

A 'cabinet without a parliament'? Scrutinising the National Cabinet

Emma Banyer¹

Principal Research Officer at the Department of the Senate. The views expressed in this article are her own, and do not represent the views of the Department

Abstract The National Cabinet represents a dynamic and innovative approach to crisis management across the Federation. However, it cannot be said to be a cabinet in the Westminster sense. Lacking cabinet solidarity, and answerable to nine separate legislatures, its members have nevertheless been bound by the rules of cabinet secrecy, at times frustrating parliamentary scrutiny of its decisions. In the wake of a successful challenge to its foundations, an attempt was made to embed the National Cabinet—and its secrecy provisions—through legislation.

INTRODUCTION

Many of the key decisions impacting the lives and livelihoods of Australians during the COVID-19 pandemic have been made at National Cabinet meetings. But what *is* the National Cabinet? What authority does it have? Who, or what, does it answer to? Are its decisions subject to parliamentary scrutiny? If so, by which parliaments, and what mechanisms? The National Cabinet has replaced the Council of Australian Governments as an ongoing fixture of Australia's Federation. Have its decisions been

¹ This article is an abridged and updated version of a paper submitted towards the completion of the Graduate Certificate in Parliamentary Law, Practice and Procedure at the University of Tasmania, awarded in 2021. It incorporates a 2022 update on the National Cabinet—specifically the government's efforts to maintain cabinet secrecy in relation to the body. The views expressed in this paper are her own, and do not represent the views of the Department.

subject to scrutiny by the Australian Senate and its committees? Will the Senate, and state and territory parliaments, be able to scrutinise decisions emerging from National Cabinet in the future?

This article discusses the constitutional status of the National Cabinet as a decision-making body within Australia's Federal governmental structure. It considers the implications of National Cabinet for ministerial accountability and parliamentary scrutiny, applying theoretical and practical lenses. The article concludes by looking at Senator Rex Patrick's challenge to the secrecy provisions applied to all National Cabinet documents and proceedings.

COVID-19—A CHALLENGE TO PARLIAMENTARY SCRUTINY

[T]he Coronavirus pandemic poses a dual challenge for legislatures: the pandemic makes it difficult and even dangerous for legislators to operate according to regular order in their elected assemblies; and it creates a sense of emergency that empowers the executive branch and emboldens its motivations to assert greater authority at the expenses of the legislature.²

COVID-19 was recognised as a pandemic by the World Health Organization on 11 March 2020.³ Choosing to adopt a 'suppression approach' as opposed to an 'elimination strategy',⁴ Australian governments used a combination of lockdowns, border closures, social distancing measures, and testing and contact tracing to contain outbreaks. In the early days of the response, Australian parliaments 'transferred unprecedented powers' to executive governments and public service agencies, who issued health directives and guidance, and used legislation and regulations to impose significant restrictions upon the movement and actions of Australians, as well as to

² Ittai Bar-Siman-Tov, 'Parliamentary Activity and Legislative Oversight during the Coronavirus Pandemic—A Comparative Overview', *SSRN Electronic Journal*, 2020, p. 3.

³ Bar-Siman-Tov, *Parliamentary Activity*, p. 2.

⁴ J Craft and J Halligan, 'Executive governance and policy advisory systems in a time of crisis', in: A Boin, K Brock, J Craft, J Halligan, P Hart, J Roy, G Tellier and L Turnbull, 'Beyond COVID-19: Five commentaries on expert knowledge, executive action, and accountability in governance and public administration', *Canadian Public Administration*, 63(3), 2020, p. 345.

provide financial supports.⁵ It is not unusual for governments to centralise authority, and reduce normal accountability mechanisms, during national emergencies or in wartime situations. In order to act swiftly and effectively, executive governments often find ways to work around 'cumbersome' legislative processes, with the effect that parliamentary scrutiny can be curtailed.⁶ In such an environment emerged the National Cabinet—a novel and innovative approach to crisis management across the Federation.

Parliaments sidelined? Committees step up

Daly writes that parliament is 'the central mechanism for representation of the people, deliberation, production of legislation, and oversight of government', and its role in democracy is critical.⁷ Bar-Siman-Tov contends that legislatures must continue their 'crucial role in checking the executive and ensuring that countries will not lose their constitutional values and democratic soul' while responding to the pandemic.⁸ Daly argues that parliaments were sidelined across Australia early in the pandemic, with Australian governments at state and Federal levels relying on executive power, delegated legislation and the National Cabinet to make decisions, and making 'little provision to keep parliaments functioning during the pandemic', compared with other Western countries.⁹

When the Federal Parliament was suspended on 23 March 2020, the suspension was expected to last until 11 August 2020, sparking fears that Australia's parliaments had been 'deemed surplus to requirements',¹⁰ with the cancellation of sittings initially 'hampering scrutiny of government pandemic measures'.¹¹ Moulds observes that, when parliaments *did* sit in this early period—sometimes for just a day or two—laws

⁵ Sarah Moulds, 'Scrutinising COVID-19 laws: An early glimpse into the scrutiny work of federal parliamentary committees', *Alternative Law Journal*, 45(3), 2020, p. 180.

⁶ Bar-Siman-Tov, *Parliamentary Activity*, p. 2.

⁷ T Daly, 'Prioritising Parliament: Roadmaps to Reviving Australia's Parliaments', *Governing During Crises, Policy Brief No. 3*, Melbourne School of Government, University of Melbourne, 1 August 2020, p. 3.

⁸ Bar-Siman-Tov, *Parliamentary Activity* 1, p. 3.

⁹ Daly, *Prioritising Parliament*, pp. 2-3. Note: Ittai Bar-Siman-Tov studied 26 parliaments in the pandemic, finding that 'most' (22 out of 26) continued to operate during the pandemic. This included Italy's parliament and parliaments in countries where 'several MPs and ministers have been diagnosed with the coronavirus'. Bar-Siman-Tov, *Parliamentary Activity*, p. 7.

