

COMMITTEE SUMMARY

Review of the National Emergency Declaration Act 2020

Jayden Spudvilas-Powell • Individual Submission • 3 February 2026

Core finding

The accountability architecture of the National Emergency Declaration Act 2020 (NED Act) assumes that emergency powers will be exercised and reported. The sole declaration to date, the 2022 NSW Floods Declaration,¹ activated none of the substantive powers the Act was designed to provide. No national emergency law powers were exercised, no section 15 determinations were made, and no statutory report was tabled in Parliament. Three subsequent reviews have raised the same concerns about definitions, disallowance, and oversight. The Government has declined to engage substantively with any of them, while conducting a parallel classified review of emergency management powers whose findings remain invisible to Parliament.²

Recommendations

1. **Decision-record duty.** Require a Statement of Decision Reasons to be tabled in both Houses within 5 sitting days of any declaration, extension, or variation, specifying the trigger pathway, consultation undertaken, and powers considered necessary.
2. **Non-use reporting.** Require the responsible minister to table a periodic report during any declaration period stating whether powers were exercised, whether section 15 determinations were made or considered, and if neither, why the declaration was maintained. This is the single highest-leverage transparency improvement available.
3. **Consultation auditability.** Require written reasons, recorded contemporaneously, whenever the 'not practicable' consultation exception in section 11(3) is relied upon.
4. **Compensating oversight.** Require a mandatory closed Committee briefing within 14 days of any declaration. Require the Government to table a substantive response to each review within 90 days. Consider an affirmative resolution requirement for extensions beyond a cumulative threshold.
5. **Definitions and the classified review.** Re-state the need for statutory definitions of 'emergency' and 'Commonwealth interests.' Request that the Department of Home Affairs provide a declassified summary of its non-statutory review of emergency management powers, or take evidence on its findings.

Full submission follows.

¹National Emergency (2022 New South Wales Floods) Declaration 2022 (F2022L00312), made 11 March 2022, expired 10 June 2022.

²Australian Government Response to the Senate Legal and Constitutional Affairs Legislation Committee Report: National Emergency (2022 New South Wales Floods) Declaration 2022 (November 2024).

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**SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS
LEGISLATION COMMITTEE**

Review of the National Emergency Declaration Act 2020

Dear Committee Secretary,

I welcome the opportunity to contribute to the Committee's five-year statutory review of the National Emergency Declaration Act 2020 (the NED Act). This submission is made in an individual capacity. It focuses on statutory design, accountability mechanisms, and post-event auditability.

Standing. I am completing a Juris Doctor at the Australian National University (2026). My work centres on administrative transparency and governance design, including Freedom of Information law, civic-technology projects focused on decision visibility, and published research tools for administrative review. I provided evidence to this Committee's inquiry into the Freedom of Information Amendment Bill 2025 (Submission 38). The perspective I bring is that of an administrative law researcher concerned with whether statutory frameworks produce auditable, reviewable decision records when they are used under stress.

Scope. This submission addresses the accountability architecture of the NED Act as revealed by its sole use to date, the National Emergency (2022 New South Wales Floods) Declaration 2022, and the pattern of engagement between the executive and Parliament across the three prior reviews. It does not address operational emergency management policy.

1. EXECUTIVE SUMMARY

Five years after commencement and one real-world activation, the NED Act's accountability architecture can now be assessed against evidence rather than intention. This submission identifies five findings and five corresponding recommendations.

