



Law Council
OF AUSTRALIA

Office of the President

21 June 2021

Senator the Hon Sarah Henderson
Chair
Senate Legal and Constitutional Affairs Legislation Committee
Parliament House
CANBERRA ACT 2600

By email: legcon.sen@aph.gov.au

Dear Chair

REVIEW OF THE NATIONAL EMERGENCY DECLARATION ACT 2020 (CTH)

1. Thank you for inviting the Law Council of Australia to appear at the Committee's public hearing of its review of the above Act (**NED Act**) on 10 June 2021.
2. This correspondence provides the Law Council's responses to the following matters, which were taken on notice during questioning by Senator the Hon Kim Carr:
 - (1) Could the public demonstrations and other activities which occurred in Washington DC and Portland, Oregon, in 2020 and 2021 be capable of being the subject of a national emergency declaration under the NED Act, if they occurred in Australia?
 - (2) Would it be possible to invoke the NED Act in the case of an industrial dispute? What would be the consequences?
 - (3) Is there any overlap between the framework set down by the NED Act, and the 'call out' powers under Parts III and IIIAAA of the *Defence Act 1903* (Cth)? When these two pieces of legislation are taken in totality, are sufficient safeguards in place to protect civil liberties and protect the public in emergencies?
 - (4) In the context of a possible amendment to the NED Act to require the Prime Minister to consult the Leader of the Opposition on any proposal to recommend that the Governor-General make a national emergency declaration, could the Law Council provide some examples of existing Commonwealth laws that contain consultation requirements with the Opposition?
 - (5) Could the Law Council provide any further comment on the recommendations made by the Senate Standing Committee for the Scrutiny of Bills (Senate Scrutiny of Bills Committee) in its advisory report on the (then) NED Bill?
 - (6) Could the Law Council provide further explanation of its submission that the Prime Minister's information-gathering power in section 16 of the NED Act should be subject to exclusions for information that is the possession, custody or control of integrity and oversight agencies?

Circumstances in which declarations could be made (questions 1 and 2)

3. It is not possible to provide a definitive answer, in the abstract, to questions (1) and (2), as the statutory thresholds for the power to make a national emergency declaration in section 11 of the NED Act necessarily require a detailed assessment of the specific circumstances of a particular event. In particular, the question of whether or not an individual event meets the requirements of paragraphs 11(1)(a)-(d) is likely to involve complex questions of fact and degree. This includes assessing whether:
 - the event constitutes an ‘emergency’ that is causing or is likely to cause ‘nationally significant harm’;
 - that the emergency is affecting or is likely to affect ‘Commonwealth interests’;
 - that the making of the declaration is ‘appropriate’ having regard to the nature and severity of the nationally significant harm; and
 - that, for reasons of emergency management, it is ‘desirable’ for the declaration to be made for the purposes of one or more ‘national emergency laws’ (essentially, existing Commonwealth Acts which contain emergency powers that can be triggered on a lower statutory threshold than usual, if a national emergency declaration is made).
4. Notably, the definition of ‘nationally significant harm’ in section 10 of the NED Act, which applies to the issuing threshold, is drafted to cover any type of hazard (whether a natural disaster or a human-induced event of any kind) provided that it meets the requisite thresholds of severity in terms of its degree of impact and harm, in that it:
 - has a ‘significant national impact’; and
 - causes a specified type of harm, including to life or health of persons, animals or plants, damage to property (including infrastructure), harm to the environment, or disruption to an essential service.
5. There is nothing on the face of the definitions of key terms in the NED Act which are relevant to the enlivenment of the power in section 11 to make a declaration that would automatically or necessarily exclude public acts of protest or industrial action. This is provided that such events met the thresholds in relation to the existence of an ‘emergency’, their degree of impact and harm, and were assessed by the executive government as being appropriately and desirably the subject of a declaration.
6. The Law Council notes that various legislative options would be open, if any Committee members are concerned that the NED Act has the potential to improperly permit the making of emergency declarations in response to certain events which, in the opinion of those Committee members, should never be capable of triggering the powers under the NED Act, or the Acts prescribed as ‘national emergency laws’ under section 10 of that Act.
7. One possible approach may be to recommend the insertion of specific exclusions or limitations. In this regard, a broad analogy might be drawn with the definition of a ‘terrorist act’ in section 100.1 of the *Criminal Code Act 1995* (Cth) to the extent that the definition of the latter term contains an explicit exclusion in subsection 100.1(3) for ‘advocacy, protest, dissent or industrial action’ that is not intended to cause loss or endangerment of life or limb, or a serious risk to public health or safety.
8. Similarly, section 17A of the *Australian Security Intelligence Organisation Act 1979* (Cth) (**ASIO Act**) contains an express provision stating that nothing in this Act, which confers intrusive and coercive intelligence collection powers on ASIO, limits ‘the right

of persons to engage in lawful advocacy, protest or dissent' and that the exercise of that right 'shall not, by itself, be regarded as prejudicial to security'.

Interaction with Defence 'call out' powers (question 3)

9. The Law Council understands that the framework established under the NED Act is unlikely to have significant direct interaction with the separate framework for the 'call out' of Australian Defence Force (**ADF**) personnel under the *Defence Act 1903* (Cth) (**Defence Act**), whether under the recently amended reserve call out powers in Division 3 of Part III, or the call out powers in Part IIIAAA to protect Commonwealth interests, or the States or self-governing territories, from domestic violence.
10. This reflects that the thresholds and other requirements for the taking of action under the NED Act and Defence Act are discrete, as well as the legal actions that may be taken under each Act. Importantly, the *National Emergency Declaration (Consequential Amendments) Act 2020* (Cth) did not amend the Defence Act, to effectively lessen the thresholds for call-out where a national emergency declaration is in force.
11. Rather, the Law Council's principal concerns in relation to the balance between the protection of civil liberties and public order or safety during emergencies arise from the shortcomings identified in the NED Act. These are detailed in the Law Council's submission. Implementation of the Law Council's 11 recommended amendments could address these outstanding concerns in relation to the NED Act.

