

## National Emergency Declaration Bill 2020

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| <b>Purpose</b>     | This bill seeks to establish a legislative framework for the declaration of a national emergency by the Governor-General, on the advice of the Prime Minister |
| <b>Portfolio</b>   | Attorney-General  |
| <b>Introduced</b>  | House of Representatives on 3 December 2020   |
| <b>Bill status</b> | Received the Royal Assent on 15 December 2020   |

### Broad discretionary power<sup>23</sup>

2.62 In [Scrutiny Digest 18 of 2020](#) the committee requested the Attorney-General's advice as to:

- why it is necessary and appropriate to provide the executive with a broad power to declare a national emergency in circumstances where key terms in the bill are undefined; and
- whether the bill can be amended to include inclusive definitions of 'emergency' and 'Commonwealth interest', or, at minimum, additional guidance on the exercise of the power in relation to these concepts on the face of the primary legislation.<sup>24</sup>

### Attorney-General's response<sup>25</sup>

2.63 The Attorney-General advised:

The Senate Standing Committee on the Scrutiny of Bills (the Committee) requests the Attorney-General's advice in relation to a number of matters in the National Emergency Declaration Bill 2020 (NED Bill) and the National Emergency Declaration (Consequential Amendments) Bills 2020 (Consequential Amendments Bill) (at paragraphs [1.29], [1.38], [1.45], [1.50], [1.51], [1.56] and [1.75]).

The Senate Standing Committee on Legal and Constitutional Affairs is to conduct a review of the National Emergency Declaration Act 2020 (NED Act)

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23 Clauses 11 and 12. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii).

24 Senate Scrutiny of Bills Committee, *Scrutiny Digest 18 of 2020*, pp. 9-11.

25 The Attorney-General responded to the committee's comments in a letter dated 25 January 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 3 of 2021* available at: [www.aph.gov.au/senate\\_scrutiny\\_digest](http://www.aph.gov.au/senate_scrutiny_digest).

by 30 June 2021 which will provide an opportunity to consider further the matters raised by this Committee, in particular where the Committee has asked whether further amendments should be made.

In relation to the Committee's requests for more detailed advice, the following is provided.

The Committee requested more detailed advice as to why it is necessary and appropriate to provide the executive with a broad power to declare a national emergency in circumstances where key terms in the bill are undefined (at paragraph [1.29]).

The NED Bill does not define key terms, such as 'emergency' and 'Commonwealth interest' (clause 10), to ensure the framework supports an 'all hazards' approach. This is necessary and appropriate so as not to limit the circumstances in which a declaration can be made to certain types or kinds of defined emergencies. For instance, the unpredictable nature of the COVID-19 pandemic has demonstrated the importance of such flexibility to ensure that the framework will apply to emergencies that are beyond our current thinking and experience. The term 'emergency' should be read in conjunction with the definition of 'nationally significant harm'. If an emergency has caused, is causing or is likely to cause harm that rises to the level of national significance, that emergency may be the subject of a national emergency declaration, regardless of the cause of the emergency.

The Revised Explanatory Memorandum to the NED Bill provides guidance on what constitutes an 'emergency' for the purpose of the framework. For example, the types of emergencies that may be subject of a declaration include:

- major natural disasters – such as bushfires that spread across multiple jurisdictions, or a geomagnetic storm that causes extensive disruption or damage to electricity and communication networks
- communicable disease outbreaks that pose a major threat to the health and life of Australians
- large-scale cyber incidents or terrorist attacks, and
- major chemical, biological or radiological incidents.

The Bill does not define 'Commonwealth interests', as this term is intended to reflect the full extent of the Commonwealth's constitutional interests and power. As such, it would not be appropriate to include a definitive list. This position is supported by the Senate Foreign Affairs, Defence and Trade Legislation Committee's Report into the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000. In that Report, the Committee rejected submissions that the concept 'Commonwealth interests' should be defined, noting its scope is extensive and would be difficult to exhaustively define [see Senate Standing Committee on Foreign Affairs and Trade, *Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000* (Inquiry,

16 August 2000) p. 13 [1.59]]. Consistent with this position, it is not appropriate to include a definition of 'Commonwealth interest'. As the Committee notes, the Explanatory Memorandum provides guidance on the interpretation of this concept.