1. **The Act's strongest design feature is consolidation.** The enumerated list of national emergency laws in section 10 gives decision-makers a single reference point for the full suite of Commonwealth emergency powers. This alone justifies the legislative framework.
2. **The Act's weakest design feature is that transparency depends on the exercise of powers.** Reporting obligations under section 17 trigger only when powers are used. When the only declaration to date activated none of the substantive emergency powers, the reporting architecture produced silence rather than accountability. The public record cannot distinguish between 'no powers were needed' and 'powers were considered but not used for undisclosed reasons.'
3. **The federal–state consultation process produced no auditable trace.** Neither New South Wales nor Queensland requested the 2022 declaration. The Committee's per-declaration review found the Government did not provide information about the Prime Minister's consultations with the states.³ Both state flood inquiries made no mention of the NED Act.⁴ The statutory consultation requirement in section 11(2) was either satisfied through a process that left no reviewable record, or the 'not practicable' exception was relied upon without public explanation.
4. **The Government has declined to engage substantively with Parliament's reform recommendations across three reviews.** The April 2024 Government Response to the first operational review dismissed every recommendation, including majority, Labor and Greens recommendations, with the identical formula: 'given the passage of time since the report was tabled, a substantive Government response is no longer appropriate.'⁵ The November 2024 response to the per-declaration review revealed a classified non-statutory review of emergency management powers, the findings of which remain invisible to Parliament.⁶ This pattern undermines the Act's own accountability design.
5. **Targeted amendments to decision-recording, non-use reporting, and consultation auditability would close the principal gaps without impeding emergency response.** These amendments follow existing Commonwealth precedents and are compatible with operational urgency.

³Senate Legal and Constitutional Affairs Legislation Committee, National Emergency (2022 New South Wales Floods) Declaration 2022 (8 February 2023).

⁴2022 NSW Flood Inquiry, Report (29 July 2022), 28 recommendations; Queensland Inspector-General of Emergency Management, South East Queensland Rainfall and Flooding: February to March 2022 Review, Report 1: 2022–2023 (31 August 2022), 19 recommendations. Neither report references the National Emergency Declaration Act 2020 or the NSW Floods Declaration in its terms of reference, legislative framework, findings, or recommendations.

⁵Australian Government Response to the Senate Legal and Constitutional Affairs Legislation Committee Report: Review of the National Emergency Declaration Act 2020 (April 2024).

⁶Australian Government Response to the Senate Legal and Constitutional Affairs Legislation Committee Report: National Emergency (2022 New South Wales Floods) Declaration 2022 (November 2024).

2. THE ACT'S ACCOUNTABILITY DESIGN IN BRIEF

The NED Act implements Recommendation 5.1 of the Royal Commission into National Natural Disaster Arrangements.⁷ It serves three functions identified by that Commission: public communication of seriousness, mobilisation of Commonwealth agencies, and power to act without a state or territory request in defined circumstances.

The Act's accountability architecture comprises:

- A subjective satisfaction test requiring the Prime Minister to be 'satisfied' of triggering conditions before advising the Governor-General (section 11).
- A consultation requirement with affected states and territories, subject to a 'not practicable' exception determined by the Prime Minister (sections 11(2)–(3)).
- Time-limitation of declarations to three months with indefinite three-month extensions (sections 11(5), 12).
- A Henry VIII clause enabling ministers to suspend, vary, or substitute administrative requirements in primary legislation during a declared emergency, with enumerated scope limits and institutional carve-outs (section 15).
- Reporting to Parliament when national emergency law powers are exercised (section 17).
- Exemption of declarations, extensions, variations, and revocations from disallowance (sections 11(6), 12(5), 13(4), 14(4)).
- Compensating oversight through per-declaration Senate review (section 14A), an immediate post-commencement review (section 18(a)), and this five-year review (section 18(b)).

This architecture assumes that powers will be exercised, that exercise will be reported, and that Parliament will review. The 2022 floods declaration tested those assumptions and exposed a gap: when the declaration exists but the machinery is not substantively engaged, the accountability architecture is largely inert.

⁷Royal Commission into National Natural Disaster Arrangements, Report (28 October 2020), Recommendation 5.1, pp 140–149.

3. THE 2022 NSW FLOODS DECLARATION AS AN ACCOUNTABILITY TEST

The National Emergency (2022 New South Wales Floods) Declaration 2022 was the first and remains the only national emergency declaration made under the NED Act.⁸ It was made on 11 March 2022 and expired on 10 June 2022 without extension or variation.

The February–March 2022 floods were among the most severe in Australia's recorded history. In northern New South Wales, the Lismore gauge peaked at 14.4 metres, two metres above the previous record set in 1954 and matched in 1974. Twenty-one lives were lost in New South Wales alone, over 22,000 requests for assistance were received, and more than 2,000 flood rescues were conducted.⁹ The scale and severity of these events is not in question. What is in question is whether the NED Act's accountability architecture produced a reviewable record of the decisions made under it.

