

## Chapter 1 – New and continuing matters

This chapter lists new matters identified by the committee at its meeting on 12 May 2014, and continuing matters in relation to which the committee has received recent correspondence. The committee will write to the relevant proponent of the bill or instrument maker in relation to substantive matters seeking further information.

Matters which the committee draws to the attention of the proponent of the bill or instrument maker are raised on an advice-only basis and do not require a response.

This chapter includes the committee's consideration of 18 bills introduced between 24 and 27 March 2014 and 175 instruments received between 8 March and 25 April 2014.

### Defence Legislation Amendment (Woomera Prohibited Area) Bill 2014

*Portfolio: Defence*

*Introduced: Senate, 27 March 2014*

#### Purpose

1.1 The Defence Legislation Amendment (Woomera Prohibited Area) Bill 2014 (the bill) seeks to establish a framework intended to provide all non-Defence users within the Woomera Prohibited Area (WPA) and industry more generally with a level of certainty over Defence activity in the area; and to allow users to make commercial decisions with some assurance as to when they will be requested to leave the area because of Defence activity. The bill is said to give effect to the recommendations in the Final Report of the Hawke Review of 3 May 2011, which included a recommendation that the WPA 'be opened up for resources exploration and mining to the maximum extent possible within the confines of its primary use for defence of Australia purposes'.<sup>1</sup>

#### Background

1.2 The committee has previously examined the following, substantially similar, bills:

- Defence Legislation Amendment (Woomera Prohibited Area) Bill 2013 (introduced in May 2013);<sup>2</sup> and

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1 Explanatory memorandum (EM), p. 2.

2 Parliamentary Joint Committee on Human Rights, *Eighth Report of 2013*, 19 June 2013, p. 69.

- Defence Legislation Amendment (Woomera Prohibited Area) Bill 2013 (introduced in December 2013).<sup>3</sup>

## **Committee view on compatibility**

### ***Right to privacy***

1.3 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home. However, this right may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that objective.

### ***Search and request powers exercisable without consent***

1.4 Schedule 1 of the bill seeks to amend the definition of 'defence premises' in the *Defence Act 1903* (the Act) to include the WPA. This will allow defence security officials at defence access control points and on defence premises in the WPA to exercise existing powers in Part VIA of the Act (Security of defence premises).

1.5 Part VIA provides that a defence security official may, in relation to a person who is about to pass a defence access control point or is on defence premises, request that that person provide identification information or undergo a limited search on the basis of consent.<sup>4</sup> A defence security official may also request to search a vehicle, vessel or aircraft about to pass a defence access control point on the basis of consent.<sup>5</sup> Where a person refuses such a request, a defence security official may refuse to allow a person or vehicle to pass a defence access control point.<sup>6</sup>

1.6 Part VIA further provides that the same powers may be exercised by special defence officials at defence access control points without consent.<sup>7</sup> The committee notes that the proposed powers to request information and to search a person without their consent represent limitations on the right to privacy. Regarding the justification for these powers, the statement of compatibility for the bill generally states that the powers in part VIA

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3 Parliamentary Joint Committee on Human Rights, *Second Report of the 44<sup>th</sup> Parliament*, 11 February 2014, pp 39-43.

4 *Defence Act 1903*, section 71H.

5 *Defence Act 1903*, section 71J.

6 *Defence Act 1903*, sections 71H(3)(a) and 71J(2)(a).

7 *Defence Act 1903*, sections 71R and 71S.

...are intended to protect the lives of those who work and live on defence premises, as well as protecting national security information, equipment and capability stored on defence premises...[and they] may only be used in the maintenance of these objectives.<sup>8</sup>

1.7 However, it is not clear to the committee why the ability to exercise the powers without consent is considered necessary, particularly as defence security officials will have the power to refuse to allow a person to pass a defence access control point where a person does not to consent to an information or search request, and to restrain and detain a person who is on defence premises and refuses a request.