Possible consultation requirement with Opposition Leader (question 4)

12. As noted at the public hearing, the Law Council supports a statutory requirement for the Prime Minister to consult with the Leader of the Opposition in the House of Representatives on a proposed national emergency declaration. Receipt of advice from the Prime Minister that such consultation had occurred would be a statutory precondition to the exercise of power by the Governor-General to make a declaration.
13. The Law Council notes that several pieces of national security legislation contain various requirements for the Prime Minister to consult with the Opposition Leader on proposed executive action, or to provide certain information on a confidential basis. National security laws are useful comparators because, like declarations of national emergency, they are directed to activities 'peculiarly adapted to the government of a nation and which cannot otherwise be carried out for the benefit of the nation'.¹
14. Examples of specific provisions of Commonwealth Acts include the following:
 - the Prime Minister must consult with the Leader of the Opposition on proposed appointments of various Commonwealth agency heads, before recommendations are made to the Governor-General. Such requirements apply in relation to the appointment of persons to the following offices:
 - the Director-General of Security under subsection 7(2) of the ASIO Act;
 - the Director-General of National Intelligence under subsection 24(2) of the *Office of National Intelligence Act 2018* (Cth); and
 - the Directors-General of the Australian Signals Directorate and Australian Secret Intelligence Service under subsections 17(3) and 27B(3) of the *Intelligence Services Act 2001* (Cth); and

¹ *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 397 (Mason J).

- the Prime Minister must give the Opposition Leader copies of various classified or otherwise confidential reports that are required to be prepared under various Acts, including:
 - annual reports on Ministerial decisions made under the 53A(3) of the *Australia's Foreign Relations (State and Territory Arrangements) Act 2020* (Cth), per subsection 53A(3) of that Act; and
 - the classified annual reports of ASIO under subsection 94(3) of the ASIO Act.

Senate Scrutiny of Bills recommendations (question 5)

15. The Law Council strongly supports all of the recommendations of the Senate Scrutiny of Bills Committee on the (then) NED Bill.² This is reflected in the Law Council's recommendations 1, 4, 8 and 10, which endorse corresponding recommendations of the Scrutiny of Bills Committee.

Recommended exclusions from information-gathering power (question 6)

16. Recommendation 9 of the Law Council's submission supports the imposition of certain exclusions on the power of the Prime Minister to require Commonwealth entities to provide certain information while a declaration is in force, despite any other law to the contrary (such as secrecy and privacy laws).
17. As noted at paragraph [92] of the Law Council's submission, at pages 26-27, the Law Council suggests an exclusion for information that has been obtained by a Commonwealth integrity or oversight agency, or an authorised officer under the *Public Interest Disclosure Act 2013* (Cth) (**PID Act**), for the purpose of performing oversight or investigative functions.
18. This reflects that information given to oversight bodies is provided for the purpose of those bodies conducting independent investigations into Commonwealth officials or activities. Such investigations are often conducted for cause' into alleged or suspected wrongdoing or maladministration. Information is frequently provided by complainants or other individuals who come forward confidentially, with the assurance of the extensive non-disclosure provisions for investigative information in relevant legislation governing the relevant oversight body or investigative process. Examples of such non-disclosure provisions are found in section 65 of the PID Act, section 35 of the *Ombudsman Act 1976* (Cth), and section 34 of the *Inspector-General of Intelligence and Security Act 1986* (Cth).
19. The Law Council is concerned that a compulsory disclosure power of the kind in section 16 of the NED Act, which would override existing statutory protections of the kind illustratively outlined above, may prejudice independent investigations and have a chilling effect on witnesses or complainants coming forward. In other words, it may result in the disclosure of the particulars of complaints, including the identification of complainants, to persons under investigation or inquiry. In practical terms, such disclosures could enable persons subject to inquiry to take action to conceal their activities, take reprisals against witnesses or complainants, or otherwise frustrate or hinder the conduct of an inquiry. This risk is particularly acute given that the NED Act does not contain any limitations or prohibitions on the subsequent use and disclosure of information whose provision is compelled under section 16.
20. The Law Council notes that a separate provision of the NED Act, namely subsection 15(8), excludes certain oversight-related legislation from the extraordinary 'Henry VIII

² Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 3/21*, (February 2021).

clause', which empowers Commonwealth Ministers to suspend or modify certain requirements of Commonwealth legislation. The Explanatory Memorandum indicates that this exclusion was included to recognise that certain requirements in oversight-related legislation are considered to be so important that they should apply in all circumstances, notwithstanding the making of a national emergency declaration.³ The Law Council submits that such reasoning applies with equal force to the compulsory information-gathering power in section 16 of the NED Act.

Further information

21. Thank you again for the opportunity to participate in this inquiry. The Law Council would be pleased to provide any further assistance the Committee may require. Should you wish to speak with me directly, I am contactable on _____ or _____

22. The responsible officer within the Law Council Secretariat, Dr Natasha Molt, Director of Policy, is also available to assist the Committee Secretariat or Committee members' offices and is contactable on _____ or _____

Yours sincerely

Dr Jacoba Brasch QC
President

³ Explanatory Memorandum, National Emergency Declaration Bill 2020 (Cth), [86].