THE UNIVERSITY OF SYDNEY

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Professor Anne Twomey
Professor of Constitutional Law

Ms Lyn Beverley
Committee Secretary
Senate Foreign Affairs, Defence and Trade Legislation Committee
PO Box 6100
Parliament House
Canberra, ACT, 2600

Dear Ms Beverley,

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

Please accept this submission for the Committee's inquiry into the above bill. I would like to make the following comments.

Constitutional power and authorisation to call out the ADF

This Bill amends the provisions in the *Defence Act 1903* (Cth) to deal with the call-out of the reserve forces. What is curious about it is that it does not tackle the fundamental underlying issue, which is the source of constitutional power for the defence forces to engage in civil aid during a disaster or an emergency.

On 4 January 2020, there was a formal 'call out' of 3000 ADF Reserves under s 28(3)(g) in circumstances involving 'civil aid, humanitarian assistance, medical or civil emergency or disaster relief'. There was not, however, a formal call out of the regular members of the ADF. This is because Part IIIAAA of the *Defence Act*, which provides for such a call out, does not extend to civil aid. It can only be activated under ss 35 and 33 of the Defence Act to protect the States and Territories from 'domestic violence' (as recognised by s 119 of the Commonwealth Constitution) or to protect Commonwealth interests (as recognised by Dixon J in *Re Sharkey*).

While the regular forces were not 'called out' under Part IIIAAA to deal with the bushfires, 3500 of them were still deployed to do so. This meant that the regular forces were operating under the Commonwealth's prerogative powers to deploy the armed forces, without statutory backing, and had only the power to act that any ordinary person has. Similarly, there have been deployments, without 'call-out' or statutory backing, of the ADF regular forces to respond to the pandemic.

Faculty of Law
New Law Building F10
Eastern Avenue
The University of Sydney
NSW, 2006
Australia

ABN 15 211 513 464
CRICOS 00026A

http://sydney.edu.au/law
http://ssrn.com/author=808822

The reason why the call-out provisions in the *Defence Act* are confined to deal with 'domestic violence' and the protection of Commonwealth interests is because this is the extent of the acknowledged defence powers (in s 51(vi), s 68 and s 119 of the Constitution) to deal with matters that do not involve war or external threats. Civil aid to respond to natural disasters or pandemics does not fall within the scope of 'defence'.

It is possible, however, that the ability to provide such aid might fall within the 'nationhood power' (in ss 61 and 51(xxxix) of the Constitution) if it could be characterised as 'the capacity to engage in enterprises and activities peculiarly adapted to the government of a nation' which 'cannot otherwise be carried on for the benefit of the nation' (*Victoria v Commonwealth and Hayden* (1975) 134 CLR 338, 397). But this raises two problems. First, there is the question of whether providing such aid is something peculiarly national in nature that cannot be done by the States. It is possible that some disasters on a national scale might trigger that requirement, but not all would do so. Secondly, there is considerable doubt about whether the nationhood power can be exercised in a coercive manner.

The upshot of this uncertainty has been that statutory provisions have not been included in the *Defence Act* to deal with aid to the civil community by the regular forces of the ADF during natural disasters or emergencies, in case such provisions would be struck down in the courts for not being supported by a constitutional head of power. Yet the ADF still fulfils these activities by relying on the Commonwealth's prerogative powers, presumably in the hope that the prerogative is so murky and uncertain in its application that its exercise is harder to challenge. This does, however, leave the ADF legally exposed.

The strangest aspect of this legal strategy is that the reserve forces can be called out under section 28 of the *Defence Act* in circumstances involving 'civil aid, humanitarian assistance, medical or civil emergency or disaster relief'. How is it that such a provision cannot be included in the *Defence Act* regarding the regular forces, due to a lack of constitutional power, but it is included in relation to the reserve forces?

This anomaly will be aggravated by proposed s 123AA of the *Defence Act.* It will provide immunity to all members of the Defence Force, both regulars and reserves, when acting in the performance of their duties if the duties are in respect of the provision of assistance to prepare for or respond to a natural disaster or other emergency. But this raises the question of when such matters are within the member's duties, which goes back to the question of whether there is constitutional power to deal with such matters. Proposed s 123AA provides for a Minister to direct the provision of this assistance, if satisfied of certain matters that appear to invoke the application of the nationhood power.

If this Bill is passed, we will end up in the position where there is no direct statutory authority in the Act to provide such assistance, but there is immunity in relation to its provision if a Minister issues a formal direction that seeks to bring the assistance within the nationhood power. This Bill is only adding to the conceptual mess, rather than fixing it.

