
Defence Legislation Amendment (Woomera Prohibited Area) Bill 2013

Sponsor: Senator Farrell

Introduced: Senate, 12 December 2013

Summary of committee concerns

1.152 The committee thanks Senator Farrell for providing a comprehensive statement of compatibility, which has greatly assisted the committee in undertaking its scrutiny role.

1.153 The committee seeks further information as to why powers exercisable at defence access control points without consent are necessary. The committee also seeks further information as to how persons who are arrested without warrant by members of the Defence Force for the offence of trespass are dealt with prior to being brought before a law enforcement officer.

Overview

1.154 This bill seeks to establish a framework to enable and improve the ability of non-Defence users to access and use the Woomera Prohibited Area (WPA), an area which is primarily a prohibited area for defence purposes. The bill gives effect to the recommendations made in the Final Report of the Review of the Woomera Prohibited Area (the Review), which, according to the explanatory memorandum, found that the opening up of the WPA for resource exploration and mining 'would likely bring significant economic benefit to South Australia and the nation more broadly'.¹

1.155 The bill proposes to amend the *Defence Act 1903* (Defence Act) to:

- authorise the Minister for Defence to make, by legislative instrument, the Woomera Prohibited Area Rules prescribing certain matters, including defining the WPA and the zones to be demarcated within that area;
- create a permit system for access and use by non-Defence users of the WPA;
- introduce offences and penalties for entering the WPA without permission and for failing to comply with a condition of a permit (including an infringement notice scheme and demerit point system for the latter);
- provide for compensation for any acquisition of property from a person otherwise than on just terms that results from the operation of the new regime;

1 Explanatory memorandum, p 2.

- provide that the Rules may limit the amounts of compensation payable by the Commonwealth for loss or damage in the WPA arising from a breach of common law or statutory duty of care in relation to the use of the area for the testing of war material; and
- include the WPA in the definition of defence premises in section 71A(1) of the Defence Act so that the powers of defence security officials set out in existing Part VIA of the Defence Act will be applicable in the WPA.

Compatibility with human rights

Statement of compatibility

1.156 The bill is accompanied by a detailed statement of compatibility that identifies that the bill engages a number of rights, including the right to life,² the right to liberty (including the prohibition against arbitrary detention),³ the right to freedom of movement,⁴ the right to be presumed innocent,⁵ the right to privacy⁶ and the right to culture.⁷ The statement concludes that to the extent that the measures in the bill 'may limit human rights, those limitations are reasonable, necessary and proportionate'.⁸

1.157 The committee thanks Senator Farrell for providing such a comprehensive statement of compatibility, including an assessment of the existing powers in Part VIA of the Defence Act as applied to the WPA by the bill, as it has greatly assisted the committee in undertaking its scrutiny role.

1.158 The committee considers that, except in relation to those issues set out below, any limitations in the bill have been adequately explained in the statement of compatibility and as such do not appear to give rise to human rights concerns.

2 Article 6 of the International Covenant on Civil and Political Rights (ICCPR).

3 Article 9 of the ICCPR.

4 Article 12 of the ICCPR.

5 Article 14(2) of the ICCPR.

6 Article 17 of the ICCPR.

7 Article 27 of the ICCPR and article 15 of the International Covenant on Economic, Social and Cultural Rights.

8 Statement of compatibility, p 18.

Committee view on compatibility***Right to privacy – powers exercisable without consent at defence access control points***

1.159 The bill seeks to amend the definition of 'defence premises' in the Defence Act to include the WPA.⁹ As a consequence, existing Part VIA of the Act (Security of defence premises) will apply to the WPA. Part VIA of the Act includes the powers exercisable by defence security officials at defence access control points and on defence premises.

1.160 Part VIA provides that a defence security official may, in relation to a person who is about to pass a defence access control point, request that that person provide identification information or undergo a limited search on the basis of consent.¹⁰ It also provides for a power to request to search a vehicle, vessel or aircraft about to pass a defence access control point on the basis of consent.¹¹ If a person refuses such a request, the defence security official may refuse to allow a person to pass a defence access control point.¹² Part VIA also provides for the same powers to be exercised at defence access control points without consent by special defence officials.¹³

1.161 Powers to request information and to search a person without their consent engage and limit the right to privacy. Such limitations will only be permissible where they are necessary, reasonable and proportionate to achieving a legitimate objective.

1.162 It is not clear to the committee why it is necessary to have search and identification information request powers without consent at a defence access control point,¹⁴ when defence security officials already have the power to refuse to allow a person to pass a defence access control point where a person refuses to consent to an information or search request.¹⁵

1.163 The committee intends to write to Senator Farrell to seek clarification as to why it is necessary to have non-consensual powers to search and request information from a person at defence access control points, for the purposes of preventing access to defence premises.

