 0200
anne.twomey@sydney.edu.au
http://sydney.edu.au/law
http://ssrn.com/author=808822

ABN 15 211 513 464
CRICOS 00026A

There are several problems with the amendments in this Schedule. First, they defy the self-evident facts, which brings the law into disrepute. Second, they undermine the federal system. Third, they undermine the constitutional principle of responsible government. Fourth, they reduce governmental accountability and transparency.

1. Defying the facts and bringing the law into disrepute

While Parliament can enact a law that asserts things that are not true, it is unwise to do so as it brings the law into disrepute and damages public confidence in the law. Parliament could legislate to state that the earth is flat or that the moon is a ball of green cheese, but such legislation would not make it so. It would, however, cause the public to treat the law with contempt and would have the likely effect of spreading distrust about other laws. It is worse when the law has particular consequences that are inappropriate due to the gap between the law and the truth. For example, if the Parliament legislated to state that the earth is flat, and this then caused Australian laws to operate in such a way as to distort geographical measurements, it could have serious ramifications for property boundaries and the ability of ships and planes to navigate, etc. In short, it would be foolish and a potentially damaging exercise.

The same can be said of legislating to state that the National Cabinet is a committee of the Commonwealth Cabinet, when plainly it is not. As Justice White explained, with undeniable accuracy in *Patrick and Secretary, Department of Prime Minister and Cabinet* [2021] AATA 2719, the National Cabinet is not a committee 'of' the Commonwealth Cabinet. It is not fully or even primarily comprised of members of the Commonwealth Cabinet, its membership is not determined and cannot be altered by the Commonwealth Cabinet or the Prime Minister, it was not established by the Commonwealth Cabinet or, indeed, the Prime Minister, it does not derive its powers from the Commonwealth Cabinet, it is not accountable to the Commonwealth Cabinet, it can make decisions without the approval of the Commonwealth Cabinet and its decisions cannot be overturned by the Commonwealth Cabinet.

Asserting in legislation that the National Cabinet is a committee of the Commonwealth Cabinet when as a matter of fact it is not, could result in either of two outcomes. First, it may be recognised that this is no more than a convenient lie for the purpose of attracting complete confidentiality, thus bringing the Parliament and the law into disrepute. Second, it might be interpreted as having the effect of changing the nature, status, composition and powers of the National Cabinet so that it ceases to be an inter-governmental body and becomes no more than a committee that is controlled by the Commonwealth Cabinet and the Prime Minister. This would undermine both its utility and the federal system.

2. Undermining the federal system

The Council of Australian Governments ('COAG') was a key element in Australia's federal architecture. It was the body that facilitated co-operation amongst all levels of government. A federal system is one that balances competition, diversity, innovation and customisation of policies on the one hand, against co-operation and unity of endeavour on the other. The key to a well-calibrated and efficient federal system is to

identify when co-operation or unity is needed or when instead it is better for there to be difference and competition. COAG was instrumental in fulfilling this role (eg through ministerial councils and the adoption of uniform legislative schemes).

If National Cabinet is to be the successor of COAG, it also needs to fulfill that role. It cannot do so if it is a subservient committee of one participant in the federal system. It needs to be a body of equals that makes collective decisions, with each member being responsible to his or her own legislature and people for any action taken in implementing those decisions. The retention of the 'sovereign authority and powers' of the Commonwealth, the States and Territories and their individual responsibility for the implementation of the decisions of the National Cabinet as they see fit, has been recognised in the terms of reference of the National Cabinet itself (Attachment A to the National Cabinet Minute of 15 March 2020), in the Commonwealth's *Cabinet Handbook* (14th ed, 2020, at [151]) and by the Prime Minister in a Press Conference on 5 May 2020 (https://www.pm.gov.au/media/press-conference-australian-parliament-house-act-05may20).

It is inconsistent with this equality of status, retention of sovereign power and, indeed, the federal system as a whole, for the National Cabinet to be a committee of the Commonwealth Cabinet, dependent on that one jurisdiction for its power, authority and composition. If the assertions made in the amendments proposed in Schedule 3 are to be treated as fact (rather than the convenient fiction they appear to be), this would seriously undermine the federal system.

While I can understand why the State Premiers and the Chief Ministers would support the secrecy of the National Cabinet and its committees, as there are often good reasons to maintain confidentiality, particularly during a crisis, I cannot for the life of me understand why they would sign up to the National Cabinet being treated as nothing more than a committee of the Commonwealth Cabinet. This would traduce their power and role in the federation.

If the Commonwealth wanted simply to protect the secrecy of the workings and documents of the National Cabinet, it could instead have offered a stand-alone exemption in the *Freedom of Information Act 1982* (Cth) for National Cabinet deliberations, records and documents. There is no need to seek to make the National Cabinet a committee of the Commonwealth Cabinet other than to subjugate it to the Commonwealth's will and power. The short-term attractions of secrecy should not blind the States to what is going on here. Only the very foolish would accept the formulation of this Bill as appropriate. Have none of the Premiers and Chief Ministers seriously thought about the potential long-term consequences of it? Have the pressures of dealing with the pandemic caused them to grab at the bauble of secrecy being dangled before them by the Commonwealth while ignoring the ulterior motives and long-term structural effects of this far more damaging Bill?

It is interesting to note the contents of the statement from the Prime Minister, Premiers and Chief Minister on 'The Importance of Confidentiality to Relationships between the Commonwealth and the States and Territories' from 17 September 2021 (https://www.pm.gov.au/sites/default/files/media/national-cabinet-statement-the-

importance-of-confidentiality-to-relationships.pdf). While on the one hand it makes reasonable claims about the importance of confidentiality (which could well be made in applying a public interest test) it does not assert that the National Cabinet is a committee of the Commonwealth Cabinet. It simply asserts that National Cabinet is conducted on an understanding that confidentiality would apply to its discussions, papers and records of meeting 'in line with the process outlined in the Commonwealth Government's Cabinet Handbook'. This is quite different from what is provided for in this Bill – that the National Cabinet is a committee of the Commonwealth Cabinet. If the Premiers think that this Bill does no more than support their claims to confidentiality made in this statement, then they have been very poorly advised. It does a lot more and is far more damaging.

