



Law Council
OF AUSTRALIA

Review of the National Emergency Declaration Act 2020

Senate Legal and Constitutional Affairs Legislation Committee

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2021 Executive as at 1 January 2021 are:

- Dr Jacoba Brasch QC, President
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- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council acknowledges the contribution of the Victorian Bar and the Law Council's National Human Rights Committee and Constitutional Law Committee of its Federal Litigation and Dispute Resolution Section in the preparation of this submission.

Executive Summary

1. The Law Council of Australia welcomes the opportunity to provide this submission to the Senate Legal and Constitutional Affairs Legislation Committee (**Committee**) review of the *National Emergency Declaration Act 2020* (Cth) (**NED Act**).
2. The National Emergency Declaration Bill 2020 (**Originating Bill**) was introduced and passed in December 2020 to implement the Australian Government's response to the following recommendation of the Royal Commission into National Natural Disaster Arrangements (**Royal Commission**):

The Australian Government should make provision, in legislation, for a declaration of a state of national emergency. The declaration should include the following components:

- (1) *the ability for the Australian Government to make a public declaration to communicate the seriousness of a natural disaster,*
 - (2) *processes to mobilise and activate Australian Government agencies quickly to support states and territories to respond to and recover from a natural disaster, and*
 - (3) *the power to take action without a state or territory request for assistance in clearly defined and limited circumstances.*¹
3. The Law Council acknowledges the intent of the NED Act, and the underlying recommendation of the Royal Commission, to facilitate rapid and coordinated responses to emergencies of national significance—including natural disasters, as well as other hazards such as pandemics, terrorist attacks, or chemical, biological or radiological exposure incidents.
 4. The Law Council notes that the NED Act does not appear to fully implement the third component of the above recommendation, in that it does not purport to empower the Commonwealth to unilaterally assume the role of first responder, or to direct a State in managing an emergency occurring within that State's territorial jurisdiction. The Law Council considers it prudent to adopt a more cautious approach, given that there is a level of constitutional risk and uncertainty associated with legislation purporting to authorise such actions, especially in the absence of a referral of legislative power from the States to expressly support Commonwealth legislation of this kind.
 5. Although the NED Act has taken a more conservative approach than the corresponding Royal Commission recommendation, the powers it confers are nonetheless highly significant. In particular, it will enable the executive government to unilaterally suspend or modify the application of existing requirements of numerous Commonwealth laws while a statutory national emergency declaration is in force. The delegation of such legislative powers to the executive raises a fundamental tension with the rule of law, which requires the content of the law to be clear, certain and stable in that it is capable of change only via the explicit approval of the Parliament, to which the executive arm of government is accountable.

¹ Royal Commission into National Natural Disaster Arrangements, *Final Report*, (October 2020), recommendation 5.1. See also the supporting commentary at 140-149 at [5.22]-[5.72].

6. Accordingly, the Law Council is concerned to ensure that rigorous statutory safeguards are applied to the powers conferred by the NED Act, so that they can only be lawfully exercised where it is strictly necessary and proportionate to an emergency of national significance.
7. The Law Council notes that some valuable amendments were made to the Originating Bill during its Parliamentary debate, which improved safeguards around the proportionate exercise of the new powers. These measures strengthened aspects of the thresholds for the variation of emergency declarations;² limited the range of Commonwealth legislation that can be disapplied or varied by a Ministerial determination while a national emergency declaration is in force;³ and provided mechanisms for Parliamentary oversight. This was in the form of provisions requiring the Committee to retrospectively review the making of individual declarations of national emergencies, to conduct the present review of the provisions of the NED Act, and to review its operation after a period of five years.⁴
8. Despite these improvements, the Law Council considers that several aspects of the thresholds for making emergency declarations, and exercising delegated legislative powers in reliance on those declarations, are disproportionately low. This is principally because key concepts in the issuing criteria for national emergency declarations are undefined, and several important matters are left wholly or substantially to unguided executive discretion in individual cases.
9. Accordingly, the Law Council recommends 11 key amendments to the NED Act, which cover the following matters:

Making national emergency declarations (Parts 1 and 2)

- consideration should be given to inserting inclusive statutory definitions of the terms ‘emergency’ and ‘Commonwealth interest’ for the purpose of the declaration-making power in section 11;⁵
- the power in paragraph 11(3)(b), which enables the Prime Minister to bypass consultation with the governments of affected States and Territories on a proposed national emergency declaration, should be limited further. The current requirement that the Prime Minister need only consider that consultation would not be practicable should be replaced with a requirement for the Prime Minister to be satisfied, on reasonable grounds, that because of exceptional circumstances which are beyond the control of the Commonwealth, the time needed to consult with the relevant States or Territories on a proposed national emergency declaration would frustrate the effectiveness of such a declaration;
- the Prime Minister should be subject to explicit statutory obligations in section 14, in relation to advising the Governor-General to revoke a national emergency declaration (noting that the provision as presently drafted confers a broad discretion on the Prime Minister to advise the Governor-General to revoke a declaration, if the Prime Minister considers it appropriate). Namely:

² Bill, subsections 13(1)-(1B).

³ Ibid, subsection 15(8).

⁴ Ibid, section 14A.

⁵ See further, Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest* 3/21 (February 2021), 34-35 at [2.64]-[2.69].

- the Prime Minister should be obliged to periodically review and reassess whether the grounds for the issuance of a national emergency declaration remain in force, at prescribed intervals after the declaration is issued (indicatively, every 14 days); and
- if the Prime Minister becomes aware of information suggesting that there are reasonable grounds on which to be satisfied that the issuing grounds for a declaration are no longer met, they must:
 - inform the Governor-General as soon as possible after becoming aware of that information; and
 - take all reasonable steps to ensure that action taken by the Commonwealth in reliance on that declaration is ceased, pending its formal revocation by the Governor-General.

Ministerial determinations to disapply or modify certain legislation (Part 3)

- the delegated legislative power in subsection 15(2), which is exercisable when a national emergency declaration is in force, should be subject to stronger pre-conditions to its exercise, which replace those currently in subsection 15(4). Namely, the Minister administering a Commonwealth Act should only be permitted to make a declaration suspending or modifying certain provisions of that Act if they are satisfied, on reasonable grounds, that:
 - the making of the Ministerial determination would be a reasonable, necessary and proportionate response to the relevant emergency specified in a national emergency declaration that is in force; and
 - the balance of public interest considerations tend in favour of making the Ministerial determination. (That is, the anticipated benefit of the determination to the public, or a section of the public, must be assessed as outweighing any reasonably foreseeable detriment to any person or group, or other public interests);⁶
- the responsible Minister should be subject to a statutory obligation under subsection 15(6) to revoke a Ministerial determination, as soon as possible, if they form the view that the relevant issuing criteria are no longer met;
- the list of Commonwealth Acts in subsection 15(8) which are exempt from the Ministerial determination power should be expanded, so that there is a comprehensive exemption for all Acts conferring functions and powers on Commonwealth oversight and integrity bodies; freedom of information and archives laws; and statutory reporting or notification obligations concerning the exercise of intrusive powers (especially under national security legislation);
- the Committee's function in section 14A to retrospectively review each national emergency declaration made under section 11 should be amended to explicitly cover the review of all Ministerial determinations made under subsection 15(2) in reliance on the relevant national emergency declaration;

⁶ See further, Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 3/21* (February 2021), 38-39 at [2.78]-[2.79].