DACC – Defence Assistance to the Civil Community

When the regular forces are deployed for civil community aid, in reliance on prerogative powers, this is done under the 'Defence Assistance to the Civil Community Manual' (DACC Manual: https://www.defence.gov.au/publications/docs/DACC-Manual.pdf). It sets out the terms and conditions upon which civil aid is provided. Presumably due to legal concerns that neither the prerogative nor the nationhood power permit coercive action, DACC only applies in relation to situations that do not involve the use or potential use of force (including intrusive or coercive acts) by ADF members (see para [1.1]). 'Force' is defined as including restricting the freedom of movement of the civil community, whether there is physical contact or not: (see para [6.13]). It is difficult to see how DACC can therefore be used in relation to guarding people in quarantine hotels or manning borders to prevent people from crossing the State border, as this does appear to involve restricting freedom of movement, or at the very least has the 'potential' to do so.

Further, it is a condition of the use of DACC that 'local, state or territory resources, including commercially available resources, are or imminently will be exhausted, are inadequate, not available or cannot be mobilised in time' (see, eg, DACC Manual Part B, [2.4(b)] regarding significant emergency assistance). In short, States must exhaust all their own resources and any commercially available resources, before calling on ADF assistance under DACC. Again, I assume that this is for legal reasons, in an attempt to justify such action under the 'nationhood power' by acting under DACC only when a State is not able to perform the task itself.

However, given these constraints in the DACC Manual, it would be understandable, if a State took the view that it could not call upon the ADF to guard quarantined people in hotels because (a) this would involve restricting their freedom of movement, which is not permitted under DACC; and (b) the State had not exhausted commercially available sources, such as private security guards. While I do not claim to be an expert in relation to military law, it is unclear to me how DACC would have authorised the deployment of the ADF to fulfil such tasks, and whether doing so would fall within the Commonwealth's prerogative or nationhood executive powers. The uncertainty about the application of DACC and the use of the ADF to provide civil aid needs to be resolved. Hopefully, in its response to the Royal Commission into National Natural Disaster Arrangements, the Government will address these problems. Again, this Bill does not achieve this outcome.

The source of the call-out order for reserves

Under s 28(4) of the current *Defence Act*, the Governor-General makes a call-out order of the reserve forces acting on the advice of the Executive Council, or 'if, after the Minister has consulted the Prime Minister, the Minister is satisfied that, for reasons of urgency, the Governor-General should act with the advice of the Minister alone – the Minister.'

As there is already a mechanism that accommodates urgency, there is no apparent reason why the Executive Council should be excluded from decision-making in non-urgent circumstances. The Explanatory Memorandum states that this change is being made so that a call out order can be implemented without delay, and notes that the majority of situations in which a call out order would be considered are urgent situations.

Yet, as far as I am aware, it is ordinarily the case that volunteers from the reserves are sufficient to fill all needs on a 'call for' basis, so no call-out is needed. ADF regular and reserve forces have always been sufficient to deal with emergencies from Cyclone Tracey to the Queensland floods of 2019 without any call-out of the reserves. My understanding is that there have only ever been two call-outs of the reserve forces. The first was a small-scale experimental call-out on 28 November 2019 for 23 reservists in response to bushfires, which was intended to see how the system operates, rather than being urgent or necessary. It had been foreshadowed in a brief to the Minister that she noted on 11 November, and discussed in a letter to the Prime Minister on 18 November (https://www.smh.com.au/politics/federal/defence-was-preparing-for-natural-disaster-reserve-callout-last-year-20200320-p54c2m.html), so there was plenty of time to organise an Executive Council meeting. The second larger scale call-out was in January 2020 in response to bushfires that had been raging for some time. In both cases, the threat was known long before the call-out was made, suggesting that an Executive Council meeting could have been managed.

