



Australian Government
Department of Defence

Defence Submission to the Senate Foreign Affairs, Defence and Trade Legislation Committee

DEFENCE LEGISLATION AMENDMENT (ENHANCEMENT OF DEFENCE FORCE RESPONSE TO
EMERGENCIES) BILL 2020

Introduction

1. The measures in the *Defence Legislation Amendment (Enhancement of Defence Force Response to Emergencies) Bill 2020* (the Bill) are intended to improve existing arrangements for the ADF and other Defence personnel to provide assistance during natural disasters and other emergencies. These measures were developed following consideration within Defence of lessons learnt during the 2019/2020 bushfire disasters. The measures also align with the interim observations and draft propositions of the Royal Commission into National Natural Disaster Arrangements.
2. The ADF has provided assistance to civil authorities and the community in these sorts of events for decades. The current framework for providing this sort of assistance is the Defence Assistance to the Civil Community (DACC) Manual and Policy (available at <https://www.defence.gov.au/publications/docs/DACC-Manual.pdf> and <https://www.defence.gov.au/publications/docs/DACC-Policy.pdf>).
3. During 2020, DACC assistance has included large scale assistance during the 2019/2020 bushfire disasters, and in response to the COVID-19 pandemic. The 2019/2020 bushfire disasters was the first time the Reserves have been called out to support DACC operations, instead of relying only on members of the Permanent forces and Reserve members who have volunteered.
4. The measures in the Bill are relatively modest amendments to the *Defence Act 1903* (the Act) to streamline processes for Reserve call outs, and to provide ADF members and other personnel with protection from liability when they are providing assistance (similar to protections available to emergency services workers in State and Territory legislation). Importantly, the measures do not:
 - a. expand or alter the Government's legal authority to deploy the ADF in response to natural disasters or other emergencies
 - b. expand or alter the powers legally available to ADF members and other personnel who are providing assistance in relation to a natural disaster or other emergency
 - c. authorise ADF members and other personnel to use force or coercive powers against members of the Australian community.

Processes around call out of Reserve members

5. Schedule 1 of the Bill includes proposed amendments to sections 28 and 29 of the Act, which provide for Reserve call out, to streamline the process for calling out members of the Reserves. There have been some concerns that these amendments will reduce the safeguards before the ADF is deployed in Australia in response to a natural disaster.

6. The power to call out the Reserves does not authorise the deployment of the ADF, and does not provide the ADF with any powers once they are deployed. It is a mechanism to increase the numbers of available ADF members by requiring Reserve members to render service. Reserve call out is available in a wide range of circumstances listed in the Act, including up to a time of war.

7. The measures in the Bill do not change these aspects of Reserve call out. Instead, the Bill streamlines the process for making a Reserve call out order, and provides greater flexibility in how called out Reserve members can be used.

8. Some key points:

- a. The Bill does not alter, change or otherwise diminish the role of the States and Territories in the process of calling out the Reserves. State or Territory consent is not required or appropriate for a Reserve call out.
- b. The Bill does not alter, change or otherwise expand the circumstances in which the Reserves can be called out, or in which the ADF can be deployed in response to natural disasters or other emergencies.
- c. The Bill does not alter, change or otherwise diminish the role of Parliament in the process of calling out the Reserves. The nature of Reserve call out does not lend itself to Parliamentary review, noting that it can occur in a wide range of circumstances, including urgent circumstances, for short or long periods. Reserve call out orders are published on the Federal Register and are publicly available.
- d. The Bill does not alter, change or otherwise diminish the role of Cabinet in the process of calling out the Reserves. There is currently no requirement for Cabinet to be involved in the decision to call out the Reserves, and that will continue to be the case.
- e. The changes to the Reserve call out processes will not adversely affect Reserve members. The changes will make administration of a Reserve call out easier, and will align conditions of service between called out Reserve members and Reserve members who have volunteered.

Immunity provision

9. Schedule 2 of the Bill provides immunity from liability to ADF members, other Defence personnel, and certain other people while they are performing duties to support emergency and natural disaster preparedness, recovery and response. The intent of the provisions in Schedule 2 is to provide ADF members and others with similar immunities as are available to State and Territory emergency services personnel.

Existing bases to deploy the ADF within Australia

Part IIIAAA of the Defence Act

10. Section 119 of the Constitution states that the Commonwealth shall protect every State against invasion and, on the application of the State's Government, from 'domestic violence'. Similarly, the executive power of the Commonwealth extends to protecting Commonwealth interests against threats. The ADF may be used for these purposes.

11. 'Calling out' the ADF in these circumstances has been strictly prescribed in Part IIIAAA of the Act. Part IIIAAA describes the circumstances when the ADF can be called out for these purposes, and the process to be followed. When the ADF is called out under Part IIIAAA, a range of legislative powers are triggered, including powers to use necessary and reasonable force, control people's movement, conduct searches, detain people for the purposes of placing them in police custody, secure an area, and direct people to answer questions.

