

COMMITTEE

Inquiry into Defence Legislation Amendment (Enhancement of Defence Force Response to Emergencies) Bill 2020 – 30 October 2020

COMMITTEE INQUIRY QUESTION ON NOTICE

Department of Defence

Topic: SSCFADTLC - Q1 - 30 October 2020 - Enhancement of Defence Force Response to Emergencies Bill 2020 - Constitutional Ambiguity - Kitching

Question reference number: 1

Senator / Member: Kimberley Kitching

Type of question: Spoken

Date set by the committee for the return of answer: 02 November 2020

Question:

Senator KITCHING: Yes, that's true. I have something to ask you in relation to your own submission. We've had several submitters who have expressed contrary views around the immunity provisions, particularly those that are enjoyed by state and territory emergency services. I know we are running out of time and Senator Steele-John has questions, but could you take on notice and outline how the proposed immunities are similar to those in state or territory jurisdiction? On notice as well, could you provide some specific examples or comparison? Just so I'm clear, your submission makes clear that the proposed immunity provisions would be similar to those enjoyed by state and territory emergency services. We've had some submissions that have expressed a contrary view. Could you take on notice how the proposed immunities are similar to those in state or territory jurisdictions and provide some specific examples or comparisons on that? Mr James from the Australian Defence Association has suggested that it might be possible to amend the bill such that the operative sentence would read, 'A natural disaster or emergency not requiring the use of force by ADF personnel'. Would you be able to take on notice any concerns you would have with that proposal? And if you do have concerns could you outline what those concerns are? I think you've kind of addressed the constitutional ambiguity, if I can put it like that. In their submissions Professor Letts and Professor Twomey outlined some constitutional ambiguity with respect to the powers that underpin the use of the ADF.

ACTING CHAIR: Senator Kitching, I take all that is on notice? And the officers—

Senator KITCHING: All of this is on notice—

ACTING CHAIR: You are now at six minutes.

Senator KITCHING: I just want to add to that last question on notice. I understand that those considerations might extend beyond what's contained in this bill itself—

ACTING CHAIR: I think, Senator Kitching, you've certainly made that clear to the department—

Senator KITCHING: I was wondering if defence could comment on the constitutional issues raised by Professor Letts and Professor Twomey? I think that might be helpful for the committee.

Answer:

Question 1: How the proposed immunities are similar to those in State and Territory jurisdictions and provide some specific examples

Emergency management legislation in each State and Territory includes provisions providing immunity from liability. For example:

- *State and Emergency Management Act 1989 (NSW), s 59*
- *Emergency Management Act 2004 (SA), s 32*
- *Emergency Management Act 2013 (Vic), s 75*
- *Emergency Management Act 2005 (WA), s 100*
- *Emergency Management Act 2006 (Tas), s 58*
- *Disaster Management Act 2003 (Qld), s 144*
- *Emergencies Act 2004 (ACT), s 198*
- *Emergency Management Act 2013 (NT), s 113*

These are a sample of the range of immunity provisions that exist in State and Territory legislation for emergency service workers, with one example from each of the eight State and Territories.

- Three States explicitly provide for immunity from civil and criminal liability (South Australia, Tasmania, Northern Territory).
- Three States provide for immunity from liability without specifying if it includes criminal liability (Australian Capital Territory, New South Wales, Victoria).
- Two States explicitly limit the provision to civil immunity (Western Australia, Queensland).

Recommendation 7.3 in the report of the Royal Commission into National Natural Disaster Arrangements is also on point:

Recommendation 7.3 Legal protection for Australian Defence Force members
The Australian Government should afford appropriate legal protections from civil and criminal liability to Australian Defence Force members when conducting activities under an authorisation to prepare for, respond to and recover from natural disasters.

Question 2: it might be possible to amend the bill such that the operative sentence would read, 'A natural disaster or emergency not requiring the use of force by ADF personnel'. Would you be able to take on notice any concerns you would have with that proposal? And if you do have concerns could you outline what those concerns are?

