

14 October 2020

Senate Standing Committees on Foreign Affairs, Defence and Trade
Legislation Committee
Submitted via aph.gov.au website

L1 Endeavour House
1 Franklin Street
Manuka ACT 2603

+61 2 6130 0530
mail@tai.org.au
tai.org.au

ABN 90 061 969 284
ACN 061 969 284

Defence Legislation Amendment (Enhancement of Defence Force Response to Emergencies) Bill 2020

The Australia Institute submits these comments on the draft bill to assist the Senate Foreign Affairs, Defence and Trade Legislation Committee in its consideration of the issues raised by this bill. In our view, the bill should not proceed. The bill presents several risks to the ADF, its personnel and its standing in the Australian community. Beyond the details discussed below, the bill represents another example of the 'securitisation' of Australian public policy. Securitisation avoids complex policy problems and reflexively extends the roles and responsibilities of military, law enforcement and intelligence agencies. Securitisation turns problems into threats.¹

This submission was prepared by Allan Behm, head of the Institute's International and Security Affairs program, and Rod Campbell, the Institute's Director of Research. For the Committee's information, Allan Behm was previously head of the Protective Services Coordination Centre and of the Security Division in the Attorney General's Department, responsible for national counter-terrorism arrangements, and head of the Strategy Division in the Department of Defence responsible for Defence Assistance to the Civil Community (DACC) and Defence Assistance to the Civil Power (DACP) policy.

Notwithstanding the claim made in the Explanatory Memorandum, and repeated in the Assistant Minister's second reading speech, this bill does nothing to "enhance Defence's capacity to provide assistance in relation to natural disasters and other emergencies". Defence's capacity to employ its capabilities to assist the civil community lies in the training, systems and procedures that underpin the efficiency and effectiveness of all Australian Defence Force (ADF) operations. If this bill does anything, it attempts to streamline procedures for calling out the ADF Reserves.

Accordingly, the title of the bill should be amended to reflect this: Defence Legislation Amendment (Streamlining Defence force Employment in Emergencies) Bill 2020.

Neither the Explanatory Memorandum nor the Assistant Minister's second reading speech explain why it is necessary to streamline Call Out of the Reserves, when, in practice, the Reserve is maintained at a lower level of readiness, and at a lower level of general capability, than the regular ADF. There is no indication that the government has addressed the risks associated with deploying less well trained and equipped Reserve members when regular naval personnel operate the fleet units and aviation support, regular air force personnel

¹ See Behm (2020) *Securitisation – Turning Problems into Threats*,
<https://www.tai.org.au/content/securitisation-turning-problems-threats>



operate the transport aircraft, and regular army personnel operate the rotary wing elements. And the infantry battalions are in general better trained for civil assistance tasks.

There are six issues that the Committee should address before it finalises its consideration of this draft bill and forwards its recommendations to government.

What Does 'Emergency' Mean?

The term is extremely open-ended and subject to whatever interpretation the Minister or the Prime Minister may wish to give it. While the Explanatory Memorandum qualifies 'emergency' with 'not requiring the use of force', the bill makes no such qualification. The Australia Institute suggests that the term 'emergency' should be defined narrowly in a Definitions section within the bill, so as to exclude emergencies such as civil disorder, protests or strikes that may require DACP. Alternatively, the term 'emergency' could be expressed as 'emergency resulting from catastrophic natural or man-made events' to ensure that the use of force is not contemplated in these amendments.

ADF and Reserve Members to be Unarmed

The Australia Institute would encourage the Committee to ensure that the amendments proposed in the bill be supplemented by a specific reference to ensuring that the ADF and Reserve members deployed for the purposes of the bill are unarmed and do not carry weapons.