¹⁰ Scott Prasser, 'A Funny Thing Happened on the Way to the National Cabinet—Out Goes Good Policy, One, Two, Three', *Australasian Parliamentary Review*, Winter/Spring 2020 35(1), p. 154.

¹¹ Daly, *Prioritising Parliament*, p. 4.

relating to COVID-19 were passed 'within days, sometimes hours, with limited safeguards', and little opportunity for parliamentarians to scrutinise the bills.¹² However, Moulds also notes the establishment of the Senate Select Committee on COVID-19 (the COVID-19 Committee) on 8 April 2020, saying:

The very same parliamentary mechanism that owes its existence to war-time law-making emerged as a touchstone in this modern crisis: the parliamentary committee. While parliaments themselves have suspended or reduced sitting days, parliamentary committees have emerged as the forum of choice when it comes to providing some form of parliamentary oversight of executive action.¹³

With COVID-19 inquiries running in New Zealand, Canada and the United Kingdom, similar inquiries were also established in Australian jurisdictions, including South Australia and the Australian Capital Territory. In New South Wales (NSW), the task of overseeing the NSW government's handling of the pandemic was referred to the Legislative Council's Public Accountability Committee,¹⁴ and in Victoria, the Public Accounts and Estimates Committee was tasked with conducting the COVID-19 inquiry.¹⁵ In the Senate, existing scrutiny committees also stepped up. The Parliamentary Joint Committee on Human Rights continued meeting regularly by teleconference, applying rigorous human rights scrutiny to primary and delegated legislation relating to the pandemic; and the Senate Standing Committee for the Scrutiny of Delegated Legislation increased its activity in response to a burgeoning reliance on delegated legislation during the pandemic.¹⁶ During the period in which sittings were reduced, the COVID-19 Committee held a large number of public hearings—an average of two per week—at which it scrutinised numerous aspects of the government's pandemic response, including questioning the Department of the Prime Minister and Cabinet (PM&C) about the National Cabinet and the National

¹² Moulds, *Scrutinising COVID-19 laws*, p. 181.

¹³ Moulds, *Scrutinising COVID-19 laws*, p. 181.

¹⁴ Moulds, *Scrutinising COVID-19 laws*, p. 182.

¹⁵ Parliament of Victoria, Public Accounts and Estimates Committee, 'Inquiry into the Victorian Government's response to the COVID-19 pandemic' Accessed at www.parliament.vic.gov.au/paec/inquiries/inquiry/1000.

¹⁶ Moulds, *Scrutinising COVID-19 laws*, p. 3.

COVID-19 Commission Advisory Board a number of times, and questioning the Department of Health on multiple occasions.¹⁷

As it turned out, the Federal Parliament sat again in April, for one day, then in May and June. By the end of 2020, it had sat for 58 days¹⁸—only about 10 days fewer than the average yearly figure of 67 days.¹⁹ The fact that Australia was able to contain the spread of the coronavirus as effectively and quickly as it did over this period is, arguably, the only reason that Federal parliamentary sittings reached the number they did in 2020. Critics have cautioned that Parliaments must plan for future crises, and have alternative arrangements in place, to allow parliamentary business to continue under exceptional circumstances. The Centre for Comparative Constitutional Studies submits:

The COVID-19 crisis has demonstrated that a more structured approach to Parliament in times of crisis is needed. Parliamentary sittings are presently ad hoc and their timetable is set by the Government. This situation is clearly unsatisfactory and Parliament should ensure that arrangements are put in place which would allow it to continue to discharge its constitutional functions in times of emergency.²⁰

¹⁷ Parliament of Australia, Senate Select Committee on COVID-19, *First Interim Report*, December 2020, https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024513/toc_pdf/Firstinterimreport.pdf;fileType=application%2Fpdf.

¹⁸ Parliament of Australia, House Procedure Office Website, 'House of Representatives Statistics', Accessed at www.aph.gov.au/Parliamentary_Business/Statistics/House_of_Representatives_Statistics.

¹⁹ D Elder (ed), *House of Representatives Practice*. Canberra: Department of the House of Representatives, 2018, p. 681.

²⁰ Centre for Comparative Constitutional Studies, *Submission to the Senate Select Committee on COVID-19*, Parliament of Australia, 2020, p. 2.

THE NATIONAL CABINET



Cartoon: M. Golding (cartoonist), *Sun Herald Sunday*, 30 August 2020, p. 28.

As well as truncating democratic processes, national emergencies can often 'accelerate' political or administrative change. Prasser contends that the need for 'urgent and authoritative decision making' during a crisis can speed up long-term political trends and lead to the creation of 'new institutional arrangements'.²¹ The national response to the coronavirus pandemic was initially coordinated through existing intergovernmental agreements, including the 2011 *National Strategy for Disaster Resilience*, and the 2018 *National Disaster Risk Reduction Framework*—agreements negotiated through the Council of Australian Governments (COAG).

²¹ Scott Prasser, *A Funny Thing Happened*, p. 144.

However, at a scheduled COAG First Ministers' meeting in March, a new initiative—the National Cabinet—was formed, with its inaugural meeting held two days later.²²

The National Cabinet is an intergovernmental forum and decision-making body incorporating the Prime Minister, state premiers and territory chief ministers. It has been described as an example of 'executive federalism' and 'leader-centred politics'; where interactions between governments are conducted mostly by members of executive branches.²³ In relation to the pandemic, the National Cabinet receives advice from the Department of Home Affairs' National Coordination Mechanism, which is responsible for the non-health aspects of the pandemic (banking, food supply, etc), and from the Australian Health Protection Principal Committee (AHPPC); a body comprising state and territory Chief Health Officers, the Australian Chief Medical Officer and other government officials.²⁴ The Prime Minister also established the National COVID-19 Coordination Commission on 25 March 2020. It was renamed the 'National COVID-19 Commission Advisory Board' on 27 July 2020, to reflect its 'strategic advisory role in providing a business perspective to Government on Australia's economic recovery'.²⁵ When first established, Prime Minister Scott Morrison presented the National Cabinet as a 'temporary body' for coordinating the COVID-19 response, designed to supplement COAG, and not to 'bypass' Commonwealth or state parliaments.²⁶

While originally envisaged to be temporary, on 29 May 2020, the Prime Minister announced that the National Cabinet would become a permanent entity, replacing COAG, and operating 'under Federal Cabinet rules', just 'like a fair dinkum Cabinet'.²⁷ The Prime Minister maintained that National Cabinet owed its success to the fact that it was 'less bureaucratic' and more 'streamlined' than COAG.²⁸ National Cabinet would meet weekly, instead of twice a year, and the meeting would be covered under the 'same confidentiality and freedom of information [FOI] protections and protocols as

²² Prasser, *A Funny Thing Happened*, p. 146.