Defence has two main concerns with amending the Bill as suggested:

- Such an amendment would be redundant. The Bill as currently written does not authorise the use of force or coercive powers. The immunity provision would not enable the ADF to, for example, use force or coercive powers to disperse a protest or otherwise quell unrest.
- Such an amendment could potentially have unintended consequences, inadvertently limiting Defence's ability to provide assistance or the operation of the immunity provision in situations where Defence is providing assistance. For example, it would

be important not to inadvertently prevent ADF members from using force consistently with any other member of the Australian community (such as in self-defence).

Amending the Explanatory Memorandum to provide a clearer explanation of the effect of proposed section 123AA would be Defence's preferred approach. This will clarify the situation and avoid unintended consequences.

Question 3: I was wondering if defence could comment on the constitutional issues raised by Professor Letts and Professor Twomey?

Professor Letts and Professor Twomey's submissions and evidence both raise questions about the constitutional basis for Defence Assistance to the Civil Community (DACC) generally, not just in the context of this Bill.

Defence's position on the constitutional basis for providing DACC is that it is an exercise of the Commonwealth's executive power under section 61 of the Constitution. The extent of the executive power has not been exhaustively determined by the Courts, and the High Court has never considered it in the context of Defence providing assistance. This is notwithstanding that Defence has been providing assistance of this sort for decades.

Defence's understanding of the scope of the executive power informs the DACC policy, governing when Defence will provide assistance, and the sort of assistance it will provide. Some key elements of Defence's understanding of the scope of the executive power, in this context, are:

- It would not authorise the use of force or coercive powers beyond what is available to any other member of the community
- It would authorise assistance in order to protect Commonwealth interests
- It would authorise assistance where a natural disaster or other emergency has a particular level of national significance, where the Commonwealth (through Defence) is uniquely placed to respond given its capabilities or capacity. In most cases, this would involve a request from a State or Territory government.

Defence agrees with Professor Twomey's view of the proposed immunity provision that, if an ADF member is performing duties beyond the scope of what the executive power allows, this immunity provision will not assist them.

Noting the context that the High Court has never considered the executive power in this context, Defence's view is that assistance of the sort under discussion would be found to be constitutional, provided it does not involve the use of force or coercive powers.

During her evidence, Professor Twomey also discussed whether, if an ADF member was performing duties that were beyond the scope of the executive power, they would be able to claim for any injury sustained in the course of their duties under relevant legislation.

One example of legislation that provides compensation in the event an ADF member suffers an injury is *the Military Rehabilitation and Compensation Act 2004*, which provides compensation to members who suffer a 'service injury'. This is defined in section 27 as including an injury sustained by a person where the injury resulted from an occurrence that happened while the person was a member rendering defence service. This is beneficial legislation (and see section 7 of the *Australian Veterans' Recognition (Putting Veterans and Their Families First) Act 2019*), and should be interpreted in a way that benefits ADF

members claiming compensation. Defence's view is that, even in the unlikely event that assistance activities were found to be unconstitutional, an ADF member's entitlement under this legislation would be unaffected. This would similarly apply for other legislation providing ADF members with compensation for injuries suffered while providing assistance.

Defence further notes that, in the unlikely event that the assistance activities of ADF members were found to be unconstitutional, the Commonwealth would be vicariously liable for the actions of those ADF members, and would indemnify them for any liability to third parties.

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COMMITTEE INQUIRY QUESTION ON NOTICE

Department of Defence

Topic: SSFADTLC - Q2 - 30 October 2020 - Enhancement of Defence Force Response to Emergencies Bill 2020 - Status of Force Agreements - Fawcett

Question reference number: 2

Senator: David Fawcett

Type of question: Spoken

Date set by the committee for the return of answer: 02 November 2020

Question:

Senator Fawcett: I'm assuming that's the kind of thing that triggers the need for providing the same sort of immunity as in the breaking through the door example that you've just talked about. Could you provide on notice a more detailed explanation as to why the status of forces agreements in and of themselves are not adequate to extend to a visiting group of combat engineers the same kind of protections we would seek for our own forces.

