



AUSTRALIANS FOR WAR POWERS REFORM

15 October 2020

**Senate Foreign Affairs, Defence and Trade Legislation Committee
Defence Legislation Amendment (Enhancement of Defence Force Response to Emergencies) Bill 2020**

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

Submission by Paul Barratt AO

Thank you for your invitation to make a submission in relation to the Committee's inquiry into the above Bill. I do so in my capacities as a former Secretary, Department of Defence, and President of Australians for War Powers Reform, a body which seeks to reform the way Australia goes to war by requiring that, in situations short of a dire emergency, Parliamentary authorisation is required to commit the Australian Defence Force to international armed combat.

In summary, we have the following concerns about the Bill as it stands:

- We would not wish to see the normalisation of military responses to civilian emergencies such as natural disasters and large-scale accidents
- We consider that the calling out of Reserves will add only marginally to the capacity of the Defence Force to give Defence Assistance to the Civil Community (DACC), especially when due regard is paid to the long-standing 'call for' arrangements under which reservists have voluntarily provided assistance in many emergencies
- The deployment of ADF members, whether full-time or reservist, for tasks for which they are neither trained nor equipped, exposes those members, and perhaps those working with them, to danger
- The legislation does not quarantine to DACC situations either the facilitation of call-out nor the indemnification of members of foreign defence forces. It must do so
- There is a risk that the calling out of Reserves will create situations of divided command and hence of ambiguous accountability: it is important that the employment of the ADF is in response to specific requests for assistance from the States and Territories, and that the unity and independence of command is preserved
- Contrary to the claims in the Explanatory Memorandum, the legislation would have profound consequences for human rights
- Consequently, there is a risk of the ADF being injected into domestic situations which could undermine public confidence in the ADF. The legislation must preserve the clear and long-standing distinction between DACC and Defence Aid to the Civil Power (DACP), under which the ADF assists the law enforcement activities of the civilian authorities.

We would recommend that the legislation not proceed; the benefits are too slight and the risks too high.

Military responses to natural disasters and major accidents

In the ordinary course of events, responding to natural disasters and large-scale accidents, such as a train or aircraft accident or industrial fire or explosion, is the responsibility of the state and territory governments. Accordingly, they should plan and equip their police, fire, ambulance and emergency services for their foreseeable workload, including relatively rare (say, one in twenty year) events. Preparation for events currently considered rare is especially warranted because climate change is increasing the frequency and intensity of major weather events.

Arrangements for state and territory preparedness could include arrangements between jurisdictions for the sharing of equipment and personnel, as we saw during last summer's bushfires.

A 1997-98 Parliamentary Research Paper noted that there are legal difficulties inherent in nearly all uses of the defence forces for 'non-defence' purposes¹. Accordingly, if there is any merit seen in having a centralised backup capability available for deployment as needed, that should be an appropriately trained and equipped civilian agency. Calling out the Defence Reserves is no substitute for the preparedness of the civilian agencies whose business and responsibility this is.

Defence Assistance to the Civilian Community (DACC)

Subject to the provisos immediately above, it of course makes sense in extreme or urgent situations to make use of defence assets that are fit for purpose and can be made available within the requisite timeframe.

What is not clear, however, is why the existing arrangements, arrangements of very long standing, require supplementation. As noted by The Australia Institute in its January 2020 paper *Calling it Out*²:

The ADF has long experience assisting the civil community in emergencies, with relevant arrangements in place for decades. Thousands of ADF personnel, including reservists, have been involved in responses to disasters such as Cyclone Tracy, the 2009 Victorian bushfires and the 2019 Queensland floods. Where enough reservists volunteer, there is no need to use Call Out provisions. The less extreme "Call For" provisions are sufficient.

In our view, the additional capability that would be achieved by the "calling out" the Reserve would be very marginal. The principal useful assets – aircraft, ships, trucks in quantity, and specialised engineering skills – will be found in the permanent force, and the permanent force is maintained at a higher level of capability and readiness. To the extent that members of the Reserve are needed, the Reserve is likely to be an abundant source of volunteers, and it should not be necessary to call them out.

¹ Elizabeth Ward, *Call Out the Troops: an examination of the legal basis for Australian Defence Force involvement in 'non-defence' matters*, Parliamentary Library, Research Paper 8, 1997-98, available [here](#).

² Allan Behm & Roderick Campbell, *Calling it Out: Political Goals of the Commonwealth's Call Out of Defence Reserves*, The Australia Institute, January 2020, available for download from [here](#).

We therefore question the both the necessity for and the benefit of the proposed measures.

If the legislation is to proceed, we would recommend that call-out occur only at the request of the relevant state or territory government(s). The Commonwealth should not create for itself a licence to intervene in matters ordinarily the responsibility of the states and territories unless and until the affected jurisdiction requests assistance. This could be achieved by means of a new s.4B along the lines of

(4B) The Minister must advise the Prime Minister that the relevant State(s) and/or Territory Government(s) have requested the assistance of the Commonwealth.

Exposing ADF members to danger

The ADF is a national defence force; that is its sole purpose, and the sole purpose of the Defence Reserve is to provide supplementation to the permanent forces. Neither the ADF nor the Reserve is trained or equipped to deal with natural disasters or large-scale accidents, and nor should they be. Sending ADF members into dangerous situations for which they are neither trained nor equipped exposes them, and perhaps those they are meant to be assisting, to danger, and should be avoided except *in extremis*.