²³ Prasser, *A Funny Thing Happened*, p. 142.

²⁴ Tulich, Rizzi and McGaughey, *Cooperative Federalism*, p. 2.

²⁵ Department of the Prime Minister and Cabinet, 'National COVID-19 Commission Advisory Board', PMC Website, Accessed at: <https://pmc.gov.au/ncc>.

²⁶ Prasser, *A Funny Thing Happened*, p. 147.

²⁷ Scott Morrison, PM, quoted in Prasser, *A Funny Thing Happened*, p. 150.

²⁸ Scott Morrison, PM, *Media Release: Update following National Cabinet*, 29 May 2020, Accessed at www.pm.gov.au/media/update-following-national-cabinet-meeting.

the federal Cabinet'.²⁹ To facilitate this in practice, the Prime Minister declared the National Cabinet, the AHPPC, and the National COVID-19 Commission Advisory Board to be 'committees of cabinet', so that discussions, documents and decisions would be classified cabinet-in-confidence.³⁰ But is the National Cabinet a 'cabinet'?

The cabinet in Westminster tradition

Australia's federated system of government was constructed as a kind of 'hybrid' parliamentary system, or 'Washminster Mutation', borrowing ideas from British, American and other constitutional traditions.³¹ In common with British parliamentary democracy, Australia adopted a system of 'responsible government', meaning the executive is *part of* the legislature (rather than separate from it), and ministers are accountable, individually and collectively, to the parliament. From this flows the notion of 'collective responsibility', expressed in two key conventions: 'cabinet solidarity', and the assumption that the whole executive will resign if the government loses a vote of no confidence in the House of Representatives. As a means of protecting cabinet solidarity, 'cabinet secrecy' requires that 'documents and discussions' within cabinet are kept confidential.³²

In Westminster-style parliamentary systems of government, including in Australia's 'Washminster' system, cabinets are 'the primary decision making organ of executive government' at both state and federal levels, and operate according to the conventional rules of cabinet confidentiality, uphold cabinet solidarity, and function through collective responsibility to their respective parliaments.³³ Members of a cabinet are bound by convention to publicly support the decisions of cabinet (whether or not they were present, or agreed with a decision) and uphold cabinet secrecy, and deliberations are protected by law and exempt from FOI requests. These provisions are designed to ensure that discussions within cabinet can be frank and robust to facilitate good governance. However, because the National Cabinet has a bipartisan

²⁹ Scott Prasser, *A Funny Thing Happened*, 148.

³⁰ R Lewis, 'Rex Patrick will challenge cabinet-in-confidence rules capturing national cabinet, AHPPC', *The Australian*, 25 August 2020, Accessed at www.theaustralian.com.au/nation/politics/rex-patrick-will-challenge-cabinetinconfidence-rules-capturing-national-cabinet-ahppc/news-story/b2df53607cd1381bff72a6fec6f0dae8

³¹ Elaine Thompson, 'The 'Washminster' Mutation', Chapter 4 in P. Weller and D. Jaensch (eds), *Responsible Government in Australia*, Richmond Vic: Drummond, 1980, p. 33.

³² Thompson, *The 'Washminster' Mutation*, p. 34.

³³ Tulich, Rizzi and McGaughey, *Cooperative Federalism*, p. 2.

membership, and contains members from *nine* separate governments, Tulich, Rizzi and McGaughey argue that '[t]he principle of collective responsibility cannot apply in the usual way':

As an intergovernmental body, its members are not collectively responsible to one Parliament, but individually responsible to nine separate parliaments. Similarly, cabinet solidarity cannot be enforced, leading, as we have already seen, to public dissention by members of the National Cabinet.³⁴

As an example, the authors point to the National Cabinet meeting on 22 March, after which the Premiers of NSW and Victoria, and the Chief Minister of the ACT 'broke ranks' by recommending that parents in their jurisdictions keep school-aged children at home, 'while the Federal Government maintained that schools were safe to attend and should remain open'.³⁵ Another example can be found in the interim report from the Opposition-led COVID-19 Committee, which says that National Cabinet:

...has not functioned in accordance with longstanding Westminster conventions on cabinet government in relation to collective responsibility and solidarity. The Prime Minister's public criticisms of certain state premiers' decisions (school closures and internal border measures) fractured the national response and created unnecessary public confusion and anxiety.³⁶

Although it is called a 'cabinet', numerous legal scholars and commentators have argued the National Cabinet is simply another intergovernmental forum, like its predecessor, COAG. Twomey told *The Australian* that the word 'cabinet' has always meant 'a body comprised of ministers who were responsible to one parliament and government', and it is 'completely inappropriate' to describe the AHPPC and National Cabinet as cabinet committees. Twomey said that, while 'government may want to label something 'cabinet' or a 'cabinet committee', a court would not necessarily accept just because you gave it a label that's what it really is for the purposes of legislation'.³⁷ Similarly, Tulich, Rizzi and McGaughey argue that the National Cabinet 'bears little resemblance to a cabinet in the Westminster tradition'.³⁸ Nor does it resemble a 'war

³⁴ Tulich, Rizzi and McGaughey, *Cooperative Federalism*, p. 2.