Although the Bill includes terms that are necessarily undefined, the threshold to make a declaration is appropriately high. This is because the framework is not intended to be used to respond to emergencies to which states and territories have the capacity to respond. To satisfy the threshold to make a declaration, the emergency must cause, or be likely to cause, nationally significant harm or damage to:

- the life or health of an individual, or group of individuals, animals or plants
- the environment
- property, including infrastructure, or
- disruption to an essential service.

### ***Committee comment***

2.64 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that while the bill includes terms that are undefined, the threshold to make a declaration is appropriately high, as the framework is not intended to be used to respond to emergencies to which states and territories have the capacity to respond.

2.65 The committee also notes the advice that the term 'emergency' should be read in conjunction with the definition of 'nationally significant harm', and that regardless of the cause of an emergency, under the Act an emergency may be the subject of a national emergency declaration if it has caused, is causing or is likely to cause harm that rises to the level of national significance.

2.66 With respect to the term 'Commonwealth interests', the committee notes the Attorney-General's advice that the government's position is supported by the Senate Foreign Affairs, Defence and Trade Legislation Committee's Report into the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000. However, the committee also highlights its own comments in relation to that bill, which raised concerns about the breadth of undefined terms in the bill. At that time, the committee noted that the use of undefined terms and a failure to fully address rights and obligations of persons affected by the bill invited great reliance on the good faith of persons exercising powers under the bill. The committee further commented that:

Australia has a proud democratic tradition, and its governments have traditionally been governments of good faith. There is no question that good faith has been shown by all governments in the manner in which the existing call out powers have been exercised. However, laws which affect rights and liberties should not be drafted on the assumption that those using them will necessarily always be of good faith. Laws which assume

good faith are inevitably misused by those whose motives are less than good.<sup>26</sup>

2.67 The committee further notes that Attorney-General's advice raised concerns with respect to exhaustively defining the identified terms. While noting this advice, the committee notes that its suggestions were in relation to the inclusion of an *inclusive* definition to assist in interpreting the scope of terms used in the bill, rather than an exhaustive definition.

**2.68 From a scrutiny perspective, the committee remains concerned about the lack of guidance on the terms 'emergency' and 'Commonwealth interests' on the face of the *National Emergency Declaration Act 2020*.**

**2.69 However, in light of the fact that this bill has already passed both Houses of the Parliament, the committee makes no further comment on this matter.**

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### Exemption from disallowance<sup>27</sup>

2.70 In [Scrutiny Digest 18 of 2020](#), having regard to comments and recommendations of the Senate Standing Committee for the Scrutiny of Delegated Legislation in its *Interim report on the exemption of delegated legislation from parliamentary oversight*, the committee requested the Attorney-General's more detailed advice as to:

- why it is considered necessary and appropriate for national emergency declarations and variations to extend a national emergency declaration to be exempt from disallowance; and
- whether the bill can be amended to 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.<sup>28</sup>

### Attorney-General's response

2.71 The Attorney-General advised:

The Committee requested more detailed advice as to why it is considered necessary and appropriate for national emergency declarations and variations to extend a national emergency declaration to be exempt from disallowance (at paragraph [1.38]).

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26 Senate Scrutiny of Bills Committee, *Eleventh Report of 2000*, pp. 313-314.

27 Clauses 11 and 12. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

28 Senate Scrutiny of Bills Committee, *Scrutiny Digest 18 of 2020*, pp. 11-14.

Although disallowance of an instrument does not invalidate actions taken under the instrument prior to the time of disallowance, the prospect of a declaration being disallowed would undermine the key objective of the NED Bill—to provide a clear, certain and unambiguous signal about the significance and severity of an emergency event. If the status of the declaration were to change following a successful motion to disallow, this could suggest (potentially erroneously) that the emergency no longer exists. While it is accepted that the rate of successful disallowance motions are low, the possibility of disallowance cannot be unequivocally discounted.