3.1 Trigger and consultation visibility

Section 11(1)(c) provides four alternative pathways for a declaration. The cooperative pathway, a written request from an affected state or territory government, was not used. Neither the New South Wales Government nor the Queensland Government requested the declaration.

This was not a quiet omission. The Queensland Premier stated publicly that the time for a national emergency declaration had passed, that floodwaters had already receded, and that Queensland's own disaster management arrangements had provided all necessary powers. News reporting indicated that neither premier considered the declaration necessary. The declaration was therefore grounded on one or more of the unilateral triggers in section 11(1)(c)(ii)–(iv), most likely the broadest: that the Prime Minister was satisfied the declaration was 'appropriate, having regard to the nature of the emergency and the nature and severity of the nationally significant harm.'

Section 11(2) requires the Prime Minister to consult with affected states and territories, or be satisfied that consultation is 'not practicable.' The Committee's per-declaration review found that the joint Government submission 'did not provide the committee with information regarding the Prime Minister's consultations with the NSW and Queensland Governments.'¹⁰ The Committee observed that this lack of information made it difficult to assess whether the framework could be improved.

Neither state government submitted to the per-declaration review. Both states established independent flood inquiries. The NSW Flood Inquiry reported in July 2022 and the Queensland Inspector-General of Emergency Management reported in August 2022. Neither

⁸Senate Legal and Constitutional Affairs Legislation Committee, National Emergency (2022 New South Wales Floods) Declaration 2022 (8 February 2023), p. 6.

⁹Senate Legal and Constitutional Affairs Legislation Committee, National Emergency (2022 New South Wales Floods) Declaration 2022 (8 February 2023), p. 5.

¹⁰Senate Legal and Constitutional Affairs Legislation Committee, National Emergency (2022 New South Wales Floods) Declaration 2022 (8 February 2023), pp. 8–9.

inquiry mentioned the NED Act or the NSW Floods Declaration.¹¹ The Commonwealth's declaration framework was apparently not material to either state's assessment of the emergency response.

The trigger pathway used, the consultation undertaken, and the reasons for proceeding without state agreement are not discernible from the public record. The consultation requirement in section 11(2) may have been satisfied, but there is no reviewable trace of that satisfaction.

3.2 Exercise and reporting on emergency powers

The Committee's per-declaration review recorded that the emergency powers listed as 'national emergency laws' in section 10 were not exercised during the declaration period. No agency used the consolidated list of powers that the Act was designed to activate.

The section 15 ministerial determination power, the Henry VIII clause enabling suspension or variation of administrative requirements in primary legislation, was apparently considered. The Department of the Prime Minister and Cabinet (PM&C) wrote to departmental secretaries on 23 March 2022 requesting they consider whether affected areas would benefit from modification of administrative requirements. But no determinations were made, and the Committee's report noted the joint Government submission 'did not provide further information on the exercise of the ministerial determination power.'¹²

Because no powers were exercised, the section 17 reporting obligation was not triggered. No report was tabled in Parliament during or after the three-month declaration period.

The Australian Government Crisis Response Committee reviewed the declaration three times before allowing it to expire.¹³ The decision to let the declaration lapse rather than extend it suggests an operational assessment that the powers were no longer required, or had never been required, but no public record of that assessment exists.

The first activation of the NED Act produced a declaration that ran for its full three-month term without generating any statutory report to Parliament about what the declaration achieved, what powers were considered, or why none were used. 'Nothing happened' is not an auditable finding. It is an absence where a record should be.

3.3 The signalling function and what followed

If the declaration's primary effect was communicative, signalling the seriousness of the emergency to the public and to Commonwealth agencies, that is a legitimate function identified by the Royal Commission. But a signalling function exercised through a legislative

¹¹2022 NSW Flood Inquiry, Report (29 July 2022), 28 recommendations; Queensland Inspector-General of Emergency Management, South East Queensland Rainfall and Flooding: February to March 2022 Review, Report 1: 2022–2023 (31 August 2022), 19 recommendations. Neither report references the National Emergency Declaration Act 2020 or the NSW Floods Declaration in its terms of reference, legislative framework, findings, or recommendations.