Prime Minister's information-gathering powers (section 16)

- the Prime Minister's notice-based information-gathering powers in relation to Commonwealth entities in section 16 should be subject to the following, additional parameters:
 - there should be a prohibition on compelling information from an oversight or integrity agency, or an authorised officer under the *Public Interest Disclosure Act 2013* (Cth) (**PID Act**), which was obtained in the performance of their oversight or PID Act-related functions; and
 - there should be specific statutory protections for personal information compelled under section 16, noting that subsection 16(5) purports to override the *Privacy Act 1988* (Cth) (**Privacy Act**). This includes limitations on secondary use and disclosures, and destruction once a national emergency declaration ceases to be in force;

Reporting requirements for national emergency declarations (section 17)

- section 17 should prescribe statutory maximum timeframes for the preparation and Parliamentary tabling of reports on national emergency declarations. Namely, the reports must be prepared as soon as practicable and no later than 14 calendar days after the relevant national emergency declaration ceases to be in force. Those reports should be tabled in Parliament within 14 calendar days of preparation and provision to the Attorney-General. If the 14th calendar day falls on a day on which Parliament is not sitting the Attorney-General should be obliged to table them out-of-sitting, in accordance with the applicable procedures of each chamber;⁷ and

Parliamentary reviews of the operation of the NED Act (section 18)

- provision should be made for the Committee to conduct periodic reviews of the operation of the NED Act every three years (equivalent to once during the life of each Parliament) after completing the 'one-off' five-year review that is presently required to be conducted under paragraph 18(b).

National emergency declarations

10. Part 2 of the NED Act creates a framework for the Governor-General to make a national emergency declaration, on the recommendation of the Prime Minister. A national emergency declaration is a legislative instrument, but is not subject to Parliamentary disallowance.⁸ It may be in force for up to 3 months,⁹ but can be extended in periods of up to three months, for an unlimited number of times.¹⁰
11. The legal significance of a national emergency declaration is two-fold. First, it enables the exercise of the Ministerial determination power in section 15 of the NED Act. As discussed below, this power enables any Commonwealth Minister administering an Act to make a legislative instrument (a 'determination'), which disapplies or modifies the application of certain provisions of that Act, for the duration of the relevant national emergency declaration.

⁷ See further, *ibid*, 40 at [2.83]-[2.84].

⁸ NED Act, subsection 11(6).

⁹ *Ibid*, subsection 11(5).

¹⁰ *Ibid*, subsection 12(4).

12. Secondly, the making of a national emergency declaration triggers an ability for Commonwealth officers to exercise various emergency powers under a range of existing Commonwealth Acts (which are defined in section 10 of the NED Act as ‘national emergency laws’) on the basis of a lower threshold than what is presently prescribed in those existing Acts. This includes, for example, powers to authorise or require the following things in emergencies:
- modifying the application of the Privacy Act, governing the disclosure of personal information;
 - granting exemptions from certain environmental impact assessment and approval requirements under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth);
 - exempting aircraft from airport curfews;
 - requiring airports to give access to their services for the management of an emergency or disaster;
 - permitting access to and the disclosure of information stored on DNA databases, enabling the collection, use or disclosure of personal information in certain circumstances; and
 - prohibiting or regulating the use of radiocommunication transmitters.

Making of a National Emergency Declaration

13. Part 1 of the NED Act gives the Governor-General powers to make,¹¹ extend¹² or vary¹³ a declaration, if the Prime Minister is satisfied that the relevant thresholds and other administrative requirements in subsection 11(1) are met. This approach appears to proceed on the assumption of the constitutional convention that the Governor-General will exercise their power on the advice of the Prime Minister.¹⁴
14. In essence, subsection 11(1) of the NED Act provides that a declaration cannot be made unless the Prime Minister is satisfied that an emergency has occurred recently, or is occurring, and has caused ‘nationally significant harm’, or is doing so, or is likely to do so.¹⁵ The Prime Minister must also be satisfied that, ‘for reasons relating to emergency management, it is desirable for the declaration to be made for the purposes of one or more national emergency laws’.¹⁶
15. The term ‘nationally significant harm’ is defined in section 10 as harm that:
- (a) *has a significant national impact because of its scale or consequences; and*
 - (b) *is any of the following:*
 - (i) *harm to the life or health (including mental health) of an individual or group of individuals;*
 - (ii) *harm to the life or health of animals or plants;*

¹¹ Ibid, subsection 11(1).

¹² Ibid, subsection 12(1).

¹³ Ibid, subsection 13(1).

¹⁴ See further: Office of Parliamentary Counsel, *Drafting Direction 3.4: Conferral and Exercise of Powers (including by Governor-General)*, (October 2012), 2-3 at [1]-[9].

¹⁵ Bill, paragraphs 11(1)(a) and (b).

¹⁶ Ibid, paragraph 11(1)(d).

- (iii) *damage to property, including infrastructure;*
- (iv) *harm to the environment;*
- (v) *disruption to an essential service.*

16. Generally, a State or Territory government must have requested the making or variation of a national emergency declaration, unless such a request is not practicable because of the emergency.¹⁷ However, national emergency declarations can be made without a request from one or more States or Territories, if the Prime Minister considers that the relevant emergency has affected, is affecting, or is likely to affect, 'Commonwealth interests'; or if the making of the declaration is otherwise 'appropriate' having regard to 'the nature of the emergency, and the nature and severity of the nationally significant harm'.¹⁸
17. Section 11 of the NED Act establishes a general requirement that the Prime Minister must consult with the States and Territories on a proposed national emergency declaration. However, this requirement may be dispensed with if the Prime Minister is satisfied that such consultation is not practicable in the circumstances of a particular proposed declaration.¹⁹
18. National emergency declarations are subject to a maximum duration of three months, subject to unlimited extensions in three-month increments (or the issuing of a new declaration in the same terms as an expired declaration).²⁰

Undefined key terms—'emergency' and 'Commonwealth interests'

19. The Law Council concurs with the concerns identified by the Senate Scrutiny of Bills Committee, in relation to the fact that two key terms used in section 11 are undefined, being an 'emergency' and 'Commonwealth interests'. The Senate Scrutiny of Bills Committee identified these provisions as instances of an overly broad discretionary power to make national emergency declarations. It suggested that further efforts could be made to provide guidance about the meaning of these terms on the face of the NED Act, so as to improve clarity and certainty to the extent possible, while retaining an adequate degree of flexibility.²¹
20. The Law Council supports the objectives outlined by the Senate Scrutiny of Bills Committee, and further notes the comments of that Committee, which indicated that it did not receive a substantive response from the Attorney-General to its suggestion that the (then) Originating Bill could adopt inclusive, rather than exhaustive, definitions of these terms.²²
21. As an illustration of the potential for vagueness and subjectivity in the interpretation of an 'emergency' or whether a matter affects 'Commonwealth interests', the Law Council further notes remarks of several members of the High Court in previous decisions on the scope of the executive power of the Commonwealth under

¹⁷ Ibid, subparagraph 11(1)(c)(i)-(ii).

¹⁸ Ibid, subparagraph 11(1)(iii)-(iv).

¹⁹ Ibid, subsections 11(2) and (3).

²⁰ Ibid, subsection 11(5) and section 12.

²¹ See further, Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 3/21* (February 2021), 34-35 at [2.64]-[2.69].

²² Ibid, 35 at [2.67].

Chapter II of the *Constitution*, in connection with circumstances of national emergency or crisis.