The disallowance of the declaration or a variation may have inequitable flow-on effects, particularly in relation to the power for Ministers to substitute, suspend or modify 'red tape' requirements in legislation they administer (clause 15). Such determinations continue in force only while a national emergency declaration (to which the determinations relate) is in force; that is, once a national emergency declaration ceases to be in force, so too does the determination (subparagraph 15(7)(b)(iii)). If a motion to disallow a national emergency declaration were successful, it may produce inequitable outcomes among those for whom it was intended to have beneficial application. For instance, it may produce a situation in which a benefit or streamlined process is available to those who apply one day, while those who apply the next day will be ineligible due to intervening disallowance of the underlying national emergency declaration. Similarly, where a national emergency declaration provides a basis for imposing or suspending obligations or liabilities, the arbitrary timing of a successful disallowance motion could create inappropriate variations in the law that is applicable at particular points in time, leading to differential treatment of individuals without warning.

The Committee noted that arguments against making emergency-related delegated legislation disallowable must be balanced with the need to ensure adequate checks and balances on the limitation of the personal rights and liberties of individuals who may be subject to such delegated legislation. In recognition of this, the framework will be subject to a rigorous scheme of reviews, to ensure that it is proportionate and remains appropriate to respond to emergencies of national significance. The Senate Standing Committee on Legal and Constitutional Affairs will immediately review the framework after the NED Act commences, and report to the Senate by 30 June 2021, and is to undertake a statutory review of the Act five years after its commencement. In addition, the Minister responsible for administering the relevant national emergency law must report on the exercise of the powers or the performance of the functions if a national emergency declaration is made and powers are exercised or functions are performed under a national emergency law for the purposes of the declaration (subclause 17(2)). Together these review requirements will ensure that the framework remains appropriate, adapted and responsive to Parliament and the community's expectations.

While there is no limit to the number of extensions that can be made to the period that a national emergency declaration is in force, each extension is limited to a period of up to three months and must meet the high threshold to make a national emergency declaration.

### ***Committee comment***

2.72 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that the prospect of a declaration being disallowed would undermine the key objective of the bill, which is to provide a clear, certain and unambiguous signal about the significance and severity of an emergency event. The committee also notes the advice that the disallowance of the declaration may have inequitable flow-on effects, for example in relation to the power for ministers to suspend or modify 'red tape' requirements in legislation they administer.

2.73 The Attorney-General also advised that, in recognition of the need to ensure adequate checks and balances on the limitation of the personal rights and liberties of individuals who may be subject to emergency-related delegated legislation, the framework will be subject to a rigorous scheme of reviews, to ensure that it is proportionate and remains appropriate to respond to emergencies of national significance. This includes the review by the Senate Standing Committee on Legal and Constitutional Affairs noted above.

**2.74 While acknowledging the Attorney-General's advice, from a scrutiny perspective, the committee remains concerned that delegated legislation should be subject to parliamentary oversight, with only very limited exemptions. In this instance, the declaration of a national emergency is a precondition to the implementation of the 'streamlined framework' envisioned by the bill, including measures which may modify the operation of primary legislation or impact on the privacy of individuals. The committee therefore remains concerned that national emergency declarations and variations to extend a national emergency declaration are exempt from disallowance.**

**2.75 In light of the fact that this bill has already passed both Houses of the Parliament, the committee makes no further comment on this matter.**

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### **Power for delegated legislation to modify primary legislation (Henry VIII clause)<sup>29</sup>**

2.76 In *Scrutiny Digest 18 of 2020*, in light of the recommendations of the Senate Standing Committee for the Scrutiny of Delegated Legislation, the committee requested the Attorney-General's advice as to whether the bill could be amended to provide that:

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29 Clause 15. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

- determinations made under clause 15 cease to be in force after three months; and
- before making a determination under clause 15, 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.<sup>30</sup>

### ***Attorney-General's response***

#### **2.77** The Attorney-General advised:

The Senate Standing Committee on the Scrutiny of Bills (the Committee) requests the Attorney-General's advice in relation to a number of matters in the National Emergency Declaration Bill 2020 (NED Bill) and the National Emergency Declaration (Consequential Amendments) Bills 2020 (Consequential Amendments Bill) (at paragraphs [1.29], [1.38], [1.45], [1.50], [1.51], [1.56] and [1.75]).

The Senate Standing Committee on Legal and Constitutional Affairs is to conduct a review of the National Emergency Declaration Act 2020 (NED Act) by 30 June 2021 which will provide an opportunity to consider further the matters raised by this Committee, in particular where the Committee has asked whether further amendments should be made.

