Australian Government
Department of Defence

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
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Parliament House
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By email: scrutiny.sen@aph.gov.au

MS20-002513

Dear Senator Polley

Thank you for the correspondence of 22 October 2020 from the Senate Scrutiny of Bills Committee. The Committee is seeking advice in relation to the Defence Legislation Amendment (Enhancement of Defence Force Response to Emergencies) Bill 2020.

The Committee has asked questions in relation to the availability of Parliamentary scrutiny of Reserve call out orders under section 28 of the *Defence Act 1903* (the Act) and directions under proposed subsection 123AA(2) of the Act. The Committee has also asked questions about the availability of immunity from both civil and criminal liability in proposed section 123AA.

Response:

The measures in the Bill are relatively modest amendments to the Act to streamline processes for Reserve call outs, and to provide ADF members and others 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:

- expand or alter the Government's legal authority to deploy the ADF in response to natural disasters or other emergencies
- 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
- authorise ADF members and other personnel to use force or coercive powers against members of the Australian community.

Parliamentary scrutiny

The Committee has requested advice as to the scope of powers that may be exercised by Reserve members subject to a Reserve call out order or by protected persons subject to a section 123AA(2) direction. The Committee has asked why it is necessary and appropriate to shield these orders and directions from Parliamentary scrutiny.

Reserve call out orders

The power to call out Reserve members in section 28 of the Act does not authorise the deployment of the ADF, and does not provide called out Reserve members with any powers once they are deployed. In this context, called out Reserve members can be used in exactly the same way as Permanent ADF members when rendering emergency assistance. Except in very specific situations where Part IIIAAA of the Act is being used to respond to domestic violence or threats to Commonwealth interests, ADF members provide assistance in natural disasters and other emergencies under the executive power. This would not authorise the use of force, beyond what is available to members of the community (for example, self-defence), or the use of coercive powers (such as powers to control people's movement or detain people). This Bill also does not authorise the use of force or coercive powers.

The Bill would amend section 28 to make a Reserve call out order a notifiable instrument. This has substantially the same effect as the existing provision, which requires Reserve call out orders to be published in the Gazette. It is not necessary or appropriate to make Reserve call out orders legislative instruments, for a number of reasons:

- Reserve call out orders would not be a legislative instrument within the meaning of sub-section 8(4) of the *Legislation Act 2003*. They do not determine the law, only the particular circumstances in which one aspect of Reserve members' service obligation, as set out in Part III of the Act, applies.
- It would not be appropriate for Reserve call out orders to be disallowable, noting the significant levels of disruption this would cause for ADF operations, planning, and ADF members who had been called out.
- There are numerous mechanisms by which any decision by Government to call out the Reserves could be scrutinised by Parliament.

Directions under s 123AA(2)

The only purpose of a direction under proposed subsection 123AA(2) is to enliven the immunity provision in subsection 123AA(1). Subsection (2) was included to provide a clear decision that the circumstances described in the subsection had been met. The effect of subsection 123AA(2) is to limit the circumstances in which the immunity provision applies. Not all assistance provided by Defence will meet the threshold to enliven the provision.

Even if subsection 123AA(2) were interpreted as providing legislative authority to direct the deployment of the ADF, the scope of the provision does not increase the Minister's existing power to direct the ADF to provide assistance under the executive power. It represents a sub-set of assistance Defence is already able to provide, including at the direction of the Minister. It does not authorise the use of force or coercive powers.

It is not necessary or appropriate to make directions under subsection 123AA(2) legislative instruments, for a number of reasons:

- Directions under subsection 123AA(2) would not be legislative instruments within the meaning of subsection 8(4) of the *Legislation Act 2003*. They do not determine or alter

the law, only determine the particular circumstances in which the immunity in subsection 123AA(2) will apply.

- It would not be appropriate for directions under subsection 123AA(2) to be disallowable, noting the disruption this could cause to protected persons who are relying on the immunity.
- There are numerous mechanisms by which any decision by Government to direct assistance in relation to a natural disaster or other emergency could be scrutinised by Parliament.

Immunity from civil and criminal liability

The Committee has sought further advice about why it is considered appropriate to provide protected persons with criminal immunity, so that proceedings can only be brought against a protected person in circumstances where lack of good faith is shown. The Committee has noted that, in the context of judicial review, the Courts have taken a position that bad faith can only be shown in very limited circumstances.

The immunity provision applies in relation to acts or omissions done, in good faith, in the performance or purported performance of the protected person's duties, when rendering emergency assistance. The use of the term 'good faith' in an immunity provision of this sort is very common, with multiple examples in State and Territory legislation. The existence of the immunity is limited by the requirement that the actions or omissions be done in the performance or purported performance of the person's duties. The duties directed to be done must be lawful duties. This provision does not expand the scope of lawful duties – for example, it does not authorise the use of force or coercive powers, and does not provide authority for protected persons to commit criminal offences with impunity. A person acting outside the scope of their lawful duties will not have the protection of this provision, even if they are acting in good faith.

The immunity provision provides protections against liability in relation to how protected person performs their lawful duties, but does not expand the scope of lawful duties. For this reason, there will only be a narrow range of criminal offences where the immunity could be relied on.

Yours sincerely

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26 October 2020

THE HON SUSSAN LEY MP
MINISTER FOR THE ENVIRONMENT
MEMBER FOR FARRER

MC20-016514

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20 OCT 2020

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Dear Senator ~~Polley~~ Helen

I refer to the correspondence of 8 October 2020 from the Senate Standing Committee for the Scrutiny of Bills, requesting further advice concerning the Environment Protection and Biodiversity Conservation Amendment (Streamlining Environmental Approvals) Bill 2020.

The Committee has requested advice as to whether the Bill could be amended to require, on the face of the primary legislation, that any document incorporated into a bilateral agreement must be made freely available.

I appreciate the importance of ensuring that documents relating to accredited state and territory assessment and approval processes are made freely available to the public. I have previously advised the Committee that the type of documents that may be incorporated into bilateral agreements would either be freely available or expected to be made freely available (for example, state or territory policies and plans relevant to assessment and approvals processes).

Further to this, it is intended that approval bilateral agreements will include a requirement that states and territories publish relevant information on the Internet relating to the assessment and approval process that assist decision-makers to exercise their functions and powers under an accredited process. This information would include rules, guidelines, practices or precedents.

I am satisfied that this approach will support appropriate access and transparency, without the need for further legislative provisions.

Yours sincerely

SUSSAN LEY