22. For example, in *Pape v Commissioner Taxation* (2009) 238 CLR 1, which concerned the constitutional power of the Commonwealth to make economic stimulus payments in response to the global financial crisis, Heydon, Hayne and Kiefel JJ observed that, for constitutional purposes, the concept of a national ‘emergency’ was imprecise. They noted that there were obvious dangers in leaving its interpretation wholly or substantially to the executive government (as this would enable a government to effectively recite itself into constitutional power). However, they also acknowledged that certain dangers may arise if it were left solely to the courts to give meaning to the term (including because the relevant evidence would likely be limited to opinions of the executive government).²³
23. While these remarks were made in the context of constitutional interpretation, the Law Council considers that, in a more general sense, they also underscore the inherent uncertainty in the meaning of the term ‘emergency’, and the risks in leaving that term wholly undefined in any legal context. This lends further support to the Parliament playing a stronger role in attempting to create legislative clarity, by defining the term ‘emergency’ (and related concepts) for the purpose of the NED Act, at least on an inclusive or illustrative basis.

Recommendation 1—inclusive statutory definitions of key terms

- **Consistent with the views of the Senate Scrutiny of Bills Committee, consideration should be given to adopting inclusive statutory definitions of the expressions ‘emergency’ and ‘Commonwealth interests’ for the purpose of the NED Act.**

Revocation obligations

24. Subsection 14(1) provides that the Governor-General ‘may, in writing, revoke a national emergency declaration if the Prime Minister is satisfied that, in all the circumstances, it is appropriate to do so’.
25. The Law Council notes that the discretionary word ‘may’ in this provision is likely to be interpreted in the context of the constitutional convention that the Governor-General normally acts on advice from the Prime Minister. Subsection 14(1) may therefore effectively operate as an obligation, rather than a discretion, to revoke a national emergency declaration. In practical terms, this would appear to avert the risk that a national emergency declaration could be kept in force contrary to the advice of the Prime Minister that it is no longer necessary or appropriate.
26. However, the Law Council is concerned about overbreadth in the discretion conferred on the Prime Minister in deciding whether to advise the Governor-General to revoke a national emergency declaration. The sole statutory criterion in subsection 14(1) is the Prime Minister’s satisfaction that revocation would be ‘appropriate’ in the circumstances.
27. The Law Council considers that the scope of this discretion is disproportionately broad to the significant powers that are enlivened under Parts 3 and 4 of the NED Act while a national emergency declaration is in force. Those powers may have

²³ *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 193 at [551]–[552] (Heydon J); and 122–3 [352]–[353] (Hayne and Kiefel JJ).

the potential to cause significant intrusions to personal privacy, and potentially adversely affect other interests of individuals or sections of the public.

28. The Law Council therefore considers that the Prime Minister's discretionary power to recommend the revocation of a national emergency declaration should explicitly require an assessment of whether the requirements for the making of a declaration in subsection 11(1) are still met. If the Prime Minister forms the view that these requirements are no longer met, they should be obliged to advise the Governor-General of this view, and to take all reasonable steps to ensure that the exercise of Commonwealth powers under, or in connection with, a national emergency declaration are ceased, pending the Governor-General's revocation of that declaration. (For example, the Prime Minister could direct Commonwealth Ministers not to issue any further section 15 determinations to modify or suspend the application of particular Acts.)
29. Further, to ensure that there are transparent requirements for the Prime Minister to regularly review whether the requirements for the making of a declaration are still met, the Law Council recommends that section 14 should impose a specific statutory obligation on the Prime Minister to consider this matter at specified intervals while the declaration remains in force (indicatively, every 14 days).

Recommendation 2—revocation of national emergency declarations

- **Section 14 of the NED Act should be amended to provide that:**
 - **the Prime Minister must periodically review and reassess whether the grounds for the issuance of a national emergency declaration remain in force, at prescribed intervals (indicatively, every 14 days); and**
 - **if the Prime Minister becomes aware of information suggesting that there are reasonable grounds on which to be satisfied that the issuing grounds for a declaration are no longer met, they must:**
 - **inform the Governor-General as soon as possible after becoming aware of that information; and**
 - **take all reasonable steps to ensure that action taken by the Commonwealth in reliance on that declaration is ceased, pending its formal revocation by the Governor-General.**

Requirement to consult States and Territories on a proposed declaration

30. As noted above, the Prime Minister must consult with the Government of each State or Territory (if any) in which they are satisfied the emergency has caused the relevant 'nationally significant harm', before the Governor-General can make a national emergency declaration.²⁴ However, this requirement does not apply if the Prime Minister is satisfied that it is not practicable to consult with the relevant State or Territory Governments.²⁵ (Subsections 12(3) and 13(1B) make similar provision in relation to the extension and variation of a declaration.)
31. As the States have primary responsibility as 'first responders' to disasters and other emergencies occurring within their territorial jurisdiction, it is important that

²⁴ *National Emergency Declaration Act 2020* (Cth), subsection 11(2).

²⁵ *Ibid*, subsection 11(3)(b).

there is a legally mandated requirement for consultation on any proposal to designate a particular emergency in a State's territorial jurisdiction as one that is nationally significant, which merits Commonwealth involvement in the form of exercising the powers in Parts 3 and 4 of the NED Act. Requirements to engage in consultation are important not only in terms of adherence to the constitutional division of responsibilities between the Commonwealth and the States, but also on the practical basis of maintaining effective Federal-State cooperation.

32. The Law Council is concerned that the exception to the consultation requirement is capable of being invoked on the basis of a low threshold, which does not accurately reflect the importance of that consultation. The Law Council considers that there should be stronger statutory parameters on the ability to dispense with consultation, so that it is only available in very limited circumstances.
33. In particular, there should be a requirement for the Prime Minister to be satisfied, on reasonable grounds, that time required for consultation would frustrate the effectiveness of the proposed national emergency declaration (in relation to the ability of the Commonwealth to exercise powers under Part 3 or 4 of the NED Act, or separate powers under a Commonwealth Act specified in section 10 as a 'national emergency law').²⁶
34. A requirement of this kind would make it abundantly clear that mere inconvenience or minor delay is not a basis for avoiding the consultation obligation. Rather, the Prime Minister would need to form a view that the time needed for consultation would neutralise the desired benefit or utility in making the intended declaration.
35. Moreover, the Law Council considers that there should be a further statutory safeguard against any risk that administrative delay or inefficiency by the Commonwealth in making consultation requests to the States could be used as a basis for determining that the time needed to conduct those consultations would frustrate the effectiveness of a proposed national emergency declaration.
36. This should take the form of a statutory requirement that the Prime Minister must be satisfied, on reasonable grounds, *that because of exceptional circumstances beyond the control of the Commonwealth*, the time required to consult with States or Territories on a proposed declaration would frustrate its effectiveness.

Recommendation 3—strengthened consultation requirements

- **Subsections 11(3), 12(3) and 13(1B) of the NED Act should be amended to provide that the Prime Minister is only authorised to dispense with the requirement to consult with States and Territories on a proposed national emergency declaration, if satisfied, on reasonable grounds, that, because of exceptional circumstances beyond the control of the Commonwealth, the time needed to conduct those consultations would frustrate the effectiveness of the declaration.**

²⁶ Schedule 1 to the *National Emergency Declaration (Consequential Amendments) Act 2020* (Cth) amended provisions of each Commonwealth Act specified in the definition of a 'national emergency law' in section 10 of the NED Act. These amendments lowered existing thresholds for the exercise of emergency powers under those Acts, where a national emergency declaration is in force under section 11 of the NED Act.