### ***Committee comment***

**2.78** The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice regarding the opportunity for the consideration of further amendments provided by the current review of the *National Emergency Declaration Act 2020* by the Senate Standing Committee on Legal and Constitutional Affairs. However, the committee takes this opportunity to emphasise the importance of fulsome ministerial responses in providing information the committee needs for the effective performance of its functions set out in Senate standing order 24, and the importance of ensuring that other committees may benefit from this committee's views in undertaking their own inquiries. In this instance, the rapid passage of the bill did not allow for this committee's views to be considered when the bill was before the Parliament. The committee therefore considers that it is of particular importance that any review of the legislation is able to benefit from the committee's concluded observations.

**2.79** The committee therefore reiterates its request for the Attorney-General's advice as to the appropriateness of amending the *National Emergency Declaration Act 2020* to:

- provide that determinations made under section 15 cease to be in force after three months; and

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30 Senate Scrutiny of Bills Committee, *Scrutiny Digest 18 of 2020*, pp. 14-16.

- **provide that before making a determination under section 15, 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.**
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### **Tabling of reports<sup>31</sup>**

2.80 In [\*Scrutiny Digest 18 of 2020\*](#) the committee requested the Attorney-General's advice as to whether proposed paragraph 17(4)(a) of the bill can be amended to 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 National Emergency Declaration Act as soon as practicable, and in any case not later than 14 days after the national emergency declaration ceases to be in force.

2.81 The committee also requested the Attorney-General's advice as to whether subclause 17(5) of the bill can be amended to provide:

- that the above reports must be tabled in each House of the Parliament as soon as practicable, and in any case not later than 14 days after the Minister receives the reports; and
- that the reports are to be presented in accordance with procedures in each House for the presentation of documents out of sitting in circumstances where the reports are ready for presentation, but the relevant House is not sitting.<sup>32</sup>

### **Attorney-General's response**

2.82 The Attorney-General advised:

The Senate Standing Committee on the Scrutiny of Bills (the Committee) requests the Attorney-General's advice in relation to a number of matters in the National Emergency Declaration Bill 2020 (NED Bill) and the National Emergency Declaration (Consequential Amendments) Bills 2020 (Consequential Amendments Bill) (at paragraphs [1.29], [1.38], [1.45], [1.50], [1.51], [1.56] and [1.75]).

The Senate Standing Committee on Legal and Constitutional Affairs is to conduct a review of the National Emergency Declaration Act 2020 (NED Act) by 30 June 2021 which will provide an opportunity to consider further the matters raised by this Committee, in particular where the Committee has asked whether further amendments should be made.

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31 Clause 17. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

32 Senate Scrutiny of Bills Committee, *Scrutiny Digest 18 of 2020*, pp. 16-18.



**Committee comment**

2.83 The committee thanks the Attorney-General for this response. The committee notes that the Attorney-General's response did not address the committee's concerns in relation to the tabling requirements in the bill, instead raising the opportunity for the consideration of further amendments that is provided by the current review of the *National Emergency Declaration Act 2020* by the Senate Standing Committee on Legal and Constitutional Affairs. While noting this advice, the committee reiterates its above comments at paragraph [2.78] in relation to the importance of ensuring that other committees are able to benefit from the concluded comments of this committee when undertaking their own inquiries.

**2.84 The committee therefore reiterates its request for the Attorney-General's advice as to:**

- the appropriateness of amending paragraph 17(4)(a) of the *National Emergency Declaration Act 2020* to 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 National Emergency Declaration Act as soon as practicable, and in any case not later than 14 days after the national emergency declaration ceases to be in force;
- the appropriateness of amending subsection 17(5) of the *National Emergency Declaration Act 2020* to provide that:
  - the above reports must be tabled in each House of the Parliament as soon as practicable, and in any case not later than 14 days after the Minister receives the reports; and
  - that the reports are to be presented in accordance with procedures in each House for the presentation of documents out of sitting in circumstances where the reports are ready for presentation, but the relevant House is not sitting.

