

Defence Legislation Amendment (Woomera Prohibited Area) Bill 2014

Portfolio: Defence

Introduced: Senate, 27 March 2014

Purpose

2.10 The Defence Legislation Amendment (Woomera Prohibited Area) Bill 2014 (the bill) seeks to establish a framework intended to provide all non-Defence users within the Woomera Prohibited Area (WPA) and industry more generally with a level of certainty over Defence activity in the area; and to allow users to make commercial decisions with some assurance as to when they will be requested to leave the area because of Defence activity. The bill is said to give effect to the recommendations in the Final Report of the Hawke Review of 3 May 2011, which included a recommendation that the WPA 'be opened up for resources exploration and mining to the maximum extent possible within the confines of its primary use for defence of Australia purposes.'¹

Background

2.11 The committee reported on the bill in its *Sixth Report of the 44th Parliament*.

Committee view on compatibility

Right to privacy

Search and request powers exercisable without consent

2.12 The committee requested the Minister for Defence's further advice as to the necessity for non-consensual powers to search and request information from a person at defence access control points, and particularly:

- whether the proposed limitation on the right to privacy is aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is proportionate to that objective.

Minister's response

The Woomera Prohibited Area (WPA) has been the site of weapons testing since the 1950s and contains unexploded ordnance and the debris from weapons testing. The WPA is an extremely large remote land area and it is difficult for the Department of Defence to monitor the movements and activities of people on the WPA.

1 Explanatory memorandum (EM), p. 2.

The non-consensual search powers under Part VIA of the *Defence Act 1903* will only apply generally where a person does not have authorisation to be on Defence premises, where they constitute a threat to safety or have committed or may commit a criminal offence in relation to the Defence premises. These powers may also apply at Defence access control points.

These powers are required to ensure that people and vehicles leaving the WPA through Defence access control points are not removing war materiel or equipment. If a person attempting to enter the WPA through an access point refuses a consensual search, it is within the power of a Defence security official to refuse to allow that person to enter the WPA. In circumstances where the person is intending to leave the WPA and refuses a consensual search, a special Defence security official requires the proposed powers to conduct a non-consensual search to ensure that no materiel, including unexploded ordnance, debris from weapons testing or war materiel is removed from the WPA.

In light of the sensitive nature of testing activities and the potential hazards associated with materiel that may be present in the WPA, a mechanism to control access and ensure people's safety is compatible with this limitation on the right to privacy.²

Committee response

2.13 The committee thanks the Minister for Defence for his response and has concluded its examination of this matter.

Right to security of persons and freedom from arbitrary detention

Arrest and detention powers

2.14 The committee requested the Minister for Defence's advice as to the compatibility of the requirement that a detained person be brought 'as soon as practicable' before a member or special member of the AFP, or member of a state or territory police force, with the right to be brought promptly before a court.

2.15 The committee also sought the Minister for Defence's advice as to what protections may apply more generally to the right to security of the person and freedom from arbitrary detention, such as restrictions on the time a person may be detained without being brought before a relevant AFP or state or territory police force member, and provision for a person to access legal advice while detained.

Minister's response

The committee has requested advice as to the compatibility of the requirement that a detained person be brought 'as soon as practicable' before a member or special member of the Australian Federal Police or member of a state or territory police force, with the right to be brought

2 See Appendix 2, Letter from Senator the Hon David Johnston, Minister for Defence, to Senator Dean Smith, 17 June 2014, pp 1-2.

promptly before a court. In addition, advice has been requested on what protection may apply to the right to security of the person and freedom from arbitrary detention.

Defence advises the arrest and detention powers in this Bill already apply to 'Defence Premises' through Pt VIA of the *Defence Act 1903*, this Bill will only extend the application of these existing powers to the WPA.