Exemption from Parliamentary disallowance

Policy justification for the exemption

37. Subsection 11(6) of the NED Act provides that, while a national emergency declaration is a legislative instrument, it is not subject to the usual power of Parliamentary disallowance under section 42 of the *Legislation Act 2003* (Cth) (**Legislation Act**).
38. The Explanatory Memorandum to the Originating Bill argued that exposing national emergency declarations to potential disallowance may frustrate the judgment of the executive government about the severity of the relevant emergency incident, and create practical uncertainty in preparatory, response and recovery operations:

*A core objective of the declaration is to clearly signal to the Australian community the severity of the emergency event, and provide certainty about the Commonwealth's role, and the statutory powers that are available, in respect of a particular emergency event. This objective would be undermined if such a declaration were disallowable, as the prospect of disallowance is likely to call into question the status of the emergency event.*²⁷

39. This statement appears to impliedly reveal a policy view that the judgment of the executive government should prevail over that of the Parliament, in relation to an assessment that a nationally significant emergency exists; and the appropriate nature and extent of Commonwealth involvement in responding to that emergency, insofar as the powers in Parts 3 and 4 of the NED Act and other 'national emergency laws' prescribed in section 10 are concerned. The Law Council notes that this position is contestable. As noted below, two Senate legislative scrutiny committees have taken different views.

Views of Senate Legislative Scrutiny Committees

40. In contrast to the above policy justification offered for the exemption, in December 2020, the Senate Standing Committee for the Scrutiny of Delegated Legislation (**SSCSDL**) expressed the following, opposing view, in the context of raising concern about the volume of legislative instruments being exempt from Parliamentary disallowance during the COVID-19 pandemic:

*delegated legislation made during emergencies must be subject to parliamentary oversight with minimal exceptions. This approach ensures respect for Parliament's constitutional role as the primary institution responsible for making law and scrutinising possible encroachments on personal rights and liberties.*²⁸

41. The Senate Scrutiny of Bills Committee also expressed similar concerns about the non-disallowable status of national emergency declarations, emphasising that delegations of significant legislative powers, such as those in Part 3 of the NED Act, should be subject to Parliamentary oversight, with very limited exceptions. That Committee reported that the justification provided for exempting national

²⁷ Explanatory Memorandum, 16-17.

²⁸ See SSCSDL, *Interim Report: Exemption of Delegated Legislation from Parliamentary Oversight* (December 2020), xiii.

emergency declarations from Parliamentary disallowance, as noted above, did not assuage its concerns.²⁹

Law Council views

The importance of Parliamentary supremacy

42. The Law Council supports the position of both of these Senate Committees, and recommends that national emergency declarations should be made subject to Parliamentary disallowance. The Law Council considers it is important that the NED Act gives propriety to the doctrine of Parliamentary supremacy in relation to the making of national emergency declarations, via the disallowance power. This reflects the following factors:
- the protracted length of time that declarations may be in force (including as a result of unlimited extensions in three-month increments, or multiple consecutive declarations being made in respect of the same incident); and
 - the broad subject matter capable of constituting an ‘emergency’ (consistent with the ‘all-hazards approach’ taken in the NED Act, which does not prescribe particular types of incidents, such as natural disasters).
43. Further, Parliamentary supremacy, in the form of a disallowance power in relation to the judgment of the executive government in making national emergency declarations, would be compatible with the traditional role of the Senate as the “States’ house”. That is, a Parliamentary disallowance power would give Senators for those States which are affected by the relevant emergency a meaningful opportunity to represent and advocate for the interests of their constituents in those States about the following matters:
- the assessment by the Commonwealth executive government that the relevant event, as it affects that State, meets the requisite threshold of severity to be designated as an ‘emergency’ under section 11 of the NED Act; and
 - the appropriateness of the following legal and practical effects of the making of the national emergency declaration:
 - enlivenment of the statutory powers in Parts 3 and 4 of the NED Act, and under the Commonwealth Acts specified in section 10 as ‘national emergency laws’, in relation to that emergency, as it affects people, property and other interests in that State; and
 - potentially providing an indirect and normative ‘imprimatur’ or ‘incentive’ for the Commonwealth to take non-statutory executive action in response to the emergency event, as it affects that State. (This includes the possibility that the existence of a national emergency declaration may give the Commonwealth a sense of assurance that it would be appropriate to take such action on a unilateral basis.)

Suggestion that a Parliamentary disallowance power is unnecessary

44. The Law Council emphasises that it is no answer to suggest that a disallowance power in relation to national emergency declarations is unnecessary, because of the retrospective review functions conferred on the Committee under section 14A of the NED Act (in relation to individual declarations) and section 18 (in relation to the

²⁹ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest* 3/21, (February 2021), 37 at [2.74].

operation of the NED Act).³⁰ While retrospective Parliamentary review provides a valuable mechanism to facilitate the continuous improvement of legislation, and to learn lessons from past executive action taken under that legislation, it serves an entirely separate purpose to the exertion of Parliamentary control over the exercise of delegated legislative power, in the form of a power of disallowance.

45. In particular, the effect of Parliamentary disallowance of a legislative instrument is to apply a legal limitation to the exercise of executive power, as an instrument that has been disallowed ceases to be in force from the time of its disallowance.
46. In contrast, a retrospective Parliamentary review function serves only to provide an advisory opinion about a decision to make a national emergency declaration, after it has ceased to be in force and all relevant actions taken in reliance on that declaration have been carried out. The executive government has sole discretion about whether to accept (and, if so, how to implement) any recommendations for executive action, such as taking a different approach to the making of future national emergency declarations.
47. Additionally, the need for a power of disallowance in relation to a national emergency declaration is in no way diminished by the disallowable nature of individual Ministerial determinations made under section 15 of the NED Act, in reliance on a national emergency declaration. The task of scrutinising individual Ministerial determinations to authorise the suspension or modification of specific statutory requirements may involve very different considerations, as compared to the task of assessing whether a particular incident should be deemed an emergency of national significance for the purpose of section 11 (and thereby enliven the powers, or incentivise other non-statutory action, as noted above).

Suggestion that a Parliamentary disallowance power would be counter-productive

48. The Law Council notes that the Attorney-General raised a number of concerns about the practical effects of exercising a Parliamentary disallowance power in relation to a national emergency declaration, in a letter to the Senate Scrutiny of Bills Committee dated 25 January 2021.
49. While the Law Council acknowledges these concerns, it does not follow that they justify an exemption from disallowance. As explained below, they are capable of effective practical management in the course of making individual declarations, and, as such, do not outweigh the interest in departing from the fundamental democratic notion of Parliamentary supremacy.
50. Specifically, the Attorney-General's correspondence indicated that:
 - the Parliamentary disallowance of a national emergency declaration may mislead or confuse members of the public into believing that the specified emergency no longer exists; and
 - as national emergency declarations commence upon their registration on the Federal Register of Legislation, any subsequent Parliamentary disallowance may have adverse flow-on effects for persons who are reliant on modifications to Commonwealth laws that have been implemented pursuant to that declaration, via the making of a Ministerial determination under Part 3 of the

³⁰ This was one of the reasons provided by the Attorney-General to the Senate Scrutiny of Bills Committee, in support of the exemption from disallowance. See: Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 3/21*, (February 2021), 36 at [2.71] (reproducing correspondence from the Attorney-General of 25 January 2021).

NED Act in relation to the specified emergency. (For example, streamlined processes for applying for Commonwealth financial assistance may no longer be available. This may also result in arbitrariness or inequity, in that people who applied for assistance prior to disallowance would have the benefit of the streamlined process, whereas people experiencing the same hardship who applied for the same assistance after disallowance could not access the streamlined application process.)³¹

Risk of public confusion or misinformation

51. The Law Council considers that risks of public misunderstanding about the nature and effects of national emergency declarations are capable of management in practice, including effective public communication strategies by the Government. It may also be mitigated by the fact that States and Territories can make various declarations of states of emergency under their own emergency management legislation (which have specific effects in relation to matters within their legislative and operational responsibilities, including as first responders). Moreover, depending on the nature of the event comprising the emergency, there may also be Commonwealth emergency declarations in force under separate legislation, such as the *Biosecurity Act 2015* (Cth) in relation to human health risks (as is the case with the COVID-19 pandemic).
52. The legal significance of making a national emergency declaration under section 11 of the NED Act is principally the enlivenment of the delegated legislative powers under Parts 3 and 4 of the NED Act, and the powers in the individual Commonwealth Acts specified in the definition of a 'national emergency law' in section 10 of the NED Act. This is the matter that the Parliament would be assessing when considering whether to exercise its powers of disallowance.
53. The Law Council submits that the mere existence of the (manageable) risk that disallowance may confuse some members of the public about the severity of the emergency event should not be taken to outweigh the importance of the Parliament being the final arbiter as to whether the significant powers under the NED Act or Acts designated as 'national emergency laws' should be enlivened in particular circumstances.