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**Significant matters in delegated legislation<sup>33</sup>**

2.85 In *Scrutiny Digest 18 of 2020* the committee requested the Attorney-General's advice as to:

- why it is considered necessary and appropriate to leave the specification of additional kinds of information that must not be included in a report on the

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33 Subclause 17(6). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

- exercise of powers and functions during a national emergency to delegated legislation; and
- whether the bill can be amended omit proposed paragraph 17(6)(c) or, at a minimum, to include at least high-level guidance regarding the kinds of additional information that may be prescribed in the regulations.<sup>34</sup>

### ***Attorney-General's response***

#### **2.86 The Attorney-General advised:**

The Committee requested more detailed advice as to why it is considered necessary and appropriate to leave 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 (at paragraph [1.56]).

Paragraph 17(6)(c) provides that the Minister can prevent certain information from being required to be provided in a report under subclause 17(2) via the regulation-making power in paragraph 19(a). The inclusion of this paragraph is appropriate and necessary to provide flexibility to enable the framework to reflect tabling exemptions in legislation that contains national emergency laws, particularly where those tabling exemptions would protect sensitive information from being divulged in reporting. The ability for further tabling exemptions to be added is necessary and appropriate to ensure that the NED Bill keeps pace and can be appropriately adapted to reflect existing and new tabling exemptions that may be relevant in other legislation in a responsive manner.

### ***Committee comment***

2.87 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that the inclusion of paragraph 17(6)(c) is appropriate and necessary to provide flexibility to enable the framework to reflect tabling exemptions in legislation that contains national emergency laws, particularly where those tabling exemptions would protect sensitive information from being divulged in reporting. The Attorney-General also advised that the ability to add further tabling exemptions is necessary and appropriate to ensure that the legislation keeps pace and can be appropriately adapted to reflect existing and new tabling exemptions that may be relevant in other legislation in a responsive manner.

2.88 While noting this advice, the committee has generally not accepted a desire for administrative flexibility to be a sufficient justification, of itself, for leaving significant matters to delegated legislation.

2.89 The committee also notes that the Attorney-General's response did not address the committee's broader concerns in relation to the tabling requirements in

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34 Senate Scrutiny of Bills Committee, *Scrutiny Digest 18 of 2020*, pp. 18-19.

the bill, which would assist the committee in considering the advice provided in relation to the appropriateness of paragraph 17(6)(c).

**2.90 The committee reiterates its concerns that allowing the regulations to prescribe types of information that must not be provided in reports presented to Parliament provides the minister with a broad power to prevent important information about the exercise of powers and functions during an emergency from being reviewed by the Parliament in circumstances where there are already limitations on the Parliament's ability to review actions of the executive in relation to the declaration of national emergencies.**

**2.91 The committee also draws this matter to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation.**

**2.92 In light of the fact that this bill has already passed both Houses of the Parliament the committee makes no further comment on this matter.**

## National Emergency Declaration (Consequential Amendments) Bill 2020

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| <b>Purpose</b>     | This bill seeks 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 |
| <b>Portfolio</b>   | Attorney-General   |
| <b>Introduced</b>  | House of Representatives on 3 December 2020  |
| <b>Bill status</b> | Received the Royal Assent on 15 December 2020  |

### Significant matters in non-disallowable instruments

#### Privacy<sup>35</sup>

2.93 In [Scrutiny Digest 18 of 2020](#) the committee requested the Attorney-General's advice as to why it is considered necessary and appropriate to leave the activation of provisions authorising the collection, use and disclosure of personal information to non-disallowable instruments which are not subject to parliamentary scrutiny.<sup>36</sup>

#### Attorney-General's response<sup>37</sup>

2.94 The Attorney-General advised:

The amendments to the *Privacy Act 1988* (Privacy Act) import a new, simplified test to make an emergency declaration where the Governor-General has already declared a national emergency. Subclause 80J(2) of the Consequential Amendments Bill enables the Prime Minister or the Attorney-General to make a declaration under section 80J of the Privacy Act if a national emergency declaration is in force, and they are satisfied that the emergency to which the declaration relates is of such a kind that it is appropriate in the circumstances for Part VIA to apply. This is intended to streamline the process of making a declaration under the Privacy Act by

35 Schedule 1, item 40, proposed subsection 80J(2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i) and (iv).

36 Senate Scrutiny of Bills Committee, *Scrutiny Digest 18 of 2020*, pp. 21-22.

37 The Attorney-General responded to the committee's comments in a letter dated 25 January 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 3 of 2020* available at: [www.aph.gov.au/senate\\_scrutiny\\_digest](http://www.aph.gov.au/senate_scrutiny_digest).

removing the elements of the test that overlap with the test to make an emergency declaration under the Bill.