The vast and remote nature of the WPA combined with safety concerns associated with testing may give rise to a situation where it may take time for a detained person to be brought before a member of the police force which in any event will be done as soon as practicable. This is compatible with the right to be brought promptly before a court in that a detained person will be brought before a member of a police force as soon as circumstances allow this to occur.³

Committee response

2.16 The committee thanks the Minister for Defence for his response and has concluded its examination of this matter.

Right to enjoy and benefit from culture and the right to self determination

Impact of increased economic activity on Indigenous people

2.17 The committee requested further information from the Minister for Defence as to the compatibility of the bill with the right to enjoy and benefit from culture and the right to self-determination, with particular attention to native title and whether the increased economic activity in the WPA enabled by this bill might limit Indigenous groups' enjoyment of these rights.

Minister's response

The committee sought advice on the compatibility of the Bill with the right to enjoy and benefit from culture and the right to self-determination, with particular attention to native title and whether the increased economic activity in the WPA enabled by the Bill might limit Indigenous groups' enjoyment of these rights.

Indigenous groups will retain current access rights and will not require permission under this Bill. I note that section 72TB of the Bill specifically excludes existing users of the WPA from the application of the Bill. This includes Indigenous groups with an interest in the land. Additionally, permit holders under the Bill will be required to respect the rights of the local Indigenous groups and comply with all relevant laws and pertaining to native title and the protection of these sites. Defence engages in ongoing consultation and discussion with all stakeholders, including

3 See Appendix 2, Letter from Senator the Hon David Johnston, Minister for Defence, to Senator Dean Smith, 17 June 2014, p. 2.

Indigenous groups, to ensure there is minimal disruption caused by Defence testing.

With respect to economic activity, the Bill only creates a permission system to access a prohibited area. Any economic activity that takes place in the WPA, specifically mining activity, is regulated by the South Australian Government under its *Mining Act 1971*.⁴

Committee response

2.18 The committee thanks the Minister for Defence for his response and has concluded its examination of this matter.

Right to a fair trial and fair hearing rights

Validation of declaration and past acts in relation to the Woomera Prohibited Area

2.19 The committee requested the Minister for Defence's advice on the compatibility of the retrospective validation proposed by new section 121A with human rights, and particularly whether the measure will engage or limit the right to a fair trial and fair hearing, and the prohibition on retrospective criminal laws.

Minister's response

The inclusion in the Bill of the proposed s 121A is designed to ensure there can be no doubt about the validity of the 1989 declaration of the WPA. The purpose of s 121A is to address technical arguments that could be raised in relation to the 1989 declaration and some acts taken pursuant to it. The only perceived basis for this is that the Defence Force Regulations 1952 did not fully provide for just terms compensation for any acquisitions of property consequent on that declaration or those acts for the purposes of s 51 (xxxix) of the Constitution (although Defence is not aware of any particular cases in which this may have occurred). Section 121A rectifies any constitutional deficiencies by providing just terms compensation in accordance with s 51 (xxxix).

There are no *pending* or *completed* proceedings that would be affected by the proposed s 121A. Nor is Defence aware of any circumstances that would give rise to new proceedings in relation to the period covered by the proposed s 121A.

Even if there were such proceedings s 121A would merely prevent a person from attempting to indirectly escape liability by arguing that he or she could not have been in the WPA because the declaration of that area as a prohibited area was invalid as it effected an acquisition of property other than on just terms. Further, any such liability would not be imposed on a person who could not have reasonably known of the liability at the time the conduct constituting the offence was committed.

4 See Appendix 2, Letter from Senator the Hon David Johnston, Minister for Defence, to Senator Dean Smith, 17 June 2014, p. 2.

In any case, Defence is not aware of any information that suggests any person is likely to be prosecuted for an offence against reg 35 for conduct occurring before this Bill. There are no current investigations or prosecutions. Accordingly, to the best of Defence's knowledge, the proposed s 121A will not operate in practice so as to cause, indirectly, any retrospective imposition of criminal liability.⁵

Committee response

2.20 The committee thanks the Minister for Defence for his response and has concluded its examination of this matter.

5 See Appendix 2, Letter from Senator the Hon David Johnston, Minister for Defence, to Senator Dean Smith, 17 June 2014, p. 3.