¹²Senate Legal and Constitutional Affairs Legislation Committee, National Emergency (2022 New South Wales Floods) Declaration 2022 (8 February 2023), pp. 10–11.

¹³Senate Legal and Constitutional Affairs Legislation Committee, National Emergency (2022 New South Wales Floods) Declaration 2022 (8 February 2023), p. 9.

instrument that activates sweeping executive powers should still produce a minimum audit trail.

What followed the 2022 floods reinforces this concern. Between May 2022 and March 2023, the Murray–Darling Basin experienced further severe flooding across New South Wales, Victoria, and South Australia. In New South Wales alone, 213 continuous days of flood operations were conducted between August 2022 and March 2023. Tragically, seven people died during the New South Wales flooding, over 5,300 properties were damaged, and more than 3,000 were assessed as uninhabitable. Victoria's state-wide flood event lasted 89 days across 63 local government areas. South Australia experienced its largest River Murray flood in 50 years.¹⁴ No second national emergency declaration was made. The Act provides no mechanism for Parliament or the public to understand why the framework was used for one catastrophic event but not another. This is not a criticism of the decision itself; it is a criticism of the absence of any reviewable basis for it.

¹⁴Australian Institute for Disaster Resilience (2023) Major Incidents Report 2022–23, pp 27–42; Australian Institute for Disaster Resilience, 'New South Wales Flood, 2022' (Knowledge Hub) <<https://knowledge.aidr.org.au/resources/flood-new-south-wales-2022/>>

4. THE PATTERN ACROSS THREE PRIOR REVIEWS

The five-year review under section 18(b) does not operate in isolation. Three prior reviews have examined the NED Act and its sole use. The pattern of engagement between Parliament and the executive across those reviews is itself relevant to this Committee's assessment.

4.1 First operational review (reported 30 June 2021)

The Committee identified concerns about the breadth of undefined terms ('emergency,' 'Commonwealth interests'), the scope of the Henry VIII clause in section 15, and the exemption of instruments from disallowance. Labor senators made six additional recommendations including restoring disallowance, requiring Information Commissioner-style pre-authorisation for section 15 determinations, establishing a special parliamentary committee upon any declaration, and clarifying definitions after state and territory consultation. Greens senators made four recommendations including restricting extensions and expanding section 15 carve-outs. The Law Council of Australia, the Australian Human Rights Commission, and the NSW Government all raised substantive concerns.¹⁵

4.2 Government Response (April 2024)

The Government's formal response, tabled nearly three years after the Committee reported, addressed every recommendation from the majority, Labor, and the Greens with the identical formulation: "The Government notes this recommendation. However, given the passage of time since the report was tabled, a substantive Government response is no longer appropriate."¹⁶

This included recommendations to restore disallowance for extensions, to subject the Henry VIII clause to greater parliamentary oversight, to define 'emergency' and 'Commonwealth interests,' and to establish coordinated federal–state frameworks. No recommendation received substantive engagement.

4.3 Per-declaration review (reported 8 February 2023)

The Committee found the declaration appeared to satisfy technical requirements but identified concerns about information provision, federal–state consultation, and the exercise of statutory powers.¹⁷ The Committee recommended that any changes to the NED Act consider the findings of both operational reviews. The Committee also drew the Senate's attention to Labor senators' earlier legislative amendment recommendations.

4.4 Government Response (November 2024)

The Government agreed to the first recommendation and noted the second. Critically, the response revealed that the Department of Home Affairs had undertaken a 'classified non-statutory review' of the Commonwealth's emergency management powers, considering

¹⁵Senate Legal and Constitutional Affairs Legislation Committee, National Emergency Declaration Act 2020 (June 2021).

¹⁶Australian Government Response to the Senate Legal and Constitutional Affairs Legislation Committee Report: Review of the National Emergency Declaration Act 2020 (April 2024).