An emergency declaration made under existing section 80J of the Privacy Act is not a legislative instrument (subsection 80L(3) of the Privacy Act). The approach taken in establishing the framework in the NED Bill was to provide simplified, alternative tests where a national emergency declaration has been made, rather than modify other existing requirements in existing legislation. Consistent with existing subsection 80J of the Privacy Act, as a declaration made under subclause 80J(2) is not a legislative instrument by virtue of existing subsection 80L(3), it is therefore not subject to disallowance. This is appropriate and necessary to maintain the structure and policy underpinning the original declaration mechanism in the Privacy Act.

### ***Committee comment***

2.95 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that the approach taken in establishing the framework in the National Emergency Declaration Bill 2020 was to provide simplified, alternative tests where a national emergency declaration has been made, rather than modify other existing requirements in existing legislation. The Attorney-General also advised that the approach taken in section 80J to leave the activation of provisions authorising the collection, use and disclosure of personal information to non-disallowable instruments is consistent with existing section 80J of the Privacy Act and that this is appropriate and necessary to maintain the structure and policy underpinning the original declaration mechanism in the Privacy Act.

**2.96 While acknowledging the Attorney-General's advice, the committee maintains its scrutiny view that it does not consider that a desire to simplify legislative procedures or to have consistency with existing legislative provisions is an adequate justification for leaving significant matters, such as measures that have a potential impact on individual privacy, to non-disallowable instruments which are not subject to parliamentary scrutiny.**

**2.97 In light of the fact that this bill has already passed both Houses of the Parliament, the committee makes no further comment on this matter.**

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### **Significant matters in non-disallowable legislative instruments<sup>38</sup>**

2.98 In [Scrutiny Digest 18 of 2020](#) the committee requested the Attorney-General's advice as to whether the bill can be amended to:

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38 Schedule 1, item 55, proposed subsections 313(4A) – (4H). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

- provide that an emergency declaration made under proposed subsection 313(4D) of the *Telecommunications Act 1997* is subject to parliamentary disallowance; and
- set out at least high-level guidance in relation to when an emergency may be declared under proposed subsection 313(4D).<sup>39</sup>

### ***Attorney-General's response***

2.99 The Attorney-General advised:

The Senate Standing Committee on the Scrutiny of Bills (the Committee) requests the Attorney-General's advice in relation to a number of matters in the National Emergency Declaration Bill 2020 (NED Bill) and the National Emergency Declaration (Consequential Amendments) Bills 2020 (Consequential Amendments Bill) (at paragraphs [1.29], [1.38], [1.45], [1.50], [1.51], [1.56] and [1.75]).

The Senate Standing Committee on Legal and Constitutional Affairs is to conduct a review of the National Emergency Declaration Act 2020 (NED Act) by 30 June 2021 which will provide an opportunity to consider further the matters raised by this Committee, in particular where the Committee has asked whether further amendments should be made.

### ***Committee comment***

2.100 The committee thanks the Attorney-General for this response. While the committee notes the Attorney-General's advice that the Senate Standing Committee on Legal and Constitutional Affairs is to conduct a review of the *National Emergency Declaration Act 2020* by 30 June 2021, the committee reiterates its comments made above in relation to the National Emergency Declaration Bill 2020 at [2.78] with respect to the importance of ministerial responses to the effective performance of the committee's duties and the importance of ensuring that other committees may benefit from this committee's views in undertaking their own inquiries.

2.101 As with the National Emergency Declaration Bill 2020, the rapid passage of this bill did not allow for this committee's views to be considered when the bill was before the Parliament, and the committee considers that it is of particular importance that any review of the new National Emergency legislation is able to benefit from the committee's concluded observations.

