



Law Council  
OF AUSTRALIA

Office of the President

**15 October 2020**

Senator the Hon Eric Abetz  
Chair  
Senate Foreign Affairs, Defence and Trade Legislation Committee  
Parliament House  
CANBERRA ACT 2600

By email: [fadt.sen@aph.gov.au](mailto:fadt.sen@aph.gov.au)

Dear Chair

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

1. Thank you inviting the Law Council of Australia to provide a submission to the Committee's inquiry into the above Bill.
2. The Law Council of Australia supports the passage of the Bill, which will provide the Australian Defence Force (**ADF**) with greater flexibility in rendering assistance to the civilian community, particularly by the Reserve Forces (**ADF Reservists**).

**Overall position on the Bill**

3. The Law Council acknowledges the need for the proposed improvements, including their urgent enactment, having regard to the major natural disasters (such as the 2019-20 bushfire season) and other emergencies (including the COVID-19 pandemic) that are currently or were recently facing Australia, and that such events are anticipated to continue in their frequency and intensity.
4. The Law Council notes that the proposed amendments in Schedule 1 to the Bill concerning the call-out of ADF Reservists do not alter the existing arrangements under Part IIIAAA of the *Defence Act 1903* (Cth) (**Defence Act**) with respect to acts of domestic violence (for example, responding to terrorist attacks). Rather, the proposed amendments are directed to assistance rendered under the Defence Assistance to the Civil Community (**DACC**) arrangements.
5. The Law Council is also reassured that the measures in Schedule 2 to the Bill, which confer a civil and criminal immunity on Defence personnel who render assistance in the response and recovery to natural disasters and other emergencies, contain valuable safeguards to ensure their proportionality.
6. In particular, the immunity is only available for acts done in good faith, in accordance with a specific, written direction from the Minister for Defence (**Minister**). Those directions may only be issued if certain statutory criteria are met, which require an assessment of the nature or scale of the disaster or emergency; or the necessity of

the assistance to protect Commonwealth interests. Further, the immunity is only available to persons who have been specifically authorised (individually or by class) by the Chief of the Defence Force (**CDF**) or the Secretary of the Department of Defence (**Secretary**) or a senior executive service-level or a one-star officer delegate.

7. While the Minister can delegate their direction-making power, it is only delegable to the CDF or Secretary, and there is no power of sub-delegation. The Law Council also notes that the immunity is conferred only upon individual Defence personnel. It does not extend to the actions of the Commonwealth in issuing the directions. It therefore does not disturb the legal rights of individuals to remedies against the Commonwealth, seeking compensation for loss, damage or injury (for example, if the Commonwealth was negligent in issuing a direction to act).
8. The Law Council further supports the measures in Schedule 3 to the Bill, to ensure that ADF Reservists who render continuous full-time service as part of a call-out, have a legal right to be paid superannuation contributions by the Commonwealth. The Law Council understands that such contributions are presently paid on an administrative basis. The Law Council supports the conferral upon those personnel of a legal right to superannuation contributions by the Commonwealth. This will promote parity with requirements for civilian employees and provisions made for ADF Reservists on voluntary continuous full-time service. It will also appropriately recognise the national service of ADF Reservists on call-out.

### **Suggestions for targeted improvements in relation to Schedule 2**

9. The Law Council makes four suggestions for some targeted improvements to the measures in Schedule 2 to the Bill and related policies, in relation to the conferral of an immunity from criminal and civil liability on Defence personnel, who act in good faith, in accordance with a Ministerial direction to render assistance in the response or recovery to a natural disaster or other emergency. These suggestions are intended to improve public and parliamentary transparency, especially in relation to the use of the new power to confer immunities.

#### ***Meaning of 'other emergency'***

10. First, the Law Council recommends that consideration is given to providing an illustration of the types of 'other emergencies' (that is, emergencies other than natural disasters) that are intended to be covered by the proposed immunity.
11. While the Law Council understands the need for flexibility to respond to unforeseen circumstances, public transparency and confidence would be greatly assisted by the insertion of either an inclusive statutory definition from the Defence Act itself, or at least the inclusion of some examples in the Explanatory Memorandum, which could be utilised as aids to statutory interpretation, where permitted under section 15AB of the *Acts Interpretation Act 1901* (Cth).

#### ***Public annual reporting on the issuing of directions that enliven immunities***

12. Secondly, the Law Council recommends that consideration is given to a statutory public reporting requirement for directions issued by the Minister (or the CDF or Secretary, if the power is delegated).
13. This could be done via an annual reporting requirement, which requires disclosure of the total number of directions issued in the financial year, and requires a description of the types of directions that were given (including, for example, the types of disasters or other emergencies, and the types of assistance directed).

14. The Law Council appreciates that the large volume of directions that may conceivably be issued in major natural disaster or other emergency events may mean that a 'per use' reporting requirement, or an exhaustive annual reporting requirement, may impose an unworkable administrative burden.
15. However, the Law Council's proposed amendment for reporting on statistical information and an indication of the relevant events and assistance directed could prevent this, while also ensuring that the public and the Parliament are kept informed about the circumstances in which the new immunity is enlivened.

#### ***Exclusion of the Commonwealth from the proposed immunity***

16. Thirdly, to provide confidence to the wider community about the scope and limits of the proposed immunity, it would be desirable if the Explanatory Memorandum, including the Statement of Human Rights Compatibility, were amended to make explicit that the proposed immunity (and the consequent extinguishment of individuals' rights to legal remedies in respect of any actionable infringement of their rights) is limited to the good faith, authorised acts of authorised Defence personnel, and does not extend to the Commonwealth as whole.
17. This is relevant to the Bill's engagement of the right to an effective remedy under Article 2(3) of the *International Covenant on Civil and Political Rights*. The act of conferring an immunity on Defence personnel necessarily engages this right, because its effect is to remove any civil law cause of action that an aggrieved individual may have had in respect of any loss, damage or injury sustained by the relevant actions. The Statement of Compatibility does not presently acknowledge this, or explain the proportionality (and therefore permissibility) of this limitation.

#### ***Pro-active, periodic publication of the DACC Manual***

18. Fourthly, the Law Council is aware that the DACC operational arrangements are set down in an administrative manual issued by the authority of the Vice Chief of the Defence Force (**DACC Manual**). While this manual is unclassified, it does not appear to be pro-actively published on the Department of Defence website.
19. The most recent public release of the DACC Manual appears to have occurred as part of the Defence Department's disclosure to the Royal Commission on Natural Disaster Arrangements.<sup>1</sup> In view of the proposed arrangements in the Bill to make it easier to call out the ADF Reserve, and to enhance the ability of the ADF to provide civilian disaster and emergency assistance, the Law Council considers there would be value in the periodic, pro-active public release of the DACC.

#### **Engagement with the Law Council**

20. Finally, the Law Council acknowledges the assistance of the Department of Defence in providing briefing on the proposed amendments, notwithstanding the contracted timeframe for the Committee's consideration and intended passage of the Bill.
21. These efforts assisted the Law Council in scrutinising the Bill, and the Law Council commends this practice of constructive engagement with the national legal profession to all Departments with carriage of proposed legislative amendments.

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<sup>1</sup> RJ Griggs AO CSC, Vice Admiral, Royal Australian Navy and Vice Chief of the Defence Force, *Defence Assistance to the Civil Community, Edition 2* (16 November 2017), received by the Royal Commission on Natural Disaster Arrangements as exhibit DEF.0001.0001.

Yours sincerely

**Pauline Wright**  
**President**