Adverse effects on individuals who are reliant on Ministerial determinations

54. The Law Council acknowledges the theoretical possibility that the adverse impacts noted in the Attorney-General's letter (summarised above) could arise, if the Parliament disallowed a national emergency declaration.
55. It also acknowledges the theoretical possibility that these risks may be exacerbated if the Parliament is adjourned for a prolonged period of time when the national emergency declaration is made, including due to the emergency event specified in the declaration. This is because section 12 of the Legislation Act provides that a declaration will (unless its terms specify otherwise) commence the day after it is registered. However, section 42 of the Legislation Act provides that the Parliamentary disallowance period for the declaration is 15 sitting days after the declaration has been tabled in Parliament (which is required under section 38 of the Legislation Act to occur within six sitting days of the declaration being registered). Consequently, the disallowance period may not commence until the

³¹ Reproduced in: Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest* 3/21, (February 2021), 35-36 at [2.71].

national emergency declaration has been in force for a substantial period of time (in the nature of months, including with extensions).

56. The passage of substantial time between the commencement of a declaration and the disallowance period may elevate the risk that individuals, groups and governments affected by the relevant emergency may have organised their affairs on the basis of action taken by the Commonwealth under the declaration (such as the modification of Commonwealth legislative requirements via Ministerial determination). Accordingly, latent disallowance may generate cost and uncertainty.
57. However, the Law Council considers that these potential risks need to be considered in the context of their low likelihood of occurrence given the low rates of Parliamentary disallowance of legislative instruments,³² and the self-help remedies available to the Commonwealth to avoid them.
58. Most significantly, there would be nothing to prevent the executive government from conducting consultations with Parliamentarians on a proposed national emergency declaration, before it has made (including consultation or briefing about the incident, and the types of Commonwealth involvement which are contemplated would be carried out in reliance on that declaration). Such early engagement could enable potential areas of concern to be identified and addressed outside the disallowance process.
59. While it is conceivable that national emergency declarations may be made in time critical circumstances, the Law Council suggests that this circumstance would not be prohibitive to effective prior consultation. In particular, it is almost certain that the Parliamentary representatives of affected electorates will have the welfare of their constituents as their highest priority during the emergency event, and would be closely involved in supporting and advocating for their constituents' needs and interests. This tends to suggest that Parliamentarians would give a very high level of priority to any consultation requests in relation to a proposed national emergency declaration, which could improve the governmental support available to their constituents. It also suggests the political consequences of disallowing a national emergency declaration may create a strong incentive for an even more cautious and judicious exercise of the disallowance power in this contest.
60. Further, if concerns remain about the potential impacts of any latent Parliamentary disallowance of a national emergency declaration, it would also be possible to amend the NED Act to provide for a shorter Parliamentary disallowance period than the 15 sitting day period prescribed in section 42 of the Legislation Act.
61. This would still preserve an opportunity for disallowance (consistent with the importance of Parliamentary supremacy in the context of an instrument that enlivens significant delegations of legislative power) but would reduce the length of time available for its exercise (in recognition of the interests in certainty for affected individuals).

Recommendation 4—disallowance of national emergency declarations

- **Subsection 11(6) of the NED Act should be repealed, so that national emergency declarations made under subsection 11(1) are subject to Parliamentary disallowance.**

³² As acknowledged in the Attorney-General's letter to the Senate Scrutiny of Bills Committee, *ibid* at 36.

- **The Committee may also wish to consider whether the NED Act could be further amended to prescribe a shorter Parliamentary disallowance period for national emergency declarations than the 15-sitting day timeframe in section 42 of the Legislation Act.**

Ministerial power to modify administrative requirements during a national emergency

62. Part 3 of the NED Act delegates further legislative powers to the executive government, which are exercisable when a national emergency declaration made under section 11 is in force. Specifically, subsection 15(2) empowers a Commonwealth Minister to make a disallowable legislative instrument, in the form of a written determination, which has the effect of disapplying or modifying certain provisions of Acts which they administer, while the national emergency declaration is in force.
63. This Ministerial determination power is exercisable only in relation to provisions of the kind specified in subsection 15(1), which relate primarily to matters of information disclosure and management, namely:
- requirements to provide information in written form, pursuant to a statutory disclosure obligation;
 - requirements for the signature, witnessing, verification and attestation of documents;
 - powers and functions relating to the gathering and handling of documents including the production, making records and retention of documents; and
 - requirements for the reporting or notification of a matter to a Commonwealth Department, agency or authority.

Statutory conditions for making Ministerial determinations

64. Subsection 15(4) of the NED Act imposes conditions for the exercise of the Ministerial determination power. Paragraph 15(4)(a) requires the relevant responsible Minister for the Act in question to be satisfied that the proposed determination is in response to the emergency that is specified in the national emergency declaration made under section 11. Paragraph 15(4)(b) requires the Minister to be satisfied that the proposed the Ministerial determination will be of benefit to the public, or a section of the public.
65. In principle, the Law Council supports the imposition of statutory conditions on the making of Ministerial determinations, which are directed to matters of relevance and proportionality. However, it considers that the precise thresholds in subsection 15(4) are disproportionately low to the gravity of the Ministerial determination power. In particular:
- paragraph 15(4)(a) would allow a Ministerial determination to be made in circumstances that are only *indirectly* related to the emergency that is specified in the national emergency declaration. (That is, the Ministerial declaration-making power covers ‘circumstances relating to the emergency’, which goes further than a *direct* response to the incident comprising the emergency. It could potentially be open to interpretation as covering circumstances that have only a remote link to the emergency); and

- paragraph 15(4)(b) only requires the relevant responsible Minister for the Act in question to be satisfied that the making of the determination would return *any* degree of benefit to the public, or a section thereof. There is no statutory requirement for the Minister to be satisfied that the modification or suspension of requirements in the relevant Act is:
 - reasonably necessary for the purpose of responding to the relevant emergency specified in the national emergency declaration; and
 - proportionate to that purpose. For example, there is no statutory requirement for the Minister to:
 - consider the availability and effectiveness of potential alternatives that do not require the exercise of the power; and
 - balance competing interests, in the sense of considering the potential detriment that may accrue to other persons or wider public interests, and weighing the anticipated benefit of making the declaration against the anticipated detriment. (A statutory condition along these lines would only permit the Minister to make a determination if satisfied, on reasonable grounds, that the perceived benefits outweigh the foreseeable detriment.)
66. The Law Council recommends that subsection 15(4) is amended to incorporate the above matters, which are critical to ensuring that the Ministerial determination power can only be exercised where this is necessary for, and proportionate to, the purpose of responding to an emergency specified in a declaration.
67. As noted above, the conferral of a broad power on the executive government to modify the requirements of primary legislation is an extraordinary power with significant ramifications for individuals, businesses and governmental operations. That power is subject only to limited Parliamentary control, in the form of a power to disallow individual Ministerial determinations. This makes it important that the provisions of the NED Act which delegate the Ministerial determination power contain strong, precise and clear safeguards.
68. This approach to setting the scope of the delegated power would offer a considerably stronger protection against the risk of overbreadth, impropriety or other unintended consequences in its exercise. It would also help to facilitate consistent best practice in the exercise of delegated legislative powers, by providing clear, consistent and accessible guidance to Ministers on the relevant legal pre-conditions to exercising the determination power. More broadly, the insertion of explicit statutory criteria directed to matters of necessity and proportionality would provide a tangible assurance to the Parliament and the public about the proper exercise of these significant powers.
69. Such clarity, certainty and assurance is particularly important given that the Ministerial determination power is capable of being exercised by *all* Ministers who are appointed to a particular portfolio, not merely the senior Minister for that portfolio. Subsection 15(9) of the NED Act provides that a 'responsible Minister' for the purpose of the determination power in subsection 15(2) is *any* of the Ministers administering the Act in question, thereby covering both senior Ministers and junior Ministers (referred to variously as Assistant Ministers and Parliamentary Secretaries) who have been appointed to the relevant portfolio which is identified in the Administrative Arrangements Order as having responsibility for that Act.

