SUBMISSION TO SENATE FINANCE AND PUBLIC ADMINISTRATION LEGISLATION COMMITTEE:

COAG Legislation Amendment Bill 2021

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This submission is made on a personal basis. While I am not a lawyer or particularly expert in federalism matters, I have had considerable practical experience in intergovernmental relations as a senior Commonwealth public servant and, since leaving the Australian Public Service, have written occasional articles and book chapters on intergovernmental relations and given occasional guest lectures.

Summary

Much of the COAG Legislation Amendment Bill's 41 pages involves replacing 'COAG' with 'National Cabinet' and referring to 'ministerial councils' in place of previous terms to describe different forums of Commonwealth and State/Territory ministers. This illustrates how much bureaucratic, and even Parliamentary, effort is involved when it is decided to re-badge government activities. Accordingly, it is important to ensure that any re-badging has substantial advantages beyond any immediate political messaging benefits. There is good reason to suggest in this case that not only are there no substantial advantages but there are serious dangers in the new wording proposed.

These dangers arise most clearly in the bill's provisions in Schedule3 to include the 'National Cabinet' as a form of the (Commonwealth) 'cabinet'.

In doing so, the bill also provides for new limits to administrative law, particularly concerning public access to information. The case for these has not been made, and existing provisions in Commonwealth and State/Territory legislation would seem to provide adequate protections in the public interest.

For these reasons, I recommend the Committee oppose passage of the bill.

There is a case for legislation concerning COAG. But to promote genuine reform such legislation should provide a firm foundation for the role of COAG and its ministerial councils (and the supporting advisory mechanisms) and the related processes. Most importantly, it should include provisions to re-establish, this time as a statutory authority, the COAG Reform Council as an independent body promoting and monitoring improvements in the delivery of those public services where responsibilities are shared and/or where cooperation can enhance efficiency and effectiveness of public services and the public sector as a whole.

Replacing 'COAG' with 'National Cabinet'

Central to Australia's federal system of government is that the Commonwealth and State governments each retain sovereignty. The two Territory governments have also been granted a significant degree of sovereignty. It is such sovereignty which distinguishes federalism from decentralised unitary states (Fenna and Hollander 2013). The sovereignty of each government may

be constrained by various Constitutional provisions but it remains significant and is exercised by each government through its own legislature to which it is held accountable.

Over the last century, the Commonwealth's role has broadened and there are now many areas where responsibilities are shared. These require the elaborate machinery that has developed, particularly over the last 50 years, to promote cooperation and cohesion. The resulting arrangements have sometimes been described as 'pragmatic federalism' (Hollander and Patapan 2007) or 'cooperative federalism' (Warhurst 1983, Painter 1998, French 2004). Neither term suggests the loss of sovereignty of any of the participating governments nor that accountability through each one's legislature has been withdrawn, though the capacity of the legislatures to influence the decisions made through such intergovernmental machinery has arguably declined (hence concerns from time to time over 'executive federalism' (Menzies 2012)).

The term, 'Council of Australian Governments', most clearly reflects the Australian Constitution's federal framework, acknowledging that each member represents an Australian government and is accountable to its own parliament. Particularly in times of crisis, it is to be hoped that such a 'Council' can reach timely and consensual agreement and promote close cooperation. But it is not a 'cabinet', 'national' or otherwise.

The term 'cabinet' may encompass many types of forums as Professor Pat Weller (2021) has emphasised. But there are two key attributes whatever the form a cabinet takes:

1. the decision makers are ministers and authorised as such by the parliament to whom the ministers are accountable; and
2. the cabinet ministers accept 'collective responsibility' for the decisions made (in the event a minister does not accept collective responsibility, they are generally required to leave the cabinet).

The notion that a forum of ministers from separate and different governments accountable to their own respective parliaments and voters can constitute a 'cabinet' runs afoul of these essential characteristics. As is already apparent, calling Australia's heads-of-government meeting the 'National Cabinet' rather than COAG does not constrain any of the members representing its own sovereign government from departing from the decisions made. They are accountable not to National Cabinet, nor to the prime minister's parliament, but to their own parliaments.

The use of the term, 'National Cabinet' also suggests a further substantial shift to 'executive federalism' reducing the role of parliaments in their oversight of their executives.

Replacing the title 'COAG' with 'National Cabinet' may have served an immediate political objective to convey to the public the urgency and combined effort that the Prime Minister and Premiers/Chief Ministers attached to addressing the COVID 19 crisis. However, it serves no ongoing substantial purpose: on the contrary, it misrepresents some of the fundamentals of Australia's federal arrangements.

'National Cabinet' as part of the (Commonwealth's) 'cabinet'

This misrepresentation is exacerbated by the bill's attempt to legislate that the 'National Cabinet' is a committee of the Commonwealth's cabinet.

