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**THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA**

**HOUSE OF REPRESENTATIVES**

**DEFENCE LEGISLATION AMENDMENT (ENHANCEMENT OF DEFENCE FORCE  
RESPONSE TO EMERGENCIES) BILL 2020**

**EXPLANATORY MEMORANDUM**

**(Circulated by the authority of the  
Minister for Defence, Senator the Hon Linda Reynolds CSC)**

# DEFENCE LEGISLATION AMENDMENT (ENHANCEMENT OF DEFENCE FORCE RESPONSE TO EMERGENCIES) BILL 2020

## GENERAL OUTLINE

1. This Bill includes several measures that will enhance Defence's capacity to provide assistance in relation to natural disasters and other emergencies. The mechanism Defence uses for providing assistance in a natural disaster or other emergency (not requiring the use of force) is the Defence Assistance to the Civil Community (DACC) policy. The measures in this Bill will enhance the ability to provide DACC assistance by:

- a. streamlining the process for calling out members of the ADF Reserves under sections 28 and 29 of the *Defence Act 1903* (the Act) (Schedule 1)
- b. providing ADF members, other Defence personnel and members of foreign forces with similar immunities to State and Territory emergency services personnel in certain cases while performing duties to support civil emergency and disaster preparedness, recovery and response (Schedule 2)
- c. amending ADF superannuation legislation to ensure that Reserve members who provide continuous full-time service following a call out under section 28 of the Act are appropriately covered for superannuation and related benefits (Schedule 3).

## Schedule 1: Calling out the Reserves

2. The amendments in Schedule 1 will streamline and enhance the provisions enabling call out of the Reserves (Reserve Call Out), including where the Reserve Call Out is in response to a natural disaster or other emergency. In particular, the amendments will:

- a. Enhance flexibility in how called out ADF Reserve members serve by:
  - i. removing references to continuous full-time service (CFTS)
  - ii. enabling the Chief of the Defence Force (CDF) to determine how and when they are required to serve.
- b. Simplify the process for advising the Governor-General before making a Reserve Call Out order.
- c. Provide for Reserve Call Out orders to be made by notifiable instrument.
- d. Extend Parts 8, 9 and 10 of the