³⁵ Tulich, Rizzi and McGaughey, *Cooperative Federalism*, p. 3.

³⁶ Parliament of Australia, Senate Select Committee on COVID-19, *First interim report*, December 2020, p. xxii.

³⁷ A Twomey quoted in Lewis, *Rex Patrick will challenge*.

³⁸ Tulich, Rizzi and McGaughey, *Cooperative Federalism*, p. 2.

cabinet', such as those formed in World War II comprising government and opposition members of the Federal Parliament.³⁹

Podger argues the term 'National Cabinet' 'disguises the nature of federalism: that each jurisdiction has sovereign powers'.⁴⁰ Podger suggests the name of its predecessor, the 'Council of Australian Governments', better reflected the 'Constitutional reality'.⁴¹ Keating critiques the 'job creation' focus adopted by National Cabinet in late 2020. Keating observes that COAG traditionally focussed on '[c]oordinating the activities of each level of government to improve service delivery'.⁴² This, Keating argues, is the constitutionally-correct function of an intergovernmental body like COAG (or the National Cabinet).⁴³

Ministerial accountability

Not only does the National Cabinet lack substantial cabinet solidarity, and any mechanism to enforce it, as a virtual 'black box' in which decisions are made that affect states and territories, it could also be seen to obscure ministerial accountability at all levels of government. The paradox of ministerial accountability and the National Cabinet is beautifully captured in Pope's cartoon. The National Cabinet is wielding 'expansive power', making decisions that restrict people's freedoms and impact the livelihoods of Australians... yet, this 'expansive power' is operating 'outside of the normal accountability mechanism of collective cabinet responsibility to one Parliament'.⁴⁴

³⁹ Tulich, Rizzi and McGaughey, *Cooperative Federalism*, p. 2.

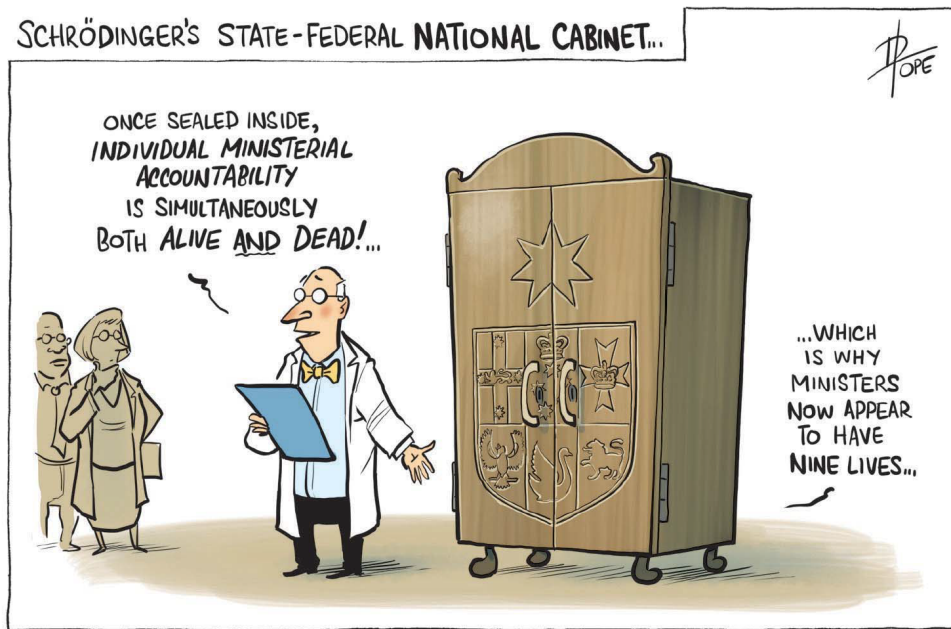
⁴⁰ A Podger, 'Federalism does not need an ongoing 'National Cabinet'', *Pearls and Irritations: John Menadue's Public Policy Journal*, Online, 19 July 2020 Accessed at <https://johnmenadue.com/>.

⁴¹ Podger, *Federalism*.

⁴² M. Keating, 'National Cabinet to replace COAG: Part 2 of 2', *Pearls and Irritations: John Menadue's Public Policy Journal*, Online, 9 June 2020. Accessed at <https://johnmenadue.com/>.

⁴³ Keating, National Cabinet to replace COAG: Part 2, p. 2.

⁴⁴ Tulich, Rizzi and McGaughey, *Cooperative Federalism*, p. 5.



Cartoon: David Pope (cartoonist), 'Schrodinger's state-federal national cabinet', *The Canberra Times*, 1 September 2020, p. 2.

Boughey argues that National Cabinet 'is not accountable in the same way that federal, state and territory cabinets are', because the split responsibilities of its members complicates how responsible government can function:

Leaders will be able to answer any questions of their respective parliaments and parliamentary committees by simply explaining that the jurisdiction is committed to a particular course of action through the intergovernmental agreement. This tends to curtail any opportunity for parliamentary input or debate.⁴⁵

The *Federal Cabinet Handbook 14th Edition*, which guides the functioning of the National Cabinet, defines ministerial responsibility and requires that ministers 'not talk publicly about matters that they propose to bring to the Cabinet nor announce a major

⁴⁵ J. Boughey, 'Executive power in emergencies: Where is the accountability?', *Alternative Law Journal*, 45(3), September 2020, p. 169.

new policy without previous Cabinet approval'.⁴⁶ When questioned about the attendance, rules and processes applying to the National Cabinet, the Secretary of PM&C, Gaetjens confirmed:

- that he, the Prime Minister, Professor Brendan Murphy (the Chief Medical Officer), a Commonwealth note taker, and a state note taker attend National Cabinet meetings, along with the First Ministers of the states and territories;
- that '[g]enerally...the Commonwealth has been taking the positions it takes to national cabinet through its own cabinet first';
- that 'discussions with [his] counterparts have indicated that the states have done the same'; and
- that National Cabinet has received presentations from other parties, including Treasury, the Reserve Bank and the Mental Health Commission.⁴⁷