3. Undermining the principle of responsible government

The principle of responsible government requires that governments are responsible to Parliament for their actions. This requires a degree of openness and accountability so that members of the public can make an accurate assessment of a government's performance and exercise their constitutional responsibility of directly choosing members of the Houses of Parliament in an informed manner. On the other hand, the convention of collective ministerial responsibility also forms part of the principle of responsible government. The justification for giving absolute confidentiality to cabinet documents is that it is necessary to ensure that the government remains collectively responsible to Parliament for its decisions (see *Egan v Chadwick*). Accordingly, Cabinet confidentiality is justified in order to maintain collective responsibility to Parliament for the decisions made by the Cabinet formed from that Parliament.

The National Cabinet is not collectively responsible to the Commonwealth Parliament. Each of its leaders is responsible individually to a separate legislature. Accordingly, the justification of maintaining 'collective ministerial responsibility' does not apply and this basis for 'Cabinet confidentiality' therefore cannot justify a departure from the ordinary requirements of accountability to Parliament. Each leader must be responsible to his or her own Parliament for their actions, including in the inter-governmental sphere, and this continues to require a degree of transparency.

Further, the extension of 'cabinet confidentiality' to the 'committees of the National Cabinet', such as the Australian Health Protection Principal Committee ('AHPPC') and the National COVID-19 Coordination Commission, is particularly problematic. None of the members of these bodies are Ministers or even elected Members of Parliament. How can such bodies be regarded as subject to the cabinet confidentiality that derives from collective ministerial responsibility when their members are not ministers and they are not collectively or even individually responsible to any Parliament? This creates an avenue, which could be easily exploited in the future, to cover any body and its work with an impenetrable veil of secrecy, without any concomitant democratic responsibility.

4. Reduction of governmental accountability and transparency

Inter-governmental relations have not previously been subject to the same levels of secrecy as Cabinet documents. Section 47B of the *Freedom of Information Act 1982* (Cth) grants a conditional exemption to documents the disclosure of which could reasonably be expected to cause damage to relations between the Commonwealth and a State or would divulge communications made in confidence on behalf of a State or the Commonwealth. Such material is exempt from production if the grant of access to it would, on balance, be contrary to the public interest (*FOI Act*, s 11(5)). In assessing the public interest, factors in favour of access include that it would promote the objects of the Act, including increasing scrutiny and review of the Government's activities. Irrelevant factors include that access to the document would result in embarrassment to the Commonwealth Government or cause a loss of confidence in the Commonwealth Government (*FOI Act*, s 11B).

The current position is therefore that some inter-governmental material is protected, if it would not be in the public interest to release it, but not all such material is exempt from public disclosure. For example, the minutes of the AHPPC have been accessible under FOI in the past without any harm done. (See, eg, the release of Minutes of the AHPPC under FOI for January and February 2020: https://www.health.gov.au/resources/foi-disclosure-log/foi-request-1560-ahppc-minutes.) Such Minutes, under this Bill, would be subject to an absolute exemption on the basis that they are records of 'a committee (however described) of the National Cabinet', which is 'a committee of the Cabinet'. This shows how the Bill would facilitate creeping secrecy in relation to inter-governmental matters across the country.

As noted above, there may be good reasons for keeping the discussions of National Cabinet and the AHPPC confidential during a major crisis, such as a pandemic. Secrecy is sometimes both legitimate and necessary. But one needs also to be confident that any requirements of confidentiality are being imposed in the public interest rather than in the political interests of governments to avoid accountability and embarrassment resulting from poor management or even corrupt behaviour.

If one were genuinely seeking to protect the deliberations, documents and records of National Cabinet and its committees for legitimate reasons, then one would add an additional sub-section to s 47B of the *FOI Act*, so that they were conditionally exempt and were not released if, on balance, it was contrary to the public interest to do so. One might well ask why the records of the National Cabinet and its committees should be kept confidential if the public interest does not warrant their protection?

Beyond freedom of information and locking up the notebooks of National Cabinet in the National Archives for 30 years (which appears far from necessary), the Bill would limit other means by which governments are made accountable. It would impose limitations upon the accountability functions of bodies by limiting access to information, particularly to parties seeking the review of government decisions (see, eg, the effect on ss 36 and 37 of the *AAT Act* and the impact of s 14 of the *ADJR Act*) or preventing access to documents by the accountability body itself (eg s 24 of the *Australian Human Rights Commission Act*, s 9 of the *Ombudsman Act* and s 70 of the *Privacy Act 1988*).

It would also muzzle the reporting of the Auditor-General in public reports (s 37 of the *Auditor-General Act* – and note the previous attempt to use this provision to prevent a parliamentary committee from fulfilling its scrutiny functions: https://auspublaw.org/2020/01/can-parliamentary-privilege-be-used-to-shut-down-parliamentary-accountability/).

While documents concerning the National Cabinet would most likely be peripheral or irrelevant to such matters, a question still arises as to whether these limitations are really required and are genuinely in the public interest.

In my opinion, Schedule 3 of this Bill should be deleted and instead proper consideration should be given to what degree of confidentiality is necessary and can be justified in the public interest in relation to the deliberations, documents and records of the National Cabinet.

I hope these comments are of assistance.

Yours sincerely,

Anne Twomey
Professor of Constitutional Law
Sydney Law School, University of Sydney