70. The apparent result is that it would be lawful for any junior portfolio Ministers to exercise the declaration-making power, even if the senior portfolio Minister was available to do so. It is conceivable that junior Ministers may not have substantial experience in exercising delegated legislative powers as significant as the Ministerial determination power in subsection 15(2). This tends strongly in favour of amending subsection 15(4) to include the Law Council's recommended statutory conditions for making these determinations.
71. Separately, the Committee may also wish to consider whether subsection 15(9) should be amended, so that the power to make determinations under section 15 is limited to the senior portfolio Minister (including an acting senior portfolio Minister) rather than any or all junior Ministers.

Recommendation 5—criteria for making Ministerial determinations

- **Subsection 15(4) of the NED Act should be amended so that the Ministerial determination power can only be exercised if:**
 - **the proposed determination covers circumstances that directly relate to an emergency that is the subject of an 'in-force' national emergency declaration made under section 11;**
 - **the relevant Minister is satisfied, on reasonable grounds, that the determination is necessary for, and proportionate to, the purpose of responding to the emergency specified in the declaration; and**
 - **in assessing the proportionality of the proposed determination, the Minister must be satisfied that the determination would confer a benefit on the public or a section thereof; and that this benefit outweighs the detriment that may accrue to another person, section of the public, or public interests more broadly.**
- **In any event, consideration should also be given to amending subsection 15(9) of the NED Act, so that only the senior portfolio Minister may make a Ministerial determination.**

Revocation of Ministerial determinations

72. Subsection 15(6) of the NED Act confers a discretionary power of revocation on a Minister who has made a determination under subsection 15(2). The Law Council considers that there should be an obligation on the relevant responsible Minister to revoke a determination, notwithstanding that the underlying national emergency declaration remains in force.
73. In particular, the revocation obligation for Ministerial determinations should apply if the relevant Minister considers that the criteria for the making of the determination in subsection 15(4)—as amended in line with the Law Council's previous recommendation—are no longer satisfied. For example, the revocation obligation would arise if the Minister is satisfied that the determination is no longer beneficial to the public or a section thereof; or if the determination is causing, or is likely to cause, a degree of detriment to other persons that outweighs the perceived benefits.
74. A statutory revocation obligation is important to ensuring the proportionality of the extraordinary powers delegated to Commonwealth Ministers to disapply or modify

otherwise applicable legislative requirements. It will provide a much stronger safeguard against Ministerial determinations continuing in force for any longer than is reasonably necessary for, and proportionate to, the purpose of responding to the emergency that is the subject of the national emergency declaration. By extension, a statutory revocation obligation will also provide a strong incentive for the regular review of all Ministerial determinations, to consider whether they remain necessary.

Recommendation 6—statutory obligation to revoke declarations if issuing criteria no longer satisfied

- **Subsection 15(6) of the NED Act should be amended to require the Minister to revoke a determination, if the Minister is satisfied that the matters specified in subsection 15(4) (as amended pursuant to the Law Council’s recommendation 5) no longer exist.**

Legislation exempt from the Ministerial determination power

75. Subsection 15(8) of the NED Act prescribes a list of Commonwealth Acts which are exempt from the Ministerial determination power to vary or disapply provisions of legislation within their portfolio responsibility. The specified Acts appear to be a limited selection of particular oversight and accountability legislation, legislation governing Parliamentary proceedings, and legislation conferring intrusive powers on law enforcement and intelligence agencies. There is also a power to make regulations to specify further Acts as being exempt.
76. Importantly, several of the Acts listed in subsection 15(8) variously confer information-gathering powers on independent oversight bodies and Parliamentary committees. They also impose numerous requirements on intelligence and law enforcement agencies to make written applications for authorisations to exercise intrusive powers, and to notify relevant oversight bodies if certain extraordinary powers are exercised. The Law Council considers it important there is no risk that a Ministerial determination could be made to modify these requirements. In the absence of a statutory prohibition, this risk is credible, given that a security-related incident, such as an act of terrorism, is likely capable of constituting an ‘emergency’ for the purpose of a national emergency declaration.
77. The range of legislation covered by the exemption in subsection 15(8) was expanded as a result of Government amendments moved during the Parliamentary debate of the Originating Bill. While the Law Council welcomes the expansion of the exemption, it is concerned that subsection 15(8) is not comprehensive of the range of oversight and accountability legislation which merits exemption from modification or suspension via a Ministerial determination. The limited selection of Commonwealth Acts specified in subsection 15(8) could fairly be characterised as arbitrary.
78. While it would be possible for regulations to be made to specify further Acts as being subject to the exemption, this exacerbates rather than resolves the Law Council’s concerns about arbitrariness. This is because the exercise of the regulation-making power to specify further Acts is solely dependent on the exercise of executive discretion from time-to-time. Such regulations are also subject to unilateral repeal at the discretion of the executive government.
79. The Law Council is particularly concerned that the following legislation is not included in the exemption in subsection 15(8):

- key Commonwealth information-management laws, including the *Freedom of Information Act 1982* (Cth) and *Archives Act 1983* (Cth);
 - the PID Act;
 - the functions and powers of the Australian Information Commissioner under the *Australian Information Commissioner Act 2010* (Cth) and the Privacy Act;
 - the functions and powers of the Australian Human Rights Commission under the *Australian Human Rights Commission Act 1986* (Cth);
 - the functions and powers of the Independent National Security Legislation Monitor under the *Independent National Security Legislation Monitor Act 2010* (Cth); and
 - a range of legislation conferring intrusive powers of an extraordinary kind on law enforcement and intelligence agencies, which apply various notification requirements to relevant oversight and integrity bodies, and apply form requirements for requests and instruments of authorisation. These include:
 - powers under Divisions 104, 105 and 105A of the *Criminal Code Act 1995* (Cth) (control orders, preventative detention orders and post-sentence detention orders); and
 - powers under Part 15 of the *Telecommunications Act 1997* (Cth) (which can be used to compel communications providers to render certain assistance to security agencies to access digital content).
80. The Law Council recommends that subsection 15(8) should create a comprehensive exemption for all oversight and accountability legislation, rather than prescribing an incomplete selection of individual Acts, and leaving any omissions to be remedied via the exercise of executive discretion to make regulations (and refrain from unilaterally repealing them).
81. It would be contrary to the independence of Commonwealth oversight and integrity bodies if their jurisdiction could effectively be ousted by a Ministerial determination which suspends their information-gathering powers as part of their inquiries. While this is unlikely to be the intended usage of the Ministerial determination power, the incomplete nature of the exemptions in subsection 15(8) makes it legally possible for the power to be exercised in that way.
82. The Law Council submits that it would be preferable to draft subsection 15(8) in functional terms, so as to describe the type or purpose of legislation that is excluded from the scope of Ministerial determinations, rather than attempting to prepare a comprehensive list of all enactments (which could quickly become outdated, even in the case of legislation prescribed by regulation).
83. For example, a 'functional' exemption could apply to any Commonwealth Act which confers functions and powers on a Commonwealth officer or agency to conduct oversight of administrative action taken by other Commonwealth officers or agencies; or to review the effectiveness of legislation.