New provisions not quarantined to DACC situations

While the focus of the Explanatory Memorandum is ostensibly on natural disasters or other emergencies not requiring the use of force, the Memorandum is highly misleading because the phrase “natural disaster or other emergency” that is used throughout the Bill indicates that the proposed facilitation of Reserve Call Out extends to all circumstances contemplated by s.28(3) of the Defence Act. That means that, in addition to “civil aid, humanitarian assistance, medical or civil emergency or disaster relief” (s.28(3)(g)), cover would be extended to “warlike operations within Australia” (s.28(3)(a)) and to “matters involving Australia’s national security or affecting Australian defence interests” (s. 28(3)(e)) – a category that is capable of extraordinarily wide interpretation.

In our understanding, such operations would properly fall within the scope of “Aid to the Civil Power” – operations which might involve the use of force. As such, they would be constrained by s.119 of the Constitution, which provides:

The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.

The preconditions for the Commonwealth to become involved in such situations are (i) that a state of “domestic violence” exists in a state, and (ii) that the relevant State Government has made an application for Commonwealth assistance.

The effect of the draft Bill would be not only to include the abovementioned classes of operations within the scope of situations for which the Defence Reserve could be called out, but to extend the proposed indemnities to members of foreign military forces or foreign police who might participate in the response. We would consider it entirely inappropriate even to contemplate involving members of foreign military forces, or foreign police forces, in any kind of response to domestic violence within Australia, or to other situations within Australia involving Australia’s national security or Australian defence interests.

In our view, if the legislation is to proceed, the new provisions must be quarantined to natural disasters and large-scale accidents, or perhaps explicitly to s.28(3)(g) of the Act, which would provide coverage for “civil aid, humanitarian assistance, medical or civil emergency or disaster relief”.

Under no circumstances should the Commonwealth attempt to legislate a provision which would enable the Commonwealth to provide ADF assistance to a State or Territory, by way of Assistance to the Civil Community or Aid to the Civil Power, without a request having been received from the relevant Government(s). Apart from the Constitutional dubiousness of the latter, it would prevent the establishment of unified command: the police cannot command the ADF and the ADF incident commander would not be able to command the police unless the police handed over command as in the existing arrangements. And any appearance of bickering between the police and the ADF would undermine confidence in both.

Legal immunity for ADF (including Reserve) personnel

The immunities proposed to be granted to ADF (including Reserve) personnel appear far too wide. It would be reasonable to grant immunity from civil liability, but the granting of immunity from criminal liability to people who are in effect carrying out civilian duties seems unwarranted. ADF personnel involved in DACP-type activities should have no higher level of immunities than those available to the state and territory first responders they are meant to be assisting.

Human rights consequences

We contest the conclusion in the Statement of Compatibility with Human Rights that forms part of the Explanatory Memorandum, that:

This Bill is compatible with human rights because it promotes and advances the right to just and favourable conditions of work, and does not otherwise engage any human rights.

Clearly, unless the Bill quarantines all of the new provisions for call-out to purposes consistent with s.28(3)(g) of the Defence Act, or some such phrase as “natural disasters and large-scale accidents”, it could engage the rights of Australian citizens in very fundamental ways. It should explicitly list the human rights with which it does not engage.

Undermining confidence in the ADF

We believe that any action that would inject ADF members into situations that are not either:

- The provision of Assistance to the Civil Community in response to a request from the relevant jurisdiction(s), or
- Assistance to the State or Territory’s law enforcement (“Aid to the Civil Power”), in response to a request from that State or Territory and in strict accordance with the Constitution and the existing arrangements

poses the risk of politicising the ADF and undermining public confidence in it. In a country that is both one of the world’s longest standing continuing democracies, and dependent for its defence upon an all-volunteer defence force, that public confidence is vital.

In addition, we consider that any measure which exposes Defence Reserve members to the risk of being compulsorily called out for a non-defence purpose for which they have not been trained will have an impact on the willingness of Australians to join the Reserve, and hence on Australia's defence preparedness.

Indemnifying foreign police

We note the provision in the draft legislation for the CDF or Secretary to authorise a member of a foreign police force to undertake duties in respect of the provision of assistance, and thereby make them a "Protected Person", with all the indemnities and protections that status entails.

We consider the use of foreign police to be undesirable and unnecessary, and question its legal basis. If foreign police are to be involved in any way, the legislation should stipulate that they are to be unarmed, and not to be required to undertake or participate in acts of coercion towards any member of the Australian public, including persons visiting or temporarily resident in Australia. Granting them "Protected Person" status should be conditional upon agreed reciprocity from any foreign government concerned, that they would allow the AFP such "Protected Person" status in their own countries.

CONCLUSION AND RECOMMENDATIONS

We recommend that the legislation not proceed, on the grounds that the benefits (if any) are far outweighed by the risks.

If the legislation is to proceed, we recommend that it be clearly and strictly quarantined to situations that involve no possibility of the use of force, such as natural disasters and large-scale accidents, or the situations set out in s.28(3)(g) of the Defence Act. It should stipulate that the Reservists called out are to be unarmed, and are not to be required to undertake any coercive act towards any person.

I would be happy to appear in person or via video link to expand on this submission.

(Paul Barratt AO)
Former Secretary, Department of Defence
President, Australians for War Powers Reform