



AUSTRALIAN
SENATE

Senate Standing Committee for the Scrutiny of Bills

17 March 2021

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

Dear Chair,

Review of the *National Emergency Declaration Act 2020*

Thank you for the opportunity for the Senate Standing Committee for the Scrutiny of Bills (the committee) to make a submission to the Legal and Constitutional Affairs Legislation Committee's review of *the National Emergency Declaration Act 2020* (the NED Act).

Since 1981 the committee has scrutinised all bills against certain accountability standards to assist the Parliament in undertaking its legislative function. These standards focus on the effect of proposed legislation on individual rights, liberties and obligations, and on parliamentary scrutiny. The scope of the committee's scrutiny function is formally defined by Senate standing order 24.

It is the committee's usual practice to table a *Scrutiny Digest* each sitting week of the Senate. The Digest contains the committee's scrutiny comments in relation to bills introduced in the previous sitting week as well as commentary on amendments to bills and certain explanatory material. The Digest also contains responses received in relation to matters that the committee has previously considered, as well as the committee's comments on these responses.

National Emergency Declaration Bill 2020

National Emergency Declaration (Consequential Amendments) Bill 2020

The National Emergency Declaration Bill 2020 (the NED bill) and the National Emergency Declaration (Consequential Amendments) Bill 2020 (Consequential Amendments bill) were introduced in the House of Representatives on 3 December 2020. The NED bill sought to establish a legislative framework for the declaration of a national emergency by the Governor-General, on the advice of the Prime Minister. The Consequential Amendments bill sought to amend various Acts and Regulations that contain powers used by the Commonwealth when responding to, or supporting the recovery from, emergencies to enable the use of alternative or simplified statutory tests to streamline the exercise of those powers where a national emergency has been declared. The two bills received the Royal Assent on 15 December 2020.

The committee has scrutinised both the NED bill and the Consequential Amendments bill against its five scrutiny principles and has commented on the two bills in its *Scrutiny Digests* [18 of 2020](#), [3 of 2021](#) and [5 of 2021](#).

The committee has raised significant scrutiny concerns in relation to numerous matters contained in the bills, including the following:

- the broad discretionary power to declare a national emergency in circumstances where key terms in the bill are undefined;
- the use of non-disallowable delegated legislation for the declaration of a national emergency;
- the power for delegated legislation to modify primary legislation (Henry VIII clause);
- requirements relating to the tabling of reports on the exercise of powers and the performance of functions in relation to a national emergency declaration;
- significant matters in delegated legislation, in particular, the specification of additional kinds of information that must not be included in a report on the exercise of powers and functions during a national emergency to delegated legislation;
- significant matters in non-disallowable instruments provided for in the Consequential Amendments bill; and
- privacy concerns related to activation of provisions authorising the collection, use and disclosure of personal information to non-disallowable instruments in the Consequential Amendments bill.

The committee encourages the Legal and Constitutional Affairs Legislation Committee to consider the committee's scrutiny comments as set out in the relevant Scrutiny Digests. Extracts from the Scrutiny Digests are attached.

The committee takes this opportunity to draw your attention to the fact that in correspondence throughout the scrutiny process both the Attorney-General and the Acting Attorney-General referred the committee to the Legal and Constitutional Affairs Legislation Committee's review of the NED Act as an opportunity to further consider amendments to the NED Act. The committee welcomes this indication that the government is willing to constructively engage with the Parliament to make improvements to this legislation. In this context, the committee encourages the Legal and Constitutional Affairs Legislation Committee to consider the full range of amendments suggested by this committee in its Scrutiny Digests, including whether the NED Act and the Consequential Amendments Act could be amended to:

- include inclusive definitions of 'emergency' and 'Commonwealth interest';
- omit subclauses 11(6) and 12(5) so that national emergency declarations made under subclause 11(1) and extensions of a national emergency declaration under subclause 12(1) are subject to the usual parliamentary disallowance process;
- provide that determinations made under clause 15 of the NED Act cease to be in force after three months;
- require that before making a determination under clause 15 of the NED Act, a minister must be satisfied that Parliament is not sitting and is not likely to sit within two weeks after the day the determination is made;
- provide that reports on the exercise of powers and the performance of functions in relation to a national emergency declaration must be given to the minister responsible for administering the NED Act as soon as practicable, and in any case not later than 14 days after the national emergency declaration ceases to be in force, and tabled in the

Parliament not later than 14 days after the minister receives the reports (see clause 17 of the bill);

- omit paragraph 17(6)(c) which leaves the specification of additional kinds of information that must not be included in a report to delegated legislation; and
- provide that an emergency declaration made under proposed subsection 313(4D) of the *Telecommunications Act 1997* is subject to parliamentary disallowance.

I trust that this submission will assist the Legal and Constitutional Affairs Legislation Committee as it undertakes this important inquiry.

Yours sincerely,

Senator Helen Polley
Chair