12. A 'Call Out' under Part IIIAAA of the Act is not the same as a Reserve Call Out.

Executive power of the Commonwealth

13. Defence regularly provides assistance to the civil community in situations that do not involve violence (or any use of force by the ADF). Assistance of this sort is an exercise of the executive power under section 61 of the Constitution. Part IIIAAA of the Defence Act has not displaced this aspect of the executive power.

14. The boundaries of the executive power have not been exhaustively defined. Deploying the ADF to assist civil authorities and the community may be characterised as part of the 'nationhood power', although there has never been any jurisprudence to confirm this. Assistance to the civil community in situations that do not reach the legislative threshold for 'domestic violence' is likely to be confined in the following ways:

- a. The non-statutory executive power would not authorise the use of force, beyond what is available to members of the community generally (for example, self-defence)
- b. The non-statutory executive power would not generally authorise the use of coercive powers (for example, powers to control people's movement or detain people).

Other law enforcement powers

15. There are also limited scenarios where the ADF has been given certain coercive powers in legislation, to support law enforcement functions. For example, ADF members deployed in the maritime environment can exercise a range of powers under the *Maritime Powers Act 2013*.

Constitutional basis for immunity provision

16. The Commonwealth does not have specific constitutional power to make laws with respect to emergencies. However, to the extent that the executive power of the Commonwealth permits the Government to act in response to a natural disaster or other emergency, the Parliament will also have power to legislate with respect to the exercise of the executive power.

17. The proposed provisions in Schedule 2 of the Bill are an exercise of the incidental power in paragraph 51(xxxix) of the Constitution.

Effect of immunity provision – power to deploy ADF within Australia

18. Proposed section 123AA would provide protection from civil and criminal liability for acts and omissions done in good faith performance of duties relating to assistance that meets certain requirements. One of the requirements is that the assistance is provided at the direction of the Minister under subsection (2). Subsection 123AA(2) would provide that the Minister may direct the provision of assistance in relation to a natural disaster or other emergency if satisfied that at least one of the listed circumstances applies.

19. Defence is aware of a concern about whether inclusion of this subsection provides a broad legislative authority to the Minister for Defence to deploy the ADF.

20. Defence's view is that proposed subsection 123AA(2) would be construed in the context in which it appears. The only purpose of a direction under the subsection is to enliven the immunity provision in subsection 123AA(1). Subsection (2) was included to provide a clear decision that the circumstances in the subsection had been met. The effect of subsection 123AA(2) is to *limit* the circumstances in which the immunity provision applies.

21. An alternative view of which Defence is aware is that subsection 123AA(2) provides legislative authority to direct the deployment of the ADF to provide certain assistance. Defence does not agree that this is the correct interpretation. However, even if Defence is wrong, the scope of the provision does not increase the Minister's existing power to direct the ADF to provide assistance under the executive power. Proposed subsection 123AA(2) represents a sub-set of assistance Defence is already able to provide, including at the direction of the Minister. Not all emergency situations (or assistance provided by Defence) will meet the threshold to enliven the immunity provision.

22. That is, even if subsection 123AA(2) is given an expansive interpretation, it does not change or expand the ability to deploy the ADF within Australia.

Scope of immunity provision – powers when providing assistance

23. Importantly, the provisions in proposed section 123AA would not authorise the use of force or coercive powers by ADF members and others when providing assistance in a natural disaster or other emergency. That is, the provision would not give the ADF any additional powers beyond those already available under the executive power. As outlined above, this generally means that ADF members can only use force that is available to any person (e.g. self-defence), and cannot use coercive powers (e.g. search and seizure powers).

24. The principle of legality, as a principle of statutory construction, means that in the absence of clear words or necessary implication the courts will not interpret legislation as abrogating or contracting fundamental rights or freedoms. The use of force or coercive powers are clear examples where the fundamental rights or freedoms of individuals are abrogated. Proposed section 123AA does not, by clear words or necessary implication, purport to authorise the use of force or coercive powers. Accordingly, section 123AA does not expand the powers available to ADF members and others.

25. The operation of the immunity in proposed section 123AA can, and would, be given a far narrower construction. The provision does not extend the scope of duties that an ADF member can perform while providing assistance. Instead, it provides protection from civil and criminal liability in the way the ADF member performs those duties, provided they are undertaken in good faith.

26. For example, an ADF member's duties might lawfully include transporting evacuees from a bushfire zone. Section 123AA would operate to protect individual ADF members (not the Commonwealth) from civil liability in the event an evacuee is injured while being transported.