Answer:

Australia has status of forces agreements (SOFAs) with seven countries. SOFAs are not in place for all countries who have provided foreign forces to provide assistance in the past, or for all countries who may provide assistance in the future.

SOFAs facilitate the basis on which foreign forces are in Australia. They are typically negotiated in the context of foreign forces cooperating with the ADF in training exercises, as opposed to assistance to the civil community. Not all existing SOFAs include an agreement to provide immunity to individual members of foreign forces, and where they do so, the agreed immunity would not generally encompass activities associated with the provision of assistance, to the civil community.

The proposed immunity provision in the Bill would enable the protections that are being made available to ADF members, to be extended to members of foreign forces providing the same sort of assistance.

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COMMITTEE INQUIRY QUESTION ON NOTICE

Department of Defence

Topic: SSCFADT - Q3 - 30 October 2020 - Enhancement of Defence Force Response to Emergencies Bill 2020 - Professor Twomey Evidence Review - Fierravanti-Wells

Question reference number: 3

Senator / Member: Concetta Fierravanti-Wells

Type of question: Spoken

Date set by the committee for the return of answer: 02 November 2020

Question:

Acting Chair: I think you need to go through and have a look at the evidence that's been given, and most especially the issues that were raised by Professor Twomey, and come back to the committee pretty quickly in response to some of the concerns that have been raised.

Answer:

Professor Letts and Professor Twomey's submissions and evidence both raise questions about the constitutional basis for Defence Assistance to the Civil Community (DACC) generally, not just in the context of this Bill.

Defence's position on the constitutional basis for providing DACC is that it is an exercise of the Commonwealth's executive power under section 61 of the Constitution. The extent of the executive power has not been exhaustively determined by the Courts, and the High Court has never considered it in the context of Defence providing assistance. This is notwithstanding that Defence has been providing assistance of this sort for decades.

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COMMITTEE INQUIRY QUESTION ON NOTICE

Department of Defence

Topic: SSCFADTLC – Q4 – 30 October 2020 - Enhancement of Defence Force Response to Emergencies Bill 2020 – Category of Legal Advice - Patrick

Question reference number: 4

Senator / Member: Rex Patrick

Type of question: Spoken

Date set by the committee for the return of answer: 02 November 2020

Question:

Senator PATRICK: All of the evidence clarifies some of the boundaries within your submission and answered our questions. I don't mean this in a disrespectful way, but, in some sense, your comment that it is absolutely sure is legally arrogant in the context. I've never seen a lawyer say that before. Your own colleague mentioned that, if indeed an order to carry out a particular duty was beyond power for constitutional reasons, the immunity would not apply. So there is even doubt amongst your own team. It's in that context I ask you: who signed the advice you received from the ATS? Did they commission a brief for the Solicitor-General? Was it someone very senior? Was it a junior lawyer? I'd like to get a sense of that.

Mr D'Amico: It was a very senior lawyer within the Australian Government Solicitor that provided us that advice.

Senator PATRICK: They have different categories. Would you be able to provide me with the category? They have lawyer, senior lawyer, executive and various levels of counsel. Can you provide me with the level, perhaps on notice if necessary?

Answer:

Defence received legal advice from the Australian Government Solicitor (AGS) on the constitutional validity of the Bill. The primary lawyer who provided advice is a Deputy Chief General Counsel (SES Band 2) in the Office of General Counsel. The lawyer has almost 30 years of experience in AGS advising on a broad range of complex constitutional and public law issues, including defence and national security legislation. The lawyer worked with two other AGS lawyers, at SES Band 2 and SES Band 3, in preparing the advice.