

SENATE
LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

National Emergency Declaration Act 2020

Australian Human Rights Commission

Senator Kim Carr asked the following question on 10 June 2021:

Senator KIM CARR: You may not have this material before you; in fact, I expect you won't: the arrangements in regard to the callout powers for the military, given that the military in the Commonwealth sense is often used to assist with the civil powers for purposes of emergency circumstances. I'd ask you to consider the overlap between this legislation and the Defence Act provisions for the callout of the Australian Defence Force where the military can be called out. In the past it has been with the explicit support of the states or where the COMDISPLAN process is engaged with, obviously, the direction of the Governor-General where there's a threat of violence. Could I ask you to consider what the overlap is between that legislation and this and whether or not there are sufficient protections in this legislation for the deployment of military personnel in the state of emergency, given the previous set of questions I've asked?

Mr Santow: Very briefly on behalf of the commission, I'm conscious that I think in 2018 there was some reform to the callout powers and we would have to take on notice the question about the relationship between that law and the current act for review.

The response to the honourable senator's question is as follows:

The *National Emergency Declaration Act 2020* (Cth) (NED Act) does not refer to the *Defence Act 1903* (Cth) or trigger any powers under that Act during a period of national emergency. However, Part IIIAAA Division 2 of the *Defence Act* provides for the Governor-General to make an order calling out the Defence Force immediately or, in certain circumstances, on a contingent basis for two reasons:

1. to protect 'Commonwealth interests';¹ and
2. where a State or self-governing Territory applies for a State protection order to protect it from domestic violence.²

'Domestic violence' is given the same meaning in the *Defence Act* as in section 119 of the Constitution, which provides for the protection of States against violence within a territory or from invasion.

¹ *Defence Act 1903* (Cth), ss 33 and 34.

² *Defence Act 1903* (Cth), ss 35 and 36.

Similar to the NED Act, the term ‘Commonwealth interests’ is undefined in the *Defence Act* and is used in critical provisions which trigger the power for the Governor-General to make an order calling out the Defence Force without a request from a State or self-governing Territory. The lack of definition for this term leaves open the circumstances in which the extensive powers under the *Defence Act* may be triggered. Subject to the other conditions in sections 33 and 34 of the *Defence Act* being satisfied, the call out powers under the *Defence Act* may be exercised during a period of national emergency.

The Commission notes that the *Defence Act* explicitly excludes the call out of the Reserves or use of the Reserves in connection with an industrial dispute in sections 33(4), 34(4), 35(4) and 36(4) and, pursuant to section 39(3)(b), the Chief of the Defence Force must not stop or restrict any protest, dissent, assembly or industrial action unless there is a reasonable likelihood of death of, or serious injury to, persons or serious damage to property.

Orders under sections 33 and 34 of the *Defence Act* may be made by the Governor-General without a request from a State or self-governing Territory. However, section 38 of the *Defence Act* requires the Commonwealth to consult with the relevant State or Territory government about an order or about the variation of an order before the order is made or varied, except where it is impracticable to do so in the case of an immediate call out of the Defence Force under section 33 of the *Defence Act* due to reasons of urgency.

Significantly, section 51U of the *Defence Act* empowers Ministers to make orders calling out the Defence Force instead of the Governor-General where the Minister is satisfied that the required circumstances in sections 33(1), 34(1), 35(1) or 36(1) exist and it is not practicable for the order or declaration to be made under the section it would usually be made because a sudden and extraordinary emergency exists.

This means that there are circumstances in which it would be possible for the Governor-General to declare a national emergency and for an order calling out the Defence Force to be made without having consulted with a State or Territory impacted by the emergency.