**1.8 The committee therefore requests the Minister for Defence's further advice as to the necessity for non-consensual powers to search and request information from a person at defence access control points, and particularly:**

- **whether the proposed limitation on the right to privacy is aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is proportionate to that objective.**

***Right to security of the person and freedom from arbitrary detention***

1.9 Article 9 of the International Covenant on Civil and Political Rights (ICCPR) provides for the right to security of the person and freedom from arbitrary detention. This includes the right of a person:

- to liberty and not to be subjected to arbitrary arrest or detention;
- to security;
- to be informed of the reason for arrest and any charges;
- to be brought promptly before a court and tried within a reasonable period, or to be released from detention; and
- to challenge the lawfulness of detention.

1.10 The only permissible limitations on the right to security of the person and freedom from arbitrary detention are those that are in accordance with procedures

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8 EM, p. 18.

established by law, provided that the law itself and the enforcement of it are not arbitrary.

#### *Arrest and detention powers*

1.11 In addition to the search, request and seizure powers outlined above, existing Part VIA of the Act allows a defence member to arrest, without warrant, a person on defence premises if the member reasonably believes that the person has committed the offence of unauthorised entry on defence premises or defence accommodation.<sup>9</sup> If a member arrests a person for this offence, he or she must, as soon as practicable, bring or cause the person to be brought before a member or special member of the Australian Federal Police (AFP) or a member of a state or territory police force.<sup>10</sup>

1.12 The statement of compatibility for the bill notes that under Part VIA arrest and detention is 'lawful in certain circumstances' and that its provisions 'outline the circumstances to be satisfied that it is not arbitrary'.<sup>11</sup>

1.13 However, as described above, the right to security of the person and freedom from arbitrary detention includes the right of a person who is arrested or detained and charged with a criminal offence to be brought promptly before a court. In the committee's view, the requirement that an arrested person be brought before a law enforcement officer 'as soon as practicable' is imprecise. To the extent that this could, in practice, lead to delays in bringing a person before a court (particularly given the nature and location of the WPA), this may represent a limitation on a person's right to be brought promptly before a court.

**1.14 The committee therefore requests the Minister for Defence's advice as to the compatibility of the requirement that a detained person be brought 'as soon as practicable' before a member or special member of the AFP, or member of a state or territory police force, with the right to be brought promptly before a court.**

**1.15 The committee further seeks the Minister for Defence's advice as to what protections may apply more generally to the right to security of the person and freedom from arbitrary detention, such as restrictions on the time a person may be detained without being brought before a relevant AFP or state or territory police force member, and provision for a person to access legal advice while detained.**

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9 *Defence Act 1903*, section 72P.

10 *Defence Act 1903*, section 72K.

11 EM, p. 15.

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***Right to enjoy and benefit from culture******Right to self-determination***

1.16 The right to enjoy and benefit from culture is contained in article 27 of the International Covenant on Civil and Political Rights (ICCPR) and article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). This includes:

- the rights of individuals belonging to ethnic, religious and linguistic minorities within a country to enjoy their own culture, practise their own religion and use their own language;
- the right of all persons to take part in cultural life;
- the right of all persons to enjoy the benefit of scientific progress and its applications; and
- the right of all persons to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author.

1.17 Any proposed limitation on this right must pursue a legitimate aim, be compatible with the nature of the right and be strictly necessary for the promotion of general welfare in a democratic society.

1.18 While the right of Indigenous peoples in relation to their culture is protected by article 27 of the ICCPR and article 15 of the ICESCR, an underlying fundamental guarantee of those rights is found in the right to self-determination guaranteed by article 1 of the ICCPR and article 1 of the ICESCR.<sup>12</sup>

***Impact of increased economic activity on Indigenous people***

1.19 As noted above, the bills seeks to establish a legislative scheme to enable the WPA to be opened up for resources exploration and mining to the maximum extent possible within the confines of its primary use for defence of Australia purposes.

1.20 The EM for the bill notes that the WPA 'contains significant Indigenous sites and [that] local Indigenous groups have native title rights and interests in most of the area'.<sup>13</sup> In terms of the potential impact of the bill on the right of Indigenous groups to enjoy and benefit from culture, including cultural values and rights associated with their ancestral lands and relationship with nature, the statement of compatibility states:

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12 See Parliamentary Joint Committee on Human Rights, *Sixth Report of 2013*, 15 May 2013, Native Title Amendment Bill 2012, pp 43-44.