**2.102 The committee therefore reiterates its request for the Attorney-General's advice as to the appropriateness of amending the *Telecommunications Act 1997* to:**

- **provide that an emergency declaration made under subsection 313(4D) is subject to parliamentary disallowance; and**

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39 Senate Scrutiny of Bills Committee, *Scrutiny Digest 18 of 2020*, pp. 22-24.

- set out at least high-level guidance in relation to when an emergency may be declared under subsection 313(4D).<sup>40</sup>

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## Significant matters in non-disallowable instruments (provisions akin to Henry VIII clause)<sup>41</sup>

### Exclusion from tabling<sup>42</sup>

2.103 In [Scrutiny Digest 18 of 2020](#) the committee requested the Attorney-General's advice as to:

- why it is considered necessary and appropriate to include powers in the bill which allow non-legislative instruments to modify the operation of the *Therapeutic Goods Act 1989*; and
- why it is necessary and appropriate to provide that instruments made under proposed subparagraphs 18A(2A)(b)(i), 32CB(2A)(b)(i), and 41GS(2A)(b)(i) are not required to be tabled in the Parliament.<sup>43</sup>

### Attorney-General's response

2.104 The Attorney-General advised:

Proposed subparagraphs 18A(2A)(b)(i), 32CB(2A)(b)(i), and 41GS(2A)(b)(i) provide for alternative tests to exempt certain therapeutic goods, biologicals and medical devices from certain requirements under the *Therapeutic Goods Act 1989*, so that the goods, biologicals or medical devices can be quickly stockpiled or made available urgently to deal with an emergency. The alternative tests streamline the requirement for the Minister to establish a possible future emergency or an actual emergency, where there is a national emergency declaration in force.

The approach taken in establishing the framework was to provide simplified, alternative tests where a national emergency declaration has been made, rather than modify other existing requirements in the legislation. In this regard, the proposed subparagraphs are appropriate and necessary to maintain the structure and policy underpinning the original tests and tabling exemptions.

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40 Senate Scrutiny of Bills Committee, *Scrutiny Digest 18 of 2020*, pp. 22-24.

41 Schedule 1, item 60, proposed subsection 18A(2A); item 65, proposed subsection 32CB(2A); and item 70, proposed subsection 41GS(2A). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

42 Schedule 1, item 62, proposed paragraph 18A(11)(a); item 67, proposed paragraph 32CF(2)(a); item 72, proposed paragraph 41GW(2)(a)(v).

43 Senate Scrutiny of Bills Committee, *Scrutiny Digest 18 of 2020*, pp. 25-27.

The amendments are intended to enable the Minister to establish a possible future emergency or an actual emergency by reason of a national emergency declaration being made. Where a national emergency declaration is in force, the Minister is not required to satisfy themselves of other factual circumstances to establish a possible future emergency or an actual emergency. This is necessary and appropriate to enable the Minister to act decisively where a national emergency declaration is on foot and it is necessary to exempt specific therapeutic goods, biologicals or medical devices from certain requirements so they can be stockpiled or made available without delay.

**Committee comment**

2.105 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that the relevant subparagraphs provide for alternative tests for exemptions from certain requirements under the *Therapeutic Goods Act 1989* so that goods, biologicals or medical devices can be quickly stockpiled or made available urgently to deal with an emergency. The Attorney-General advised that where a national emergency declaration is in force, the Minister is not required to satisfy themselves of other factual circumstances to establish a possible future emergency or an actual emergency, and that this is necessary and appropriate to enable the Minister to act decisively where a national emergency declaration is on foot and it is necessary to exempt specific therapeutic goods, biologicals or medical devices from certain requirements so they can be stockpiled or made available without delay.

2.106 The Attorney-General also advised that the approach in establishing the National Emergency Declaration framework was to provide simplified, alternative tests when a national emergency declaration has been made, and that, in this regard, the subparagraphs maintain the structure and policy underpinning the original tests and tabling exemptions.

**2.107 While acknowledging the Attorney-General's advice, the committee maintains its scrutiny view that the fact that a certain matter continues current arrangements does not, of itself, provide an adequate justification for provisions that enable non-disallowable instruments to modify the operation of primary legislation, or for exclusions from tabling requirements.**

**2.108 In light of the fact that this bill has already passed both Houses of the Parliament, the committee makes no further comment on this matter.**