

28 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 – Question on Notice

I was asked during the Committee’s hearing on 27 September by Senator Ayres to take on notice a question about the effect of references to State Cabinet that were made in Schedule 3 of the *COAG Legislation Amendment Bill 2021* (Cth), to see whether they were potentially unconstitutional or would undermine the federal system.

I have now looked at the references to State Cabinet in the proposed amendments to the *Administrative Appeals Act 1975* (Cth), the *Australian Human Rights Commission Act 1986* (Cth), the *Freedom of Information Act 1982* (Cth), the *Independent National Security Legislation Monitor Act 2010* (Cth), the *Law Enforcement Integrity Commissioner Act 2006* (Cth), the *Parliamentary Joint Committee on Law Enforcement Act 2010* (Cth) and the *Privacy Act 1988* (Cth).

As far as I can tell, none of the proposed amendments make any substantive change in relation to State Cabinets or State Cabinet Committees (although they do in relation to the National Cabinet). Instead, the proposed amendments, to the extent that they concern State Cabinets, merely clarify more awkward existing wording, without making changes in substance. All the relevant Acts already included provisions concerning the protection of such documents of State Cabinets and their committees or permitted the relevant State Attorney-General to grant a certificate.

In addition, I don’t think that defining the term ‘State Cabinet’ in Commonwealth legislation, as ‘the Cabinet of a State or a committee of the Cabinet of a State’ would in any way affect how States construct or operate their Cabinets or Cabinet committees, or could give rise to any s 109 inconsistency with Commonwealth laws. None of the provisions appear to be seeking to interfere with how States deal with State Cabinet information. They only concern how Commonwealth bodies, which hold such documents or information, may deal with it.

The only substantive changes directly relevant to the States are in the *Freedom of Information Act*. The proposed amendments to s 34 would extend the application of a conclusive exemption to National Cabinet documents, including documents submitted (or proposed to be submitted) to the National Cabinet by a State Minister and documents brought into existence for the dominant purpose of briefing a State Minister on a National Cabinet document. While these proposed amendments would expand the scope of s 34 in a way that reduces transparency concerning the National Cabinet, I do not think that they would interfere in any way with the States.

Accordingly, I am not concerned about the references to the States in the Bill (but remain concerned about other aspects of the Bill – namely classifying the National Cabinet as a committee of the Commonwealth Cabinet and classifying its deliberations, decisions and documents as being subject to Cabinet confidentiality.)

Yours sincerely,

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