13 EM, p. 2.

The Bill has not altered the rights of Indigenous people to access their traditional lands in the Woomera Prohibited Area. Clause 72TB clarifies the pre-existing rights under the Defence Force Regulations 1952 for specified Indigenous people; or someone employed, engaged by, or acting for, or on behalf of those people; or someone accompanied by those people, to continue to access their traditional lands in the Woomera Prohibited Area. Additionally, all new non-Defence users of the Woomera Prohibited Area must comply with all relevant laws, including those related to Indigenous land and sites, as a condition of access.<sup>14</sup>

1.21 While the committee notes that the current rights of access of Indigenous people will be preserved, the extent to which the proposed increase in mining and development activities may limit the right of such persons to enjoy and benefit from culture is unclear. For example, it is not clear whether mining or development activities might impact upon native title rights, or restrict or diminish the capacity of Indigenous people to express or enjoy the cultural values and rights associated with particular areas in the WPA.

**1.22 The committee therefore requests further information from the Minister for Defence as to the compatibility of the bill with the right to enjoy and benefit from culture and the right to self-determination, with particular attention to native title and whether the increased economic activity in the WPA enabled by this bill might limit Indigenous groups' enjoyment of these rights.**

***Right to a fair trial and fair hearing rights***

1.23 The right to a fair trial and fair hearing are contained in article 14 of the International Covenant on Civil and Political Rights (ICCPR). The right applies to both criminal and civil proceedings, to cases before both courts and tribunals and to military disciplinary hearings. The right is concerned with procedural fairness, and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body.

1.24 Circumstances which engage the right to a fair trial and fair hearing may also engage other rights in relation to legal proceedings contained in Article 14, such as the presumption of innocence and minimum guarantees in criminal proceedings. Such circumstances may also engage or interact with other aspects of the ICCPR, such as the prohibition on retrospective criminal laws (Article 15) and the right to challenge the lawfulness of detention (Article 9(4)).

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14 EM, p. 19.

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*Validation of declaration and past acts in relation to the Woomera Prohibited Area*

1.25 Part 2 of the Schedule 1 to the bill proposes the insertion of new section 121A in the Act. Proposed section 121A provides that the 1989 declaration of the WPA under regulation 35 of the *Defence Force Regulations 1952*, and things done by the Commonwealth under regulation 35 as a result of the declaration, are taken always to have been valid.

1.26 The statement of compatibility for the bill provides no assessment of the compatibility of the proposed measure with human rights. However, the EM states that the purpose of the proposed section is 'to avoid any doubt on the past applicability of the Defence Force Regulations to [WPA] which may arise as the result of the new access regime by the Bill.'<sup>15</sup> No further information is provided about the reason for concerns about the validity of the declaration, or the nature of any acts that would or may be retrospectively validated under this measure.

1.27 While the terms of proposed section 121A suggest that the provision may be directed at the validation of property acquisitions,<sup>16</sup> the committee notes that the proposed retrospective validation of the declaration and of acts done as a result of the declaration may engage the right to a fair trial and fair hearing. For example, if the effect of the retrospective validation would be to defeat a pending or prospective action before the courts, this would limit the right of a person to a fair hearing—that is, to have their rights and obligations determined before a competent, independent and impartial tribunal.

1.28 Equally, the committee notes that the retrospective validation may engage the prohibition against retrospective criminal laws,<sup>17</sup> if its effect was to retrospectively validate an otherwise invalid provision which creates or gives rise to criminal liability.

**1.29 The committee therefore requests the Minister for Defence's advice on the compatibility of the retrospective validation proposed by new section 121A with human rights, and particularly whether the measure will engage or limit the right to a fair trial and fair hearing, and the prohibition on retrospective criminal laws.**

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15 EM, p. 11.

16 See proposed section 121A(3) and (4).

17 Article 15, ICCPR.