National Cabinet is supported by the Federal Cabinet Secretary, a position held by 'a political staffer', employed under the *Members of Parliament (Staff) Act 1984* (Cth), rather than a public servant.⁴⁸ PM&C's *Cabinet Handbook* was updated in October 2020 to incorporate a section on the National Cabinet and related bodies. It clarifies that the National Cabinet can co-opt 'expert advisors',⁴⁹ as it has done with the AHPPC. The Handbook states that the Commonwealth Cabinet Office 'provides secretariat support to the National Cabinet, in collaboration with State and Territory support areas', and requires strict confidentiality protocols.⁵⁰ It is notable that the Secretary of PM&C is the 'formal custodian of National Cabinet records' and, in the event of a change of government at Commonwealth, state or territory level, successor governments are

⁴⁶ Department of the Prime Minister and Cabinet, *Cabinet Handbook 14th Edition*, October 2020, p. 11, www.pmc.gov.au/resource-centre/government/cabinet-handbook.

⁴⁷ Philip Gaetjens, Secretary, Department of the Prime Minister and Cabinet, Select Committee on COVID-19, *Committee Transcript*, 13 May 2020, p. 2. Available at: <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Fcommsen%2F608011bb-99d9-4b10-9fa8-521eaa899fa5%2F0000%22>.

⁴⁸ Answers to written questions on notice by the Department of Prime Minister and Cabinet, asked by Senator Gallagher on 22 May 2020, received 5 June 2020, Qu No: 0037, www.aph.gov.au/DocumentStore.ashx?id=01d0ef02-6a35-49e1-8130-b215d1bc14fb.

⁴⁹ Department of the Prime Minister and Cabinet, *Cabinet Handbook 14th Edition*, October 2020, pp. 30–31, www.pmc.gov.au/resource-centre/government/cabinet-handbook.

⁵⁰ *Cabinet Handbook*, pp. 30–31.

required to apply to PM&C for access to historical records. In making a decision regarding release, PM&C 'will consult' with the party that was in government when the record was created.⁵¹

Prasser asks: with the Prime Minister alone determining which documents and information associated with National Cabinet are released to the public, 'how can ministerial accountability be practised'—particularly at the state and territory level? How can first ministers returning to their parliaments 'be held accountable...about the decisions made by National Cabinet? Indeed, can those First Ministers even discuss those issues?'⁵²

Rather than being responsible to nine parliaments, the Hon. Colin Barnett calls National Cabinet a 'cabinet *without* a parliament', saying it holds no 'constitutional or legislative powers', and is 'simply a meeting'.⁵³ Barnett insists that 'the states remain sovereign in their own right', as demonstrated by their unilateral action on border closures, often against the wishes of the Commonwealth.⁵⁴ Western Australia's decision not to participate in the 'opening up plan' and 'hotspot definition' agreed by all other jurisdictions on 4 September 2020 can be seen as a public acknowledgement that parties within National Cabinet are *not* bound by cabinet solidarity.⁵⁵ Prasser notes that the states' 'digression' from National Cabinet decisions have resulted in 'no penalties':

Commonwealth funding flowed regardless of the decisions that the States took, whether or not they were in accord with the increasingly weak enunciations from the fortnightly National Cabinet meetings. This was most vividly seen in relation to border closures, where several states practised what Paul Kelly described as 'pandemic protectionism' taking Australia back to the state

⁵¹ *Cabinet Handbook*, p. 32.

⁵² Prasser, *A Funny Thing Happened*, pp. 152–153.

⁵³ C Barnett, 'A cabinet without a parliament, a meeting with no power', *Australian Financial Review*, 1 June 2020, emphasis added, www.afr.com/politics/federal/a-cabinet-without-a-parliament-a-meeting-with-no-power-20200601-p54y83.

⁵⁴ Barnett, *A cabinet without a parliament*.

⁵⁵ Scott Morrison, PM, *Media Release: Update following National Cabinet*, 4 September 2020, <https://www.pm.gov.au/media/national-cabinet-040920>.

sovereignty model of the 1890s when the colonies were unencumbered by the responsibilities or constraints of nationhood.⁵⁶

Power and authority

It is fair to say the National Cabinet is not a cabinet in the Westminster sense. Accountability for decisions made at National Cabinet meetings lies in nine separate jurisdictions, and ministerial accountability is obscured (if not erased) by its structure and processes. The National Cabinet is not, however, 'a meeting with no power', as Barnett wrote.⁵⁷ Boughey observes that National Cabinet has been the body responsible for making many of the key decisions regarding 'when to impose and ease restrictions' relating to COVID-19, which have then been implemented by the states and territories, who have the constitutional authority to enact and enforce the necessary orders.⁵⁸ These decisions have far-reaching ramifications.

Tulich, Reilly and Murray propose that National Cabinet exemplifies a growing 'presidentialisation of Australian politics'; a trend towards greater emphasis on 'leaders as individuals rather than leaders of a collective executive', and ultimately, a trend that de-emphasises the role of parliaments.⁵⁹ The rhetoric suggests that each first minister is able to participate freely at National Cabinet, as an individual, but this rhetoric:

...elides the underlying reality under our Westminster system of government that their executive positions are all subject to the potentially shifting sands of parliamentary majorities. Parliamentary supremacy and indeed sovereignty remains in form, but in function the National Cabinet resembles a meeting of US governors and the President — each of whom are of course directly elected and thus able to claim their own mandate. In this way, the National Cabinet could be seen as an exemplar of thesis, as an institutional innovation which shifts power further away from Parliament and towards individual leaders.⁶⁰

⁵⁶ Prasser, *A Funny Thing Happened*, p. 155.

⁵⁷ Barnett, *A cabinet without a parliament*.

⁵⁸ Boughey, *Executive power*, p. 169.

