

Senate Standing Committee on Legal and Constitutional Affairs (Legislation Committee)

Inquiry into the Operation of the *National Emergency Declaration Act 2020*

Attorney-General's Department

Hearing date: 10 June 2021

Hansard page: 36

Question type: Spoken

Paul Scarr asked the following question:

Senator SCARR: I have one final question in relation to that. Have you had a chance to read the Law Council of Australia's submission to this inquiry?

Mr Walter: Yes, I have had a brief look. My officers have been through it as well.

Senator SCARR: Their recommendation 3 talks about this consultation issue. They've proposed to this committee that the consultation requirements be strengthened. This is their proposal:

... 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— and this is the phrase they've proposed—beyond the control of the Commonwealth, the time needed to conduct those consultations would frustrate the effectiveness of the declaration.

Both of the circumstances you have outlined—I am not seeking to hold you to them being the only circumstances, of course—to justify where there wasn't consultation, and I think reasonably, would be due to something beyond the control of the Commonwealth, so the tsunami event, the space weather event; it's not something of the Commonwealth's making. What do you make of this proposal? Do you have any thoughts about what the impact of the words 'beyond the control of the Commonwealth' would have in terms of qualifying the ability to make an emergency declaration without consultation? Do they raise any concerns, from your perspective? You can take it on notice.

The response to the Senator's question is as follows:

Before the Governor-General makes a national emergency declaration, the Prime Minister must consult with the government of each State or Territory (if any) in which the Prime Minister is satisfied the emergency has caused, is causing or is likely to cause nationally significant harm (subsection 11(2)). However, paragraph 11(3)(b) does not require the Prime Minister to consult with an affected State or Territory Government if the Prime Minister is satisfied that it is not practicable to do so. This is replicated in subsections 12(3) (where an extension of a national emergency declaration is sought) and 13(1B) (where a variation of a national emergency declaration is sought).

The phrase 'not practicable' is intended to enable the Commonwealth to act quickly where the proximity, nature or type of nationally significant harm does not permit the Prime Minister to properly consult each affected State and Territory. The phrase should be considered in the

context of an emergency that has satisfied the high thresholds in subsection 11(1) (and correspondingly subsections 12(1) and 13(1)).

There may be situations where genuine consultation is not achievable in limited circumstances. In these situations, it may be that notification of a national emergency declaration is provided, but due to the nature and/or scale of the emergency, it is not feasible to await a response from an affected State or Territory.

The department is considering whether there are any amendments that can be made to these provisions to better reflect the intent as part of the second phase of work on the Act.

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Kim Carr asked the following question:

Senator KIM CARR: I've only got one question to follow up on what Senator Scarr said. I'll chance my arm here. I think there would be considerable sympathy with what Senator Scarr is expressing about that balance. If I might put it to all the officers: if your argument is that you're trying to deal at an operational level with a genuine national emergency and you can't predict what that's going to be—I'm obviously expressing my concern about civil rights and the misuse of that by a malevolent politician in the future—the question arises on both counts: why is parliamentary scrutiny through a disallowable instrument not appropriate? The argument you've put to us is not going to wash. Can you put back to us why that is not appropriate? You can take it on notice and give it some thought, because that seems to be the balance there somewhere. If you want flexibility, we want protections against misuse. The best thing I can suggest, in an administrative sense, is parliament having the flexibility of saying, 'Hang on a minute. Your explanation doesn't stand up'. That's what a disallowable instrument is; it's a mechanism by which the parliament says, 'Hang on; you're going to have to do better than that'. A disallowable instrument doesn't mean you can't go back and do things. It just says to public officials, 'You are now accountable to another authority—namely, the legislature of the country'.

CHAIR: Senator Carr, is that the completion of your question?

Senator KIM CARR: That's on notice, if you could, please. If you can give me an argument as to why that shouldn't apply?

The response to the Senator's question is as follows:

The *National Emergency Declaration Act 2020* (the Act) exempts a national emergency declaration (subsection 11(6)) including an extension (subsection 12(5)), variation (subsection 13(3)) or revocation (subsection 14(2)) of the declaration, from the disallowance provisions in the *Legislation Act 2003*.

The legislation was designed to enable states and territories to integrate their emergency management and response arrangements into the NED Act framework. As the declaration serves as a foundation for other actions, there was a need to ensure that the disallowance of the declaration would not destabilise any other arrangements. In the event that states and territories were to rely on the declaration in any way, disallowance of the federal instrument would have potentially inequitable flow-on effects that would be difficult to rectify. In this regard, the exemptions from disallowance align with justifications that the Parliament has

previously considered and endorsed.