In his recent AAT judgment (Patrick and Secretary, Department of Prime Minister and Cabinet), J. White made similar comments to those above when ruling that the 'National Cabinet' was not 'cabinet' under existing legislation. In particular, he said that: 'The mere use of the name "national

cabinet" does not, of itself, have the effect of making a group of persons making use of the name a "committee of cabinet". Nor does the mere labelling of a committee as a "cabinet committee" make it so." The question raised by this bill is whether it could, by changing some words in legislation, alter the accepted meaning of 'cabinet' and ignore the original reasons for referring to 'cabinet' in each act where it appears. In effect, Commonwealth legislation would involve the Commonwealth having some authority over the operation of State governments that would seem to be entirely contrary to the Commonwealth Constitution since it would be purporting to regulate the actions of State premiers.

Schedule 3 of the bill involves a series of amendments to legislation to specify that a committee of cabinet includes the committee known as the National Cabinet. By clear implication this would make the National Cabinet a committee of the Commonwealth cabinet (e,g. the amendment of the AAT Act retains a separate definition of a State Cabinet).

This distorts the very understanding of the Commonwealth cabinet. Like the public service, cabinet is not mentioned in the Constitution, but it has through convention become a central institution. Its identification in legislation is clearly intended to convey its central role in government decision-making which needs to be protected in the public interest and consistent with the Constitution. At best, this bill blurs what that role is and the core attributes involved, and it throws doubt on the reasons for referring to the cabinet and its committees in each law where reference to them is made.

If there is good reason for referring to COAG or its equivalent in particular laws, then that could and should be done separately without this inappropriate attempt to make the meeting of Australia's heads of government a committee of cabinet and to refer to that meeting whenever reference to cabinet is made.

Specific provisions for the 'National Cabinet'

I have not examined each of the amendments listed in Schedule 3 but suggest the Committee consider each in turn. Rather than focus on the pretence that the National Cabinet is a cabinet committee, consideration should be given as to whether and how the deliberations of COAG and its ministerial committees and forums should be referred to in the relevant legislation.

There is, for example, a public interest case for confidentiality surrounding intergovernmental deliberations, but whether that requires some blanket exemption from Freedom-of-Information (FOI) access is not clear. Much of the documentation for the 'National Cabinet' is already confidential because of its preparation for the Commonwealth (or a State/Territory) cabinet. Moreover, as the recent AAT judgment made clear, the fact that the 'National Cabinet' is not in any valid sense a committee of cabinet did not mean the relevant information would necessarily be made public. On the other hand, much of the supporting material for COAG and its ministerial committees (e.g. recent modelling of COVID 19 infections, hospitalisations and deaths) may well fail any public interest test for exemption from public access. Accordingly, a new blanket exemption from FOI would seem to be inappropriate. Nor am I persuaded that any extension of existing exemption is required for COAG documents.

In his Second Reading speech. Minister Tudge argues that "the maintenance of confidentiality is essential to enable full and frank discussions between representatives of all jurisdictions". He does not, however, provide any evidence that the present arrangements have been inhibiting full and frank discussion and from what he says the opposite would seem to be true. To any casual observer, the proceedings of the 'national cabinet' appear to have been very full and frank, perhaps even

more than the federal government would like. If so, the bill might well be perceived as an attempt to exert a greater degree of control over the State and Territory governments.

The Minister makes no distinction between the existing Commonwealth cabinet and the 'National Cabinet' when there is a very significant one as explained above. The confidentiality of the federal cabinet rests significantly on the need to avoid the politicisation and trivialisation of its proceedings that would be likely if its papers were to be made available to the Government's direct and formal political opposition. That consideration does not apply to COAG (the 'National Cabinet') where the papers are provided to governments of all political persuasions whose members will do with them what they will for whatever purposes they wish. If this legislation were to go forward and a State Premier were to release a National Cabinet paper, what could the Federal Government do?

A missing genuine reform – the COAG Reform Council

If there was genuine interest in COAG reform, then legislation should be developed in close cooperation with the States and Territories clarifying the role and processes for COAG (however named) and its ministerial councils and advisory mechanisms. At present, COAG has no formal basis in statute or even through an Inter-Governmental Agreement (Phillimore and Fenna 2017). Such legislation should also provide for the re-establishment of the COAG Reform Council in the form of a statutory authority. The former Council was abolished in 2014 notwithstanding its achievements in promoting and monitoring improved public services. Its ability to do so was derived from its considerable independence from all the governments concerned (though its secretariat sat within the Department of Prime Minister and Cabinet – a weakness that could be addressed by making it a statutory authority) while its overall role was agreed by all jurisdictions and its program of work guided by them jointly.

The public reports of such a Council would enhance overall accountability and provide more opportunities for parliaments to review the measures taken in response to COAG and associated decisions and thereby contribute to future COAG policies and decisions.

I have not here indicated any details regarding how such an authority might be legislated, but suggest some key principles:

- A small, part-time governing council whose members are appointed jointly by COAG principals and having a balance of Commonwealth, State/Territory, business and community organisation experience;
- A CEO and staff employed under the Public Service Act bound by its values and employment principles including non-partisanship, impartiality and professionalism and being appointed on the basis of merit;
- Public reporting, drawing for example on the processes required of the Productivity Commission to ensure engagement with the public and careful evaluation;
- Capacity for COAG to refer particular matters for review;
- General responsibility to monitor and report on intergovernmental agreements and areas of shared responsibility.

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