⁵⁹ T Tulich, B Reilly and S Murray, 'The National Cabinet: Presidentialised Politics, Power-sharing and a Deficit in Transparency', *Australian Public Law*, 23 October 2020, Accessed at <https://auspublaw.org/2020/10/the-national-cabinet-presidentialised-politics-power-sharing-and-a-deficit-in-transparency/>.

⁶⁰ Tulich, Reilly and Murray, *Presidentialised Politics*.

Prasser reaches a similar conclusion, saying the change from COAG to the National Cabinet model has 'further enhanced executive federalism, extended executive power and increased the role of First Ministers', as well as sidelining parliaments.⁶¹ When asked to comment on the benefits of the change from COAG to the National Cabinet, Gaetjens praised the secrecy component and described the new model as 'more tightly focused' and 'leader-driven'.⁶²

Boughey argues that the National Cabinet's decisions are not legally enforceable; a view echoed by others.⁶³ Saunders' work on intergovernmental agreements suggests it is not that simple. Saunders applies the term 'soft law' to describe those agreements made between jurisdictions that 'have no legal effect either as contracts or through legislation'.⁶⁴ Saunders identifies section 61 of Australia's *Constitution* as the 'principal source of power' relied upon by the Commonwealth in facilitating intergovernmental agreements, but raises doubts as to the certainty of the application of section 61 to any matter for which the Commonwealth does not have 'a head of substantive legislative power'.⁶⁵ In relation to the pandemic, the Commonwealth appears to be relying on a combination of non-statutory executive powers, and statutory powers contained in the *Biosecurity Act 2015*. The Centre for Comparative Constitutional Studies submits:

The lack of clarity about the precise role of Commonwealth executive power within the Government's COVID-19 response is therefore troubling on a number of fronts. Opacity with respect to this issue makes it hard to understand whether some decisions have legislative support or not: and if not, why not. Those that do not have such legislative support are presumably reliant, at the Commonwealth level, on non-statutory executive power.⁶⁶

This situation puts the National Cabinet, and decisions emanating from it, on constitutionally 'shaky ground'. Saunders argues the terminology of 'cabinet is misleading', as the National Cabinet is simply 'a group of chief ministers, heading

⁶¹ S. Prasser, National Cabinet, p. 154.

⁶² Mr Gaetjens, Select Committee on COVID-19, *Committee Transcript*, 4 June 2020, p. 8.

⁶³ J. Boughey, Executive power, p. 170.

⁶⁴ C. Saunders, 'Intergovernmental agreements and the executive power', *Public Law Review*, 16(4), 1 January 2005, p. 299.

⁶⁵ C. Saunders, Intergovernmental agreements, p. 301.

⁶⁶ Centre for Comparative Constitutional Studies, *Submission to the Senate Select Committee on COVID-19*, p. 6.

different cabinets, through which they are individually and collectively accountable to different parliaments':

The problem is compounded by the suggestion that, somehow the national cabinet fits within the commonwealth cabinet structure. This is a logical impossibility, apparently driven by a desire to keep proceedings confidential.⁶⁷

Saunders proposes that the National Cabinet would be on a surer footing if its structure and processes were 'crafted to fit this distinctive need', rather than 'imported' from the Federal Cabinet.⁶⁸ Properly codifying the role and structure of National Cabinet would also provide an opportunity, Saunders suggests, for intergovernmental arrangements to be appropriately integrated into 'the cabinet and parliamentary processes at each level of government'.⁶⁹

Confidentiality

Asked why the National Cabinet should have the same rules of confidentiality as Federal and state cabinets, the Prime Minister is widely quoted as saying: '[I]t's not a spectator sport. It's a serious policy deliberation between governments and by cabinet members within cabinets'.⁷⁰ A number of parliamentarians have not been satisfied with this response.

Independent Senator Patrick appealed to the Administrative Appeals Tribunal in mid-2020 after being refused access to National Cabinet documents. Senator Patrick argued it is an 'abuse of cabinet convention' to apply cabinet secrecy to groups of ministers from different parliaments, and to people who are not ministers, including 'groups of doctors'.⁷¹ Part of Senator Patrick's claim relates to a request for information from the Department of Health. The Department cited cabinet-in-confidence provisions to refuse to answer questions about 'high-level decisions around domestic border

⁶⁷ Saunders, *The National Cabinet has worked*.

⁶⁸ C. Saunders, 'A New Federalism? The Role and Future of the National Cabinet', *Governing During Crises: Policy Brief No. 2*, University of Melbourne: Melbourne School of Government, 1 July 2020, p. 6.

⁶⁹ Saunders, *A New Federalism*, p. 5. This opinion is in keeping with legal advice provided by Barrister Jeremy Farrell quoted in P Karp, 'National cabinet secrecy under fire in first-of-its-kind challenge to new arrangement', *The Guardian Australia*, 19 August 2020, www.theguardian.com/australia-news/2020/aug/19/national-cabinet-secrecy-under-fire-in-first-of-its-kind-challenge-to-new-arrangement.

⁷⁰ Prasser, *A Funny Thing Happened*, pp. 152-153.

⁷¹ Lewis, *Rex Patrick will challenge*.

closures by the AHPPC'. These provisions were also used to refuse two FOI requests from Senator Patrick for National Cabinet minutes and information about its 'rules and procedures'.⁷² Senator Patrick argued that expanding the conventions of cabinet in this way, 'interferes with the accountability of government that is the very essence of responsible government'.⁷³ The Senator also maintained that the decision to make the National Cabinet permanent—replacing COAG, whose documents were generally subject to FOI⁷⁴—'creates a confidentiality span that is so broad it intrudes on rights created' by the *Freedom of Information Act 1982* (Cth).⁷⁵ Senator Patrick's case was ultimately successful—an update is provided at the end of this paper.

