

Secrecy afforded to the National Cabinet during a pandemic is not worth the long term risks.

By Rebecca Broadhead

This year marked the 254th anniversary of the passing of the first Freedom of Information (Fol) related law, which was passed in Sweden in 1766. This year Australia has faced a health and economic crisis and we should be asking ourselves - has democracy and governmental accountability been put on hold during COVID-19? Usually politicians must fight to convince their party of a policy, then parliament, while the media and the public offer scrutiny or suggestion. All of this exchange and debate between people has shifted to individual ministers within the National Cabinet making all the decisions. From all reports, this forum has worked much better than its predecessor 'CoAG' (the Council of Australian Governments) and is set to stay. Is this a moment in time where we should be considering the public's right to know what happens behind closed doors and the lack of freedom of information?

Johan Lidberg wrote in the Australian Journalism Review in 2013 that Fol laws have become a 'democratic rite of passage', where access to information systems is seen as confirmation that a country has democratically come of age. Hence, Fol has become a potent way of measuring democratic evolution. However, a large body of research shows passing the laws is the easy part; making them work in practice is hard.

The past 20 years have seen a dramatic increase in the number of Fol laws around the world. In 1990 there were only 13 active laws; now the number of Fol laws in the world is 124 and counting. All Australian jurisdictions now have either a Fol or Right to Information (RTI) Act.

Due to worries that there was too much secrecy within and between countries during the Second World War, the world saw an increase in access to information laws and Australia's first FOI laws were passed in Victoria and the Australian Commonwealth in 1982. The other states and territories then followed, with the Northern Territory act commencing in 2003.

The next significant Fol moment was the fall of the Soviet Union in 1990. A number of former Soviet dominated states in eastern Europe saw Fol as an important part of the path to democracy and enacted Fol laws.

The most recent moment in the evolution of information access is ongoing – the digital revolution. The speed and ease of sharing vast amounts of information enabled by this ongoing change has seen the number of Fol laws in the world grow.

However, the initial premise of Fol has been buried in Australia. There are too many clauses exempting documents from access - [16 in the Victorian act](#) - which severely limit the range of documents available. Most of the time the legislation has been interpreted conservatively by judges of the body that hears Fol cases, the Administrative Appeals Tribunal. The legislation's philosophy of open government has been shadowed by bureaucratic secrecy.

Journalist and advocate for Fol, Paul Chadwick, in an address to the conference 'Privacy — Make it your business' in Melbourne in 2001 after 11 September, said "secret law is bad law. Hasty law is apt to be bad law too."

Several political strategies have eroded the value of Fol. First, fees. Fol was originally free but in 1986 the federal Labor government introduced fees and state governments followed suit. An Fol request may be granted but costs for time taken to process documents can run into thousands of dollars and governments are happy to fight Fol requests all the way to the High Court.

Another strategy has been to steadily place government agencies outside the reach of Fol altogether. They do this by passing separate legislation to compartmentalise particular bodies from Fol. Since the late 1980s more government agencies have been partly or fully privatised, meaning a sizeable proportion of government is no longer covered by Fol, though nobody is quite sure how much.

On 15 March this year, Prime Minister Scott Morrison announced the establishment of national cabinet, replacing the Council of Australian Governments (CoAG) with a regular meeting between the prime minister and premiers. However successful Australian governments have been to date in managing the immediate needs of the crisis, transparency and accountability have eroded and the Cabinet's success does not bode well for long-term policy making in the public interest.

After the prime minister's department rejected a Fol request for minutes of national cabinet meetings explaining its rules, independent senator Rex Patrick lodged a review to the OAIC arguing that it is not lawful to make the body a subcommittee of federal cabinet because it is "not constituted by members of government responsible to one parliament". "A cabinet (or a sub-committee of cabinet) is properly a single cabinet of ministers exercising collective responsibility, not a single minister (or prime minister)," he submitted.

Paul Karp, writing for The Guardian in August, wrote how Patrick warned that replacing CoAG with national cabinet long-term "creates a confidentiality span that is so broad it intrudes on rights" created by the Freedom of Information Act. Apparently courts had recognised cabinet but Patrick argued the convention "must be held to be unlawful," because it "interferes with the accountability of government that is the very essence of responsible government". Victoria's hotel quarantine inquiry which hasn't been able to get records of discussions that took place at a National Cabinet meeting where hotel quarantine arrangements were first put in place, being a case in point.

There are also two advisory bodies to National Cabinet offering assistance that are being withheld from journalistic scrutiny: the Australian Health Protection Principal Committee (a regular meeting of the Chief Medical Officer and his state counterparts), and the National COVID-19 Commission (a select group of business leaders advising on 'all non-health aspects of the pandemic response').

Danielle Wood and Kate Griffiths writing for Pearls and Irritations say "despite requests from the Senate inquiry into the Australian Government's COVID-19 response, conflict-of-interest declarations have not been made public."

Parliamentary secrecy leads to corruption, vested-interest influence, and poor decision-making. While a short period of reduced oversight may have enabled a more rapid executive response, the longer it continues, the less journalists are able to do their "dirty, vital work," as academic Margaret Simons puts it.

MEAA Chief executive Paul Murphy wrote in the 2019 press freedom report: "The public's right to know is a key tenant of a healthy, functioning democracy - and it is one of the responsibilities of open and transparent government. It's also a cornerstone principle of journalism."

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