The Parliament has acknowledged that where urgent and decisive action needs to be taken in situations of emergency or where circumstances are rapidly evolving, disallowance may unduly frustrate or undermine the effectiveness of any flow-on action. In addition, the Parliament has recognised that where an instrument is part of an intergovernmental scheme, an exemption from disallowance may also be justified.

The NED Act provides for certain safeguards to balance these exemptions. In terms of Commonwealth powers enlivened by the declaration, Ministerial determinations made under section 15 of the Act are subject to disallowance. If Parliament considers that the particular use of the waiver power constitutes an overreach, it may disallow that particular determination. The waiver power itself is narrowly confined to particular categories of procedural steps, and must be exercised for the benefit of the public or a section of the public and for the purposes of responding to the emergency to which the declaration relates. The relevant Minister must also report to the Parliament on the exercise of powers under the determination (section 17), which provides transparency about the impact and lessons learned from the operation of the determination. Appropriate checks and balances for state and territory powers and frameworks integrated into the framework, if any, will be a matter for those jurisdictions.

The department is considering the advice and recommendations made by the Senate Scrutiny of Bills and Scrutiny of Delegated Legislation Committees, as well as the views expressed in submissions to this Inquiry, as part of the next phase of work to identify opportunities to improve and enhance the Act.

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Sarah Henderson **asked the following question:**

CHAIR: [...] I was wondering whether you were across the evidence given by the Australian Human Rights Commission and the Law Council of Australia this morning and whether you're able to respond to the concerns that they have raised in their testimony this morning.

Mr Walter: I didn't actually see either of them appear. My staff were monitoring it and they sent me an email, which I read, but I can't specifically recall all the points that were made. Were there particular points that were of concern?

CHAIR: Yes, if you can refer to their submissions and address some of the key concerns made in their submissions.

Mr Walter: Let me just find it.

CHAIR: Some of the issues were that the NED does not limit the number of extensions which can be made; they are not limited. There is an issue with the definition of certain terms. There's obviously the modification of primary legislation. A range of concerns were raised by both the commission and the Law Council. I was keen to see whether you were able to address those.

Mr Walter: I am just thinking about the best way for us to do that that would be of benefit to the committee. I've got the Law Council's submission open in front of me. They have very extensive recommendations. I wonder whether it might be of more value to the committee, given there's only limited time, to come back on a couple of those key ones that we haven't covered here?

CHAIR: Could you perhaps give us a response on notice?

Mr Walter: I am very conscious of the reporting date of the committee, of course.

CHAIR: If you could turn around your response quickly, because obviously a range of concerns were raised by both the commission and the Law Council this morning. [...]

The response to the Senator's question is as follows:

The department notes the concerns raised by the Law Council of Australia (LCA) and the Australian Human Rights Commission (AHRC) in their opening remarks to the Committee. The AHRC noted the following issues in relation to the *National Emergency Declaration Act 2020* (NED Act):

- the NED Act does not limit the number of extensions that can be made to a declaration
- key terms, such as 'Commonwealth interest' and 'emergency' are not defined
- the Ministerial determination power in section 15 of the NED Act is broad, and
- the Act exempts the declaration from disallowance.

The AHRC also recommends that a special oversight committee be established to provide real-time analysis while a national emergency declaration is in force.

Similarly, the LCA raised concerns that:

- the terms ‘Commonwealth interest’ and ‘emergency’ are not defined
- the NED Act affords Ministers broad discretionary powers (including the powers to revoke a declaration, to not consult affected jurisdictions where it is not practicable to do so, and the power to waive, substitute or vary procedural requirements in certain Commonwealth laws), and
- the NED Act does not provide sufficient Parliamentary scrutiny.

The AHRC and LCA also responded to a number of propositions put to them by the Committee.

In evidence provided during the hearing and in its submission to the inquiry, the department responded to some of the concerns raised by the AHRC and LCA. In particular, the department gave evidence on:

- the confines of the discretionary power to waive procedural requirements in Commonwealth legislation, including the narrow categories of procedural requirements that can be waived, substituted or varies, and that the power must be used for the benefit of the public
- the various reporting requirements to inform the Parliament and the public about the exercise of powers under the NED Act
- the limitations on the Prime Minister’s power to request information from Commonwealth entities for the purposes of responding to an emergency for which a national emergency declaration is made, and
- the exemptions from disallowance to support flow-on actions taken to respond to an emergency to which the declaration relates.

The department is considering the AHRC and LCA’s submissions and evidence provided to the Committee on how the NED Act might be improved or enhanced, as well as their responses to the Committee’s propositions, as part of its second phased of work. As part of this, the department will consider how best to balance the flexibility required to enable the Commonwealth to swiftly respond to an emergency that rises to the level of national significance, with appropriate oversight and safeguards.