Employment and Deployment of the ADF and Reserve members only at the Request of the State(s) and Territory/Territories

It is for the states and territories to manage their own affairs, including natural disasters and civil emergencies. It is not for the Commonwealth to interfere or intervene. And when ADF or other Commonwealth employees are deployed to support the states and territories, the command and control arrangements are absolutely clear. The default position should be that the state and territory authorities (e.g. SES, RFS or similar Commissioner) should exercise overall control, with clear lines of communication and control to ADF officers in charge of the deployed ADF and Reserve members.

The Australia Institute considers that it would be entirely inappropriate for the Commonwealth to decide on its own motion to provide assistance in circumstances where there was no explicit request from the relevant states or territories. Hence we recommend that, at Schedule 1, Part 1, Subsection 28(4), the bill require that the Minister advise the Prime Minister that a state or states or a territory or territories have expressly requested Commonwealth assistance in the form of Defence personnel and equipment.

The ADF as a Reserve Capability

The ADF and the Reserves should be deployed for national tasks only as a last resort. They are not purpose trained for natural disaster or other catastrophic events such as building or bridge collapses, aircraft crashes or mine disasters. Their deployment in such circumstances may generate significant risks to ADF and Reserve personnel.

Legal Immunity for ADF and Reserve Personnel

The Australia Institute considers that indemnifying ADF and Reserve personnel who are providing assistance to the civil community is problematic, in that the indemnity appears to be wider than the indemnities afforded under state legislation to emergency service officers. The ADF is an all-volunteer force and, membership of the ADF notwithstanding, its members are members of the Australian community in the same way that members of first responder organisations are members of the Australian community. First responder groups, whether they are RFS volunteers or police constables, do not appear to be immune from criminal prosecution in the conduct of their duties, though they do appear to be immune from civil liability. While immunity from criminal prosecution may serve the interests of the Commonwealth in circumstances of defence aid to the civil power (DACP) – and even that is moot – such indemnity is not appropriate when ADF members are carrying out what are essentially civilian duties. In a democracy, the rule of law must apply in all circumstances.

The solution to this problem may be for the bill to specify that ADF and reserve members will enjoy the same immunity from prosecution under State and Territory legislation as applies to emergency service officers and first responders in the state or territory in which the ADF and reserve members are deployed.

Legal Immunity for Foreign Military and Police Personnel

The Australia Institute considers that the extension of legal immunity to non-citizens is also problematic. For a non-citizen who may be completely unfamiliar with Australian law and custom and who owes no fealty to Australia to act without legal sanction is unacceptable. It would be far preferable not to deploy or employ such people. Claims of Immunity from civil and criminal prosecution by foreign diplomats under the Vienna Convention can, from time to time, cause public outrage. Public outrage at immunity for foreigners in the circumstances of natural disasters is totally avoidable. Just as foreign fire-fighters are employed with limited immunities, so too should foreign troops that undertake civilian tasks.

Conclusion

The Australia Institute considers that it is important that the Committee bear in mind that Australia's military and reserve personnel are trained for warlike operations, and that the operational mindset with which they are imbued is one of offensive and defensive military operations. While, as citizens, they are more than happy to assist the civil community, they are not trained for that. They are, moreover, an expensive asset to operate.

The Australia Institute would draw the Committee's attention to the growing practice of government to 'securitise' community and social policy issues by addressing them through what often appear to be relatively minor legislative amendments to defence and security statutes. While a constant recourse to "(ADF) boots on the ground" may generate a sense of forward movement and a measure of political theatre, community and social policy problems are generally not amenable to resolution by means of security and law enforcement legislative instruments. The problems reside in the broader civilian population, and their resolution belongs there.

To assist the Committee's deliberations, The Australia Institute is attaching a paper titled *Calling it out* prepared in January 2020 when the government responded to the bushfires ravaging NSW and Victoria by calling out the Reserves as a dramatic political gesture with little material impact.

Finally, The Australia Institute informs the Committee that it associates itself with the submission provided by Mr Paul Barratt (former Secretary of the Department of Defence) and supports his suggestions.

Allan Behm
Rod Campbell

14 October 2020