¹⁷Senate Legal and Constitutional Affairs Legislation Committee, National Emergency (2022 New South Wales Floods) Declaration 2022 (8 February 2023).

whether current legislation is sufficient to manage 'increasingly challenging crisis events.' The Government stated it was 'considering the findings' of that review. The findings themselves have not been disclosed to Parliament.¹⁸

4.5 The accountability implication

The cumulative effect is that Parliament has asked the same questions three times about definitions, disallowance, Henry VIII clause oversight, and federal–state coordination, yet the executive has either been insufficiently forthcoming with information or has explicitly declined to engage. At the same time, a parallel classified review exists that may inform legislative reform but remains invisible to the body conducting the statutory review mandated by the Act itself.

This pattern is relevant to the five-year review because it tests whether the Act's accountability architecture, which substitutes periodic Senate review for ordinary disallowance, is producing meaningful oversight in practice. If the compensating mechanism does not compel substantive engagement, the trade-off that justified the disallowance exemption is not being honoured.¹⁹

¹⁸Australian Government Response to the Senate Legal and Constitutional Affairs Legislation Committee Report: National Emergency (2022 New South Wales Floods) Declaration 2022 (November 2024).

¹⁹Senate Legal and Constitutional Affairs Legislation Committee, National Emergency Declaration Act 2020 (June 2021), pp. 17–18.

5. DESIGN PROBLEMS AND RECOMMENDED AMENDMENTS

5.1 Decision-record duty for declarations, extensions, and variations

Problem. The Act operates on a subjective 'satisfied' model. The Prime Minister's satisfaction is the jurisdictional trigger, but no provision requires a contemporaneous record of the basis for that satisfaction. The public record of the 2022 declaration does not disclose which trigger pathway was relied upon, what consultation occurred, or which national emergency law powers were considered potentially necessary.

Recommendation 1. Amend the Act to require that when a declaration, extension, or variation is made, a Statement of Decision Reasons be prepared and tabled in both Houses within 5 sitting days. The statement should specify:

- (a) the trigger pathway relied upon under section 11(1)(c);
- (b) what consultation with affected states and territories was undertaken, or if not undertaken, why it was not practicable;
- (c) which national emergency law powers and section 15 determination powers were considered potentially necessary.

The statement may be accompanied by a confidential annex where national security requires redaction, but the existence of a tabled statement should be mandatory.

5.2 Reporting on non-use of powers

Problem. Section 17 requires ministers to report when they exercise national emergency law powers. When no powers are exercised, no report is required. The 2022 declaration demonstrates the consequence: a declaration ran for three months and expired without any statutory report to Parliament about what the declaration achieved or what powers were considered. 'Nothing happened' is not an auditable finding.

Recommendation 2. Amend section 17 (or insert a new provision) to require that during any declaration period, the responsible minister table a periodic report stating:

- (a) whether any national emergency law powers were exercised and, if so, the nature and scope of that exercise;
- (b) whether any section 15 determinations were made, considered, or requested by other ministers;
- (c) if no powers were exercised or determinations made, the reasons why the declaration was maintained;
- (d) any barriers identified in the consolidated list of national emergency laws.

This is the single highest-leverage transparency improvement available. It ensures that the existence of a declaration, which activates executive powers and exempts instruments from disallowance, produces a minimum audit trail regardless of whether those powers are ultimately exercised.

5.3 Consultation auditability

Problem. The consultation requirement in section 11(2) reflects cooperative federalism. The exception in section 11(3) is self-assessed by the Prime Minister. In the 2022 declaration, the process produced no discernible public record and neither affected state participated in the subsequent review.

Recommendation 3. Amend section 11 to require that the 'not practicable' exception be accompanied by written reasons recorded at the time the determination of impracticability is made. These reasons should form part of the Statement of Decision Reasons in Recommendation 1. Where consultation occurs, the statement should record its nature and the position of consulted governments, to the extent consistent with intergovernmental comity.

5.4 Compensating oversight for disallowance exemption

Problem. The exemption of declarations, extensions, variations, and revocations from disallowance was justified in the Explanatory Memorandum on the basis that disallowance would undermine certainty for emergency response agencies. The compensating mechanism is periodic Senate review. The evidence from three review cycles suggests this compensation is insufficient if the executive can decline to engage substantively with findings and recommendations.