Making a compulsory call-out order for the reserve forces is a very serious matter. It abruptly removes people from their civilian jobs, unlike the use of reserve volunteers who can choose to volunteer when the circumstances are appropriate. Prior to 2006 the reserve forces could not be called out unless the Minister, after consulting with the Chief of the Defence Force, was satisfied that sufficient numbers of the regular forces were not available. While this is no longer a formal legal condition, the Governor-General, in Executive Council, would be entitled to inquire whether there were insufficient regular forces available and whether a call for volunteer reserves had been inadequate to cover an existing need, so that a compulsory 'call-out' was required. As commander-in-chief of the defence forces, the Governor-General might wish to be satisfied that a call-out was not occurring for political purposes and was in fact needed. While under the new procedure the Governor-General would still be required to sign the relevant order, it could be done 'on the papers', limiting the ability of the Governor-General to exercise his or her vice-regal prerogatives to ask questions, receive further advice and to warn. (See, eg, the exercise of these prerogatives by Sir Paul Hasluck as Governor-General in relation to the call-out of troops to deal with civil disorder in Papua New Guinea in 1970, which only occurred because an Executive Council meeting was required.)

The other explanation for this change was set out in the second reading speech of the Deputy Leader of the Opposition, Mr Marles. He said that the very process of determining whether an Executive Council meeting can be held 'can itself take hours'. 'The very fact of ringing the 45 members of the federal executive council to see whether or not an executive council meeting can be convened in the time required can, of itself,

take hours'. If the Commonwealth Government has not yet worked out a means of instantly contacting all members of the Federal Executive Council to inquire of their immediate availability for a meeting, then it is an indictment on its management. Getting a person to sit down and ring each of them in turn is, frankly, absurd. It is hardly an excuse for changing the legislation. Rather, it should be a reason for changing communication methods. In any case, to state the obvious, if the situation is so urgent that there is no time to go through the system to organise a meeting of the Federal Executive Council, the Minister could be legitimately satisfied that 'for reasons of urgency, the Governor-General should act with the advice of the Minister alone' under the existing provision. Accordingly, there is no justification to make this change.

Immunity

It is good that the Government is finally addressing the issue of the immunity of members of the ADF in relation to actions taken in providing civil aid, as the position has been unclear for a long time. However, this provision does not completely resolve the issue. First, it only applies with respect to things done, or not done, in the performance or purported performance of a person's duties. But, as noted above, this raises the question of whether the relevant actions or omissions fall within duties legally imposed upon a person.

Proposed s 123AA(1) clarifies that the immunity only applies if the assistance is provided at the direction of the Minister. Proposed s 123AA(2) provides that the Minister may make such a direction in relation to a natural disaster or other emergency if satisfied that 'the nature or scale of the natural disaster or other emergency makes it necessary, for the benefit of the nation', for such assistance to be provided through the use of the ADF's special capabilities or available resources. This is clearly trying to bring such actions within the scope of the nationhood power, on the basis that only the ADF has the available resources and capabilities that can be used in the circumstances for the benefit of the nation. But even if a Minister is so satisfied and gives a direction, it does not mean that all acts, including acts of coercion, performed by the ADF would fall within the constitutional scope of lawful duties.

For example, what if a member of the regular ADF was assigned the 'duty' of guarding the border between Victoria and New South Wales to prevent unauthorised persons crossing, and a person sought to crash through the barrier and was restrained and detained by the ADF member? What if the person was injured in the course of this action and then sued the ADF member? Whether the immunity applied would depend upon whether the ADF member was acting in the performance or purported performance of his or her 'duties'.

If, as contended by the Government (according to Richard Marles, in his description of assurances from the Minister, Hansard, 6 October 2020), the direction by the Minister in s 123AA(2) is only intended to trigger the immunity and not to be a substantive authorisation to act, then there would be no statutory authorisation for the ADF member to engage in such 'duties'. At best, such duties would fall under the prerogative or nationhood executive powers, and be authorised by the DACC Manual. But as noted

above, the DACC Manual is limited to non-coercive actions and there is doubt about whether the prerogative or nationhood executive powers would extend to cover coercive actions or acts which are within the capacity of the States to perform. Hence, even if there were an appropriate direction from the Minister, it would still be doubtful whether the immunity would apply.

A second issue arises from the perspective of the injured person. If the immunity is effective, what power does the injured person then have to obtain redress from the Commonwealth? This is not my area of legal expertise, but I am told by others that the question is abominably difficult, and may give rise to different results in different States depending upon their civil liability legislation. It is possible that by giving immunity to ADF members, s 123AA also gives immunity to the body the member serves (i.e. the ADF and/or the Commonwealth). The Committee should therefore inquire into whether or not this provision would prevent persons, who have been injured due to the negligence or other acts/omissions of ADF members, from being able to obtain any kind of compensation or redress. Given the complicated issues that arise in this area, it would probably be best to make this clear in the legislation itself. Hence, an amendment to clarify the position would be wise.

Yours sincerely,

Anne Twomey
Professor of Constitutional Law