27. The immunity provision is also limited by the requirement that an ADF member be acting in ‘good faith’ performance of their duties. This means that the action in question must be done while making a genuine effort to perform their duties. Actions that are clearly outside the scope of an ADF member’s duties would not be protected. For example, an ADF member who assaults someone or steals property while supposedly providing assistance would not be protected.

28. Proposed section 123AA can be contrasted with Part IIIAAA. If the ADF is called out to respond to domestic violence under Part IIIAAA, the legislation very clearly sets out the powers, including coercive powers, available to the ADF. The insertion of the general immunity provision in section 123AA does not subvert the clear legislative intent in Part IIIAAA of when those powers are available to the ADF.

Scope of ‘natural disasters and other emergencies’

29. Proposed section 123AA is only enlivened in a situation involving a ‘natural disaster or other emergency’. Defence is aware of a concern regarding the potential scope of ‘other emergency’ in this context.

30. Some emergency situations where the ADF might provide assistance to the civil community are well-known. Defence has provided assistance in response to natural disasters such as floods and bushfires on numerous occasions. Others are less apparent or foreseeable. This year is the first time the ADF has responded to requests for assistance in the context of a pandemic, for example, which would not fall within the ordinary meaning of ‘natural disaster’.

31. It is not possible to predict every sort of emergency where the ADF might be asked to provide assistance, or the type of assistance they might be asked to provide. Any attempt to list all sorts of emergencies that might be relevant would run the risk of failing to include an emergency that actually occurs.

32. However, there are some clear examples of situations that would not attract the protections of proposed section 123AA. In particular, using the ADF to break up protests or industrial disputes would involve the use of force or coercive powers that are not authorised by this section. The ADF could only be used in response to those situations within the parameters of Part IIIAAA. In addition to meeting the relevant threshold of ‘domestic violence’ and meeting the procedural safeguards, Part IIIAAA includes a strict prohibition on using the ADF to ‘stop or restrict any protest, dissent, assembly or industrial action’ unless there is a reasonable likelihood of death, serious injury, or serious damage to property.¹ The Bill does not change these limitations.

Inclusion of foreign forces in provision

33. Proposed section 123AA includes a mechanism to extend the protection from liability to members of foreign forces who are providing assistance in Australia in a natural disaster or emergency, in the good faith performance of their duties. This does not happen automatically – it requires a decision from the Chief of the Defence Force, the Secretary of Defence, or a delegate (subsection 123AA(4)).

¹ *Defence Act 1903*, s 39(3)(b)

34. There is long-standing practice of nations providing assistance to each other during emergencies.

35. Foreign military and police forces have played critical roles in numerous natural disasters and emergencies in Australia. During the 2019/2020 bushfire disaster, eight nations providing military assistance through the ADF, including members of: the New Zealand Defence Force, the Papua New Guinea Defence Force, the Republic of Fiji Military Forces, the Indonesian National Armed Forces, the United States Air Force, the Singapore Armed Forces, the Japan Self-Defense Forces, and the Royal Canadian Air Force.

36. Similarly, the ADF has provided significant disaster relief and humanitarian assistance to other countries. ADF members providing such assistance will sometimes enjoy immunity from liability, depending on the country and the arrangements in place for our forces.

37. The extension of immunities to foreign military and police forces is appropriate and justified given the long-standing practice of nations providing this sort of assistance to each other. It recognises these important relationships, and provides appropriate protection in situations where they are offering assistance and putting themselves in harm's way. This is also comparable to some State and Territory emergency management legislation, which can similarly extend immunities to volunteers from overseas agencies.

38. Extending the immunity to members of foreign military and police forces does not authorise them to enter Australia or to use force or coercive powers in Australia.

Human rights and civil liberties considerations

39. The Bill does not interfere with fundamental human rights. It does not change or expand the circumstances in which the ADF can be deployed in Australia. It does not change or expand the powers available to the ADF when deployed in response to a natural disaster or other emergency. The Bill does not authorise the use of force or coercive powers.

40. The Bill does not adversely affect the legal rights of Australian citizens in a substantive way. The Bill provides individual ADF members and other personnel with immunity from liability, comparable with the immunities already available to emergency services workers under State and Territory legislation. The Bill does not provide the Commonwealth with any immunity from liability. Any person who suffers loss or damage as a result of assistance provided by the ADF will still be able to exercise legal rights against the Commonwealth.

Conclusion

41. The measures in the Bill are modest changes to streamline Reserve call out processes, and provide ADF members and other Defence personnel with the same level of legal protection available to emergency services workers performing similar functions under State and Territory legislation.

42. They do not extend the power to deploy the ADF, or increase the powers available to the ADF when deployed. They do not authorise the use of force or coercive powers. As such, the Bill will meet the intent of enhancing the ADF's ability to provide assistance in the event of a natural disaster or other emergency, but will not interfere with the human rights and civil liberties of the Australian community.