9 Item 1 of Schedule 1 to the bill.

10 Section 71H of the *Defence Act 1903* (Defence Act).

11 Section 71J of the Defence Act.

12 Sections 71H(3)(a) and 71J(2)(a) of the Defence Act.

13 Sections 71R and 71S of the Defence Act.

14 Under sections 71R and 71S of the Defence Act.

15 Under sections 71H and 71J of the Defence Act.

Right to privacy – seizure powers

1.164 Existing Division 5 of Part VIA of the Defence Act provides for the power to seize things on defence premises. The power is exercisable by a special defence security official and allows an official to seize a thing if he or she believes on reasonable grounds that the thing may constitute a threat to the safety of a person on the premises or relate to a criminal offence committed, or that may be committed, on or in relation to the defence premises. Where the official believes on reasonable grounds that the thing has been used or otherwise involved in the commission of a criminal offence, the official must give the thing to police at the earliest practicable time.

1.165 Seizure powers engage and limit the right to privacy. The committee notes that the statement of compatibility did not address how the seizure powers in Part VIA are compatible with the right to privacy.

1.166 The committee considers that in this instance, the seizure powers applicable under the bill do not appear to raise issues of incompatibility with the right to privacy. The committee, however, emphasises its expectation, as set out in its Practice Note 1, that statements of compatibility should include sufficient detail of relevant provisions in a bill which may affect human rights to enable the committee to assess their compatibility. This includes identifying and justifying seizure powers which limit the right to privacy.

Prohibition against arbitrary arrest and detention

1.167 Part VIA of the Defence Act allows for the arrest without warrant of a person on defence premises by a member of the Defence Force if the member reasonably believes that the person has committed the offence of unauthorised entry on defence premises or defence accommodation.¹⁶ If a member of the Defence Force arrests a person for this offence, he or she must, as soon as practicable after the arrest, bring the person, or cause the person to be brought, before a member or special member of the Australian Federal Police or a member of a State or Territory police force.¹⁷

1.168 Any person who is arrested or detained and charged with a criminal offence has the right to be brought promptly before a court.¹⁸ The committee considers that the timeframe which is applicable to bringing a person before a law enforcement officer, that is 'as soon as practicable', is vague and may lead to delays in bringing a person before a court, given the nature and location of the WPA. The committee is concerned about the length of time a person may be detained before it may be 'practicable' to transfer a person to a law enforcement officer. Further, the

16 Section 72P of the Defence Act.

17 Section 72K of the Defence Act.

18 Article 9(3) of the ICCPR.

committee is concerned about where and under what conditions a person will be held, for example, whether a person will be able to contact a family member or friend, or have access to legal advice during the time they are held?

1.169 The committee intends to write to Senator Farrell to seek clarification in relation to:

- **how long a person who is arrested by a Defence Force member may likely be held before they are brought before a law enforcement officer and, in turn, before a court; and**
- **how such persons are to be dealt with until they are brought before both a law enforcement officer and a court.**

Rights of Indigenous persons

1.170 A key finding of the Review was that the economic benefits of developing the WPA were likely to be high. The Review report states that 'the South Australian Government assesses that over the next decade some \$35 billion worth of developments, iron ore, gold and uranium projects, would be possible'.¹⁹ The committee notes the measures in the bill are clearly aimed at maximising this potential through implementing a 'coexistence model' – that is, a model aimed at improving the coexistence of national security and economic interests in the WPA.

1.171 The committee is concerned about the potential impact on the rights of Indigenous persons of increased economic activity, including increased exploratory and mining activity, in the WPA. The statement of compatibility addresses the engagement of the bill with the rights of Indigenous peoples to enjoy and benefit from their culture, including cultural values and rights associated with their ancestral lands and their relationship with nature. It states that the bill 'has not altered the rights of Indigenous people to access their traditional lands in the Woomera Prohibited Area', in that the bill preserves the pre-existing rights under the *Defence Force Regulations 1952* for specified Indigenous persons to continue to access their traditional lands in the WPA.

1.172 The committee accepts that current rights of access will be preserved. However, it is unclear to the committee what kinds of impacts the increased economic activity in the WPA enabled by this bill, in particular mining and other developmental activities, will have on the rights of Indigenous persons.

1.173 The committee intends to write to Senator Farrell to seek further information as to whether the impacts on Indigenous persons of increased economic activity in the WPA enabled by this bill have been considered so as to ensure that the rights of Indigenous persons will be respected.

19 Australian Government, *Review of the Woomera Prohibited Area: Final Report*, 4 February 2011, p 5.