Recommendation 7—comprehensive coverage of integrity and accountability legislation in the exceptions to the Ministerial determination power

- **Subsection 15(8) of the NED Act should be amended so that the Acts which are excluded from the Ministerial determination power comprehensively cover:**

- **all Acts conferring functions and powers on Commonwealth oversight and integrity bodies;**
- **freedom of information and archives laws; and**
- **reporting and notification obligations under legislation conferring intrusive or coercive powers on law enforcement and intelligence agencies.**

Parliamentary scrutiny of Ministerial determinations

84. Although section 14A of the NED Act empowers the Committee to retrospectively review all national emergency declarations made under section 11, it does not expressly invest the Committee with functions to review any associated Ministerial determinations made under section 15, in reliance on the relevant national emergency declaration.
85. It is possible that the Committee, as constituted in future, may be inclined to adopt an expansive interpretation of its review function and consider both the national emergency declaration and all Ministerial determinations made in reliance upon the declaration. Importantly, a policy-based, retrospective review of the making and execution of Ministerial determinations under section 15 would complement the role of the SSCSDL in conducting technical scrutiny of the determinations shortly after they are made.
86. However, the Law Council considers that it would be preferable for the Committee's review function in section 14A to make explicit provision for it to review the associated Ministerial determinations made under section 15, as part of its examination of national emergency declarations made under section 11. This would remove any scope for argument about the scope of the review function.
87. The Committee may also wish to consider the additional suggestions of the Senate Scrutiny of Bills Committee that section 15 of the NED Act could be amended to apply further pre-conditions to the making of Ministerial determinations, which would enhance Parliamentary scrutiny. These suggested amendments would provide that:
- a Ministerial determination ceases to have effect after three months, even if the underlying national emergency declaration is extended (thereby triggering a new disallowance period if the determination is re-made, should the national emergency declaration be extended); and
 - in order to make a determination, the relevant Minister would have to be satisfied, that Parliament is not sitting, and is not likely to sit, within two weeks of the day after the declaration was made (so that the exercise of delegated legislative power to suspend or vary the application of primary legislation could not be exercised where there is reasonable opportunity for Parliament to pass amendments to the primary legislation).³³

Recommendation 8—Enhanced Parliamentary scrutiny of determinations

- **Section 14A of the NED Act should be amended to provide expressly that the Committee's review function in relation to national emergency declarations made under section 11 includes any**

³³ Standing Committee for the Scrutiny of Bills, *Scrutiny Digest* 3/21, (February 2021), 37-30 at [2.76]-[2.79].

Ministerial determinations made under section 15, which pertain to the relevant national emergency declaration.

- **Separately, the Committee may also wish to consider the amendments to section 15 of the NED Act recommended by the Senate Scrutiny of Bills Committee, as noted at paragraph [87] of this submission.**

Prime Minister's information-gathering powers

88. Section 16 of the NED Act confers powers on the Prime Minister, while a national emergency declaration is in force, to issue written notices which require Commonwealth entities to provide information, despite any other law to the contrary (such as secrecy and privacy laws that would otherwise protect such information from disclosure). This is provided that the information is sought 'for the purposes of preparing for, responding to or recovering from an emergency to which the national emergency declaration relates'.³⁴
89. The stated purpose of this power is to allow the Commonwealth to 'quickly gain a comprehensive picture of the resources at its disposal and what could be made available to assist in the response to or recovery from a national emergency'.³⁵
90. In principle, it is understandable that nationally significant emergencies will likely generate a need for the urgent disclosure of situational information to inform decisions about potential Commonwealth action (within the limits of its constitutional powers). However, the Law Council is concerned that the scope of the notice-based disclosure power in section 16 considerably exceeds the stated policy objective. The Law Council considers that the following factors make the disclosure power disproportionately broad:
- the lengthy duration of certain kinds of incidents that could be designated as national emergencies, such as health pandemics, noting that there is no limit on the making of consecutive national emergency declarations;
 - the availability of the disclosure power for the purpose of recovering from an emergency (and not merely the immediate preparations for, and response to, the incident). This is significant, given the typically long-term nature of recovery activities. For example, recovering from natural disasters, such as bushfires and floods, will require major re-building works to remediate extensive physical destruction and restore essential services; as well as support to address large-scale, adverse impacts on human health, the economy and the environment, among other areas; and
 - the statutory override provision in subsection 16(5) purports to override all applicable legal protections on the disclosure and subsequent use of sensitive information held by any Commonwealth agency. This means that the notice-based disclosure power overrides the requirements of the Privacy Act in relation to personal information, notwithstanding that provision is already made in section 80J of the Privacy Act for emergency declarations to be made, which modify applicable obligations under the Privacy Act in relation to a specified emergency. (Moreover, the *National Emergency Declaration (Consequential Amendments) Act 2020* (Cth) also amended section 80J of the

³⁴ NED Act, subsection 16(2).

³⁵ Revised Explanatory Memorandum, [91].

Privacy Act to apply a lower threshold to the making of those declarations, if a national emergency declaration made under the NED Act is in force.)³⁶

91. The Law Council considers that these factors warrant the application of further statutory parameters to the Prime Minister's notice-based information-gathering powers in section 16, to ensure that it is only exercisable where necessary for, and proportionate to, the purposes of emergency management, in relation to an emergency specified in a national emergency declaration.
92. In particular, the Law Council recommends that section 16 of the NED Act is amended to include the following measures:
- **conditions on the power to issue notices:** the Prime Minister can only issue a notice under subsection 16(2) to require the production of information if they are satisfied, on reasonable grounds, that:
 - it is necessary to obtain the relevant information by exercising the power under section 16 and invoking the override provision in subsection 16(5) (including because operating under existing legislative frameworks for the disclosure and use of that information are likely to be ineffective in the circumstances); and
 - the exercise of the compulsory production power (including the overriding of all other Commonwealth laws) would be proportionate to the purpose of responding to, preparing for, or recovering from the relevant emergency (including an assessment of the risks of adverse impacts on any persons to whom information relates); and
 - there are adequate arrangements in place to:
 - protect the security and confidentiality of information provided in accordance with a disclosure notice given under section 16 against any unauthorised access or use (including protections against access or use for purposes other than managing the Commonwealth's response to the specified emergency); and
 - ensure that records of information disclosed in accordance with a notice given under section 16 will be securely destroyed or deleted when the relevant national emergency direction ceases to be in force, or sooner if the information is no longer necessary for the purpose of preparing for, responding to or recovering from the emergency (or facilitating oversight of the collection, handling and use of that information); and
 - **exclusions from the compulsory disclosure power:** the notice-based disclosure power in subsection 16(2), and the override provision in subsection 16(5), should not extend to the production of:
 - information obtained by a Commonwealth oversight or integrity agency, or an authorised officer under the PID Act, for the purpose of performing the functions or exercising the powers of that agency or authorised officer (that is, inquiries, investigations or related activities). This reflects that the disclosure of such information could prejudice independent

³⁶ *National Emergency Declaration (Consequential Amendments) Act 2020* (Cth), Schedule 1, items 37-40 (inserting new subsection 80J(2) in the Privacy Act).

investigations, and have a chilling effect on the willingness of complainants or witnesses to come forward with matters of concern;

- ‘personal information’ within the meaning of the Privacy Act, noting that provision is separately made in section 80J of that Act for emergency declarations to be made, which modify the application of the Australian Privacy Principles in relation to the specified emergency. This includes new subsection 80J(2), which was enacted consequentially to the NED Act, and enables both the Prime Minister and the Attorney-General to make an emergency declaration under the Privacy Act, where a national emergency declaration made under the NED Act is in force, and the Prime Minister or Attorney-General (as applicable) considers it is ‘appropriate in the circumstances’. The Law Council considers that the pathway provided for in section 80J of the Privacy Act should be the sole mechanism for the disclosure of personal information by Commonwealth agencies in circumstances of emergency.