Along with Senator Patrick, other non-government members and senators publicly expressed concerns about the blanket application of cabinet confidentiality rules to the documents and proceedings of the National Cabinet.⁷⁶ In its *First Interim Report*, tabled in December 2020, the COVID-19 Committee stated: 'The Australian Government has *improperly* applied cabinet conventions to avoid transparency in relation to decisions made by the National Cabinet'.⁷⁷ The Chair of the COVID-19 committee expressed frustration that departments including Health and Treasury reported being advised by PM&C *not* to provide information—such as economic or health modelling—to the committee on the basis that the information contributed to National Cabinet deliberations.⁷⁸ Committee Chair, Senator Katy Gallagher concluded that 'the change from COAG to a national cabinet has actually reduced the transparency of the discussions and the decisions taken by the Prime Minister and the state and territory

⁷² Lewis, *Rex Patrick will challenge*.

⁷³ P Karp, 'National cabinet secrecy under fire in first-of-its-kind challenge to new arrangement', *The Guardian Australia*, 19 August 2020. Accessed at www.theguardian.com/australia-news/2020/aug/19/national-cabinet-secrecy-under-fire-in-first-of-its-kind-challenge-to-new-arrangement.

⁷⁴ Tulich, Reilly and Murray, *Presidentialised Politics*.

⁷⁵ Karp, *National cabinet secrecy under fire*.

⁷⁶ For instance, independent MP Zali Steggall, leader of the Australian Greens, Adam Bandt MP, and Labor Senator Katy Gallagher. J. Butler, 'Dark room' dealings: Secretive COVID council deciding Australia's future', *The New Daily*, 28 July 2020. Accessed at: <https://thenewdaily.com.au/news/2020/07/28/covid-commission-secret/>.

⁷⁷ Parliament of Australia Senate Select Committee on COVID-19, *First interim report*, December 2020, p. xxii. E, phasis added.

⁷⁸ Senator Katy Gallagher, Parliament of Australia, Senate Select Committee on COVID-19, *Committee Transcript*, 4 June 2020, p. 12.

leaders'.⁷⁹ In its Interim Report, the COVID-19 committee recommended the government 'publish all previous and future minutes of the AHPPC to provide the public with access to the medical advice behind all decisions affecting the community's safety, livelihoods and personal freedoms'.⁸⁰ The committee also recommended all reports of the National COVID-19 Commission Advisory Board be made public, along with the conflict of interest declarations made by commissioners.⁸¹

Not all commentators hold negative views about the National Cabinet's levels of transparency. Craft and Halligan's comparison of pandemic responses in Australia, Canada, the UK, and New Zealand, found Australia's response to be more 'open' than the Canadian and UK governments'.⁸² The authors speak positively about Australia's National Cabinet, and its practice of 'providing details of meeting decisions and key advisory documents'.⁸³ Mr Gaetjens described the process as highly transparent, saying statements from the Prime Minister about the decisions and outcomes of National Cabinet 'have been the most transparent that I've ever seen in terms of what is actually happening'.⁸⁴ The Centre for Comparative Constitutional Studies agreed that the Prime Minister and first ministers have kept the public well-informed about the decisions of National Cabinet. However, the Centre argued that more transparency was warranted and would not affect the 'efficacy of the body'.⁸⁵

Moulds also offers a positive perspective, highlighting the 'deliberative potential' presented by this kind of bipartisan 'safe space'—a space in which ministers can leave 'entrenched ideological positions' at the door, working together, free to change their minds 'in the face of compelling evidence' that is provided by interacting with experts.⁸⁶ This deliberative potential would likely be lost if discussions at National Cabinet were public.

⁷⁹ Senator Katy Gallagher, Select Committee on COVID-19, *Committee Transcript*, 4 June 2020, p. 13.

⁸⁰ COVID-19 Committee, *Interim Report*, p. xv.

⁸¹ COVID-19 Committee, *Interim Report*, p. xv.

⁸² Craft and Halligan, *Executive governance*, p. 350.

⁸³ Craft and Halligan, *Executive governance*, p. 350.

⁸⁴ Philip Gaetjens, Secretary, Department of the Prime Minister and Cabinet, Select Committee on COVID-19, *Committee Transcript*, 13 May 2020, p. 8.

⁸⁵ Centre for Comparative Constitutional Studies, *Submission to the Senate Select Committee on COVID-19*, p. 5.

⁸⁶ Moulds, *Scrutinising COVID-19 laws*, p. 6.

CONCLUSION

The National Cabinet has been an innovative and often effective way to coordinate a national response to the pandemic, but, as Senator Gallagher pointed out, changing from COAG to the National Cabinet may have 'reduced the transparency of the discussions and the decisions taken by the Prime Minister and the state and territory leaders'.⁸⁷ It is understandable that leaders in an unprecedented crisis have preferred the freedom and cover provided by the rules of cabinet secrecy, but the National Cabinet presents a number of perplexing 'accountability challenges' for parliaments, as well as leading to 'ambiguities in the messaging to the public and distinctions in measures implemented across the Federation'.⁸⁸

The National Cabinet is *not* a cabinet in the Westminster sense, and cabinet solidarity cannot be expected, or enforced. As such, proceedings and documents relating to the National Cabinet cannot be said to be entitled to 'cabinet secrecy'. Secrecy may be appropriate where there is a public interest imperative—such as in relation to critical national security decisions—but to insist upon cabinet secrecy as the foundation for all future intergovernmental interactions risks creating a 'transparency deficit'.⁸⁹ Parliamentary scrutiny is a critical adjunct to responsible government, and responsible government must be 'limited government—not mere majoritarian [rule]'—with decisions subject to oversight and scrutiny.⁹⁰ Brock and Turnbull write:

Westminster parliamentary systems work by striking a well-calibrated balance between a powerful executive branch that can take decisions and actions effectively and a functional legislative branch that holds the government to account. In times of emergency, the balance between decisiveness and accountability tends to lean more heavily towards an even more powerful, effective executive....Once an emergency or exceptional circumstances pass, the equilibrium between the branches should be restored to normal levels of

⁸⁷ Senator Gallagher, *Committee Transcript*, 4 June 2020, p. 13.

⁸⁸ Tulich, Rizzi and McGaughey, *Cooperative Federalism*, pp. 5-6.

⁸⁹ Tulich, Reilly and Murray, *Presidentialised Politics*.

⁹⁰ Thompson, *The 'Washminster' mutation*, pp. 667-668.

accountability, lest we lose the healthy and vital system of counterweights in a parliamentary democracy.⁹¹

The National Cabinet's 'presidentialised' approach and secrecy provisions may have been well-suited to facilitating a fast, bold, and dynamic pandemic response, but scrutiny and accountability will suffer if blanket secrecy provisions remain in place.

Postscript: 2022 update and developments

In August 2021, Federal Court Justice Richard White ruled in the Administrative Appeals Tribunal that the National Cabinet is not a cabinet, and its documents are not exempt under the related provisions of the FOI Act.⁹² Outlining his reasons for the decision, Justice White noted that 'the National Cabinet does not derive powers from the Cabinet'; stated that a group 'which is not 'of' the Cabinet will not be a committee of the Cabinet'; and concluded that 'none of the subject documents is an official record of a committee of the Cabinet and accordingly exempt from production by reason of s 34(1)(b) of the FOI Act'.⁹³

In response, the government introduced into Parliament the COAG Legislation Amendment Bill 2021—legislation designed to update existing laws by removing legacy references to COAG, setting out new definitions, and codifying that the deliberations and decisions of the National Cabinet are protected from disclosure through cabinet-in-confidence provisions (Schedule 3 of the Bill).⁹⁴ The Explanatory Memorandum states:

The confidentiality of information and decision-making is critical to the effective operations of the National Cabinet, enabling issues to be dealt with quickly, based on advice from experts. The sharing of sensitive data, projections and judgements—which relies on these principles of confidentiality—has been the

⁹¹ Brock, et al, *Beyond COVID-19*, pp. 350-351.

⁹² *Patrick v Secretary, Department of Prime Minister and Cabinet* [2021] AATA 2719.

⁹³ *Patrick v Secretary, Department of Prime Minister and Cabinet* [2021] AATA 2719, paras. 64, 149 and 276.

⁹⁴ Parliament of Australia, Website, 'Bills Homepage: COAG Legislation Amendment Bill 2021, 'Summary', 2 September 2021, Accessed at www.aph.gov.au/Parliamentary_Business/Bills_LEGISlation/Bills_Search_Results/Result?bld=r6782.

foundation of effective decision making in the interests of the Australian people.⁹⁵

The Bill was referred to the Senate Finance and Public Administration Legislation Committee (F&PA), as well as being considered by the Senate Standing Committee for the Scrutiny of Bills. In her submission to the F&PA inquiry, Professor Twomey argued that the amendments contained in Schedule 3 'defy the self-evident facts, which brings the law into disrepute'. Twomey said enacting 'a law that asserts things that are not true...is unwise...and damages public confidence in the law'.⁹⁶ The government-controlled committee, however, determined that it was not the committee's 'role to adjudicate on the structure and operation of Cabinet or its committees', and recommended the Bill be passed.⁹⁷

Conversely, the Labor Opposition Senators' dissenting report expressed support for Justice White's decision, and said:

The defeat in the AAT is the reason the Senate is dealing with the proposed bad law subject to this inquiry. ... [Evidence to the inquiry provided] a comprehensive legal and policy demolition of a schedule to a bill that, if passed into law, would have substantial, systemic and negative consequences for transparency, accountability and the functioning of the federation.⁹⁸

Similarly, in its report, the scrutiny committee stated it was 'concerned' that the Bill seeks to 'extend Cabinet-related exemptions in some instances to *all documents* submitted, or proposed to be submitted to, National Cabinet', rather than applying confidentiality only as required.⁹⁹ Ultimately, Labor recommended the bill be passed

⁹⁵ Explanatory Memorandum, COAG Legislation Amendment Bill 2021, p. 17. Accessed at: https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6782_ems_47ebe52c-03ad-4726-9ac1-b80d2c015dd8/upload_pdf/21034EM.pdf;fileType=application%2Fpdf.

⁹⁶ Anne Twomey, *Submission 8*, p. 2, quoted in Senate Finance and Public Administration Legislation Committee (F&PA), *COAG Legislation Amendment Bill 2021 [Provisions]*, October 2021, p. 26. Accessed at: www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/COAG.

⁹⁷ F&PA, *COAG Legislation Amendment Bill 2021 [Provisions]*, October 2021, pp. 37–38.

⁹⁸ 'Labor Senators' Dissenting Report' in F&PA, *COAG Legislation Amendment Bill 2021 [Provisions]*, October 2021, pages 40 and 43.

⁹⁹ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 16/21*, 21 October 2021, p. 12, emphasis added. Accessed at: www.aph.gov.au/-/media/Committees/Senate/committee/scrutiny/scrutiny_digest/2021/PDF/d16_21.pdf?la=en&hash=D09A5D8494209FA2C89A83D0825DDB666C695C84.

with Schedule 3 omitted; or that it otherwise be opposed.¹⁰⁰ Lacking support—including from some government members—the bill did not progress.¹⁰¹ As at 29 March 2022, the Bill has not advanced past the second reading stage in the House of Representatives.¹⁰²

¹⁰⁰ Labor Dissenting Report, *COAG Legislation Amendment Bill 2021 [Provisions]*, October 2021, p. 43.

¹⁰¹ Paul Karp, 'Government's bill to keep national cabinet discussion secret may fail as Liberal senator says he will vote against it', *The Guardian Australia*, 29 September 2021, Accessed at www.theguardian.com/australia-news/2021/sep/29/bill-to-exempt-national-cabinet-from-foi-in-doubt-after-liberal-senator-says-he-will-cross-floor.

¹⁰² *Patrick v Secretary, Department of Prime Minister and Cabinet* [2021] AATA 2719, paras. 64, 149 and 276.

¹⁰² Parliament of Australia, Websites, 'Bills Homepage: COAG Legislation Amendment Bill 2021', 2 September 2021.