



THE LAW SOCIETY  
OF NEW SOUTH WALES

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17 September 2021

Mr Michael Tidball  
Chief Executive Officer  
Law Council of Australia  
DX 5719 Canberra

By email: [nathan.macdonald@lawcouncil.asn.au](mailto:nathan.macdonald@lawcouncil.asn.au)

Dear Mr Tidball,

### **COAG Legislation Amendment Bill 2021**

Thank you for the opportunity to consider the Law Council's draft submission to the inquiry into the COAG Legislation Amendment Bill 2021 ("Bill").

The Law Society's comments below are informed by its Public Law Committee, and are confined to the provisions in Schedule 3 of the Bill that propose to deem the National Cabinet a committee of Cabinet (in particular, those that deal with freedom of information: cls 3, 14-16, Schedule 3). We assume for the purpose of this submission that the Bill is within constitutional power.

We acknowledge that there may be sound public interest reasons, particularly during the management of a public health emergency, to maintain the confidentiality of some National Cabinet documents. However, rather than the broad deeming approach taken in Schedule 3 of the Bill, in our view, it would be preferable for the Bill to acknowledge the National Cabinet as a body in its own right.

The Law Society notes that White J in *Patrick v Secretary, Department of Prime Minister and Cabinet* (5 August 2021) 2020/5875 & 2020/5876 determined that the National Cabinet did not, in fact, possess the requisite characteristics of a committee of the Commonwealth Cabinet. That decision was based on evidence about the nature, composition and operations of the body known as the 'National Cabinet'. In our view, this finding was correct, and cl 14 of Schedule 3 of the Bill proposes to create what is essentially a legal fiction.

Further, the approach taken in Schedule 3 of the Bill does not answer the question of what status National Cabinet documents have in the hands of state and territory governments. In our view it is arguable that state or territory based freedom of information applications might successfully be made in respect of these documents. Merely because the National Cabinet is defined as a committee of Cabinet for the purposes of, inter alia, the federal freedom of information regime does not necessarily render these documents cabinet documents when considered under state or territory based freedom of information laws.

If the National Cabinet is a legislatively defined body, a more certain, appropriate and bespoke information access regime may be tailored to apply to these documents.

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CONSTITUENT BODY

For example, in our view, it is not in the public interest for all National Cabinet documents to be held outside of the open access period (as governed by the *Archives Act 1983* (Cth)) for 30 years (noting that cl 6, Schedule 3 of the Bill deems National Cabinet records to be Cabinet notebooks). These documents are likely to include valuable lessons to be learnt in respect of pandemic management, or other national crises, that may be the subject of National Cabinet deliberations. It may be in the public interest for these documents to be available to the public within a considerably shorter period of time.

Thank you for the opportunity to provide these comments. Questions at first instance may be directed to Vicky Kuek, Principal Policy Lawyer, at [victoria.kuek@lawsociety.com.au](mailto:victoria.kuek@lawsociety.com.au) or (02) 9926 0354.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'JRW', followed by a horizontal line extending to the right.

Juliana Warner  
**President**