Recommendation 4. At minimum, the Act should require a mandatory closed briefing to the Committee (or its equivalent) within 14 days of any declaration, extension, or variation. This preserves operational confidentiality while ensuring the body responsible for oversight has contemporaneous access to the executive's reasoning. The Committee should additionally consider:

- (a) a requirement that the Government table a substantive response to each review conducted under sections 14A and 18 within 90 days of the review being reported;
- (b) a sunset on repeated extensions, requiring an affirmative resolution of both Houses if a declaration is to be extended beyond a cumulative period (for example, six or nine months).

These mechanisms avoid restoring full disallowance, which could compromise operational certainty, while ensuring the trade-off delivers genuine parliamentary engagement rather than a cycle of recommendations and non-response.

5.5 Statutory definitions and the classified non-statutory review

Problem. The terms 'emergency,' 'Commonwealth interests,' and the threshold for 'nationally significant harm' have been identified as insufficiently defined or ambiguous by the Law Council of Australia, the Australian Human Rights Commission, the NSW Government, the Scrutiny of Bills Committee, and this Committee itself—across three separate review processes. The Government has declined to act on these recommendations. Separately, the Department of Home Affairs has conducted a classified non-statutory review of the Commonwealth's emergency management powers, the findings of which are not available to Parliament.

Recommendation 5. The Committee should:

- (a) re-state the need for inclusive statutory definitions of 'emergency' and 'Commonwealth interests,' and request that the Government explain why it has not acted on this recommendation after five years and three review cycles;
- (b) request that the Department of Home Affairs provide to the Committee at least a declassified summary of its non-statutory review, or take evidence from the Department about the review's findings and their implications for legislative reform.

The five-year review is the statutory mechanism designed to assess whether the Act is operating as intended. A parallel classified executive review that informs potential reform but is invisible to the reviewing body undermines that design.

6. IMPLEMENTATION NOTES

Each recommended amendment has precedent in existing Commonwealth frameworks. The Statement of Decision Reasons is comparable to the model under section 13 of the Administrative Decisions (Judicial Review) Act 1977, adapted for parliamentary tabling. The National Security Legislation Monitor Act 2010 provides a model for closed reports on sensitive executive action. The non-use reporting obligation extends the logic of the existing section 17 periodic reporting model to the absence of power exercise. The mandatory government response codifies the Senate's existing 90-day convention for this specific high-stakes context.

None of these amendments require restructuring the Act's operative provisions. They strengthen the accountability layer while leaving the emergency response architecture intact. Record-creation obligations must attach at the point of decision, not at the point of review, because the absence of a contemporaneous record cannot later be repaired.

7. TIMING NOTE: NATIONAL EMERGENCY MANAGEMENT AGENCY (NEMA) IMPLEMENTATION REPORT

The NEMA has indicated that the final implementation status report on the Royal Commission's 80 recommendations will be published in early 2026.²⁰ That report will presumably mark Recommendation 5.1 (which generated the NED Act) as 'completed.' The Committee may wish to consider whether 'completed' means 'enacted' or 'fit for purpose.' The five-year review is the statutory mechanism to test that distinction.

²⁰National Emergency Management Agency, 'Royal Commission into National Natural Disaster Arrangements' (webpage) <<https://www.nema.gov.au/about-us/governance/reviews/royal-commission-into-natural-disaster>>

CONCLUSION

The NED Act was a necessary and well-conceived response to the Royal Commission's findings. Its consolidation of Commonwealth emergency powers into a single declaration framework, its enumerated scope limits, and its institutional carve-outs reflect careful legislative design. The five-year review is itself evidence of that care.

But the Act's accountability architecture has not been tested by sustained use. Its one activation produced a declaration that ran for three months, activated no substantive emergency powers, generated no statutory report to Parliament, and left no reviewable trace of the consultation and decision-making process that led to it. That absence is not neutral. It is a design outcome.

Three subsequent reviews have asked the same questions about definitions, disallowance, and oversight. The Government has declined to engage substantively with any of them.

The amendments proposed in this submission are targeted, precedented, and compatible with operational emergency response. They ask for records where decisions are made, reports where powers exist, and engagement where Parliament reviews. These are minimum conditions for the Act's accountability design to function as intended.

I would welcome the opportunity to provide further information to the Committee if required.

Yours sincerely,

Jayden Spudvilas-Powell