Otherwise, the application of the notice-based disclosure power in section 16 of the NED Act to personal information held by a Commonwealth agency would create two separate legal pathways for the disclosure of that personal information, each of which have different thresholds and oversight mechanisms. This is particularly because section 16 of the NED Act purports to override the requirements of the Privacy Act—including the modified requirements under section 80J, which have already been designed specifically to take account of emergency circumstances.

Recommendation 9—stronger safeguards on the Prime Minister’s compulsory information-gathering powers

- **Section 16 of the NED Act should be amended to impose the conditions on the Prime Minister’s information-gathering powers specified in paragraph [92] of this submission.**

Reporting requirements for national emergency declarations

93. Subsection 17(2) of the NED Act requires all Ministers responsible for administering ‘national emergency laws’ to prepare reports on the exercise of powers under those laws, in relation to an emergency that is specified in a national emergency declaration made under section 11 of the NED Act.
94. Under subsection 17(4), those reports must be given to the Attorney-General (as the Minister administering the NED Act) ‘as soon as practicable’ after the national emergency declaration ceases to be in force, or every three months, if a new declaration is issued in the same terms as an expired declaration. The Attorney-General is obliged, under subsection 17(5), to cause those reports to be tabled in Parliament ‘as soon as practicable’ after receipt.
95. At the level of general principle, the Law Council welcomes the inclusion of a statutory reporting requirement in the NED Act, including a specific requirement for the public release of such reports, via their Parliamentary tabling. This reflects that the *National Emergency Declaration (Consequential Amendments) Act 2020* (Cth) amended the provisions of the statutes specified in section 10 of the NED Act as ‘national emergency laws’ to lower the thresholds for exercising existing various emergency powers under those individual enactments, where a national

emergency declaration made under the NED Act is in force. It is therefore appropriate that a specific, public reporting requirement is applied, to provide a measure of transparency and accountability in relation to the exercise of those powers in reliance on the new, lower thresholds.

96. Additionally, the powers under sections 15 and 16 of the NED Act are also covered by the definition of a 'national emergency law' in section 10 of the NED Act, and are therefore also subject to the reporting requirement in section 17. The same interests in public and Parliamentary transparency and accountability apply to the exercise of those powers.
97. However, the Law Council concurs with the views of the Senate Scrutiny of Bills Committee that greater precision is needed in prescribing the deadlines for the preparation and Parliamentary tabling of reports under section 17 of the NED Act.³⁷ This is especially important in the case of reports which are completed while the Parliament is adjourned, including unscheduled adjournments because of the relevant national emergency (as occurred with the COVID-19 pandemic).
98. In particular, the Law Council considers that there should be a specific statutory timeframe for individual Ministers to provide their reports to the Attorney-General under subsection 17(4), rather than the indeterminate requirement of 'as soon as practicable'. The Law Council concurs with the views of the Senate Scrutiny of Bills Committee that a timeframe of 14 days after the cessation of the national emergency declaration would be appropriate. This would provide a reasonable degree of flexibility to accommodate operational or administrative activities in response to the emergency, while also prioritising the timely disclosure of information about the exercise of significant delegated legislative powers.
99. Similarly, the Law Council also considers that subsection 17(5) should be amended to prescribe a specific deadline for the Attorney-General to table the relevant reports in Parliament, and an obligation to table reports out-of-sitting if the Parliament is not sitting when they are received.³⁸ The Law Council supports the deadline suggested by the Senate Scrutiny of Bills Committee, which is 14 calendar days after the Ministerial report is provided to the Attorney-General (and if Parliament is not sitting on the 14th calendar day, then the obligation to table out-of-sitting would apply).

Recommendation 10—timeframes for preparing and tabling reports

- **The reporting and tabling timeframes in section 17 of the NED Act should be amended as follows, in line with the suggestions of the Senate Scrutiny of Bills Committee:**
 - **Ministers should be required to provide their reports to the Attorney-General under subsection 17(4) as soon as practicable, and in any case no later than 14 calendar days after the relevant national emergency declaration ceases to be in force; and**
 - **the Attorney-General should be required under subsection 17(5) to table those reports in each House of Parliament as soon as practicable, and in any case no later than 14 calendar days after receiving a report. If the 14th calendar day (or the first day on**

³⁷ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest* 3/21, (February 2021), 39-40 at paragraphs [2.80]-[2.84].

³⁸ *Ibid.*

which it is practicable to table a report) falls on a date on which Parliament is not sitting, then the Attorney-General should be required to table that report out-of-sitting, in accordance with the procedures of each House of Parliament.

Periodic reviews of the NED Act

100. Section 18 of the NED Act requires the Committee to conduct two reviews of the NED Act a whole—namely, the present review of its provisions; and a subsequent review after the fifth anniversary of the commencement of the Act.
101. In general terms, the Law Council welcomes the inclusion of statutory review requirements in the NED Act. Post-enactment reviews of the operation of a legislative regime provide transparent and participatory opportunities to assess their effectiveness and continued necessity. The retrospective review of individual declarations will also enable retrospective, advisory scrutiny of policy matters concerning their making and execution, and technical scrutiny of their provisions.
102. However, the Law Council considers that the statutory review requirements in section 18 do not go far enough, in that they only prescribe two ‘one-off’ reviews of a novel legislative regime, which was enacted in a highly truncated timeframe that prohibited detailed scrutiny of the Originating Bill (including referral to a Committee for inquiry and report). The Law Council considers that further provision should be made for periodic reviews of the operation of the NED Act, as a whole, every three years after the ‘five-year anniversary review’. This would enable a review to be undertaken once during the life of each Parliament.
103. The Law Council considers that the ongoing, periodic review of legislation which confers or enlivens extraordinary powers is an important accountability mechanism. It enables regular assessments to be made as to whether that Act is operating as intended, and whether it remains necessary, as informed by the full history of its operation at the relevant time.
104. While it would be possible for such periodic reviews to be conducted on an administrative basis this would make them reliant on the discretion of the Attorney-General, as Minister administering the NED Act. Further, if a decision was made to conduct internal reviews (for example by relevant Departments) then their degree of rigour may be contingent on competing priorities and resourcing constraints at the relevant point in time. In contrast, a statutory periodic review requirement would provide transparency about the commencement and conduct of reviews and the public release of their reports (via Parliamentary tabling). It would also help to ensure that they are given a level of priority in terms of their resourcing.

Recommendation 11—periodic review of the NED Act

- **Section 18 of the NED Act should be amended to make provision for ongoing, periodic reviews of the operation of the NED Act every three years, after the ‘five-year review’ prescribed by paragraph 18(b) has been completed.**
- **This amendment should include requirements for periodic reviews to be conducted in public to the greatest possible extent, and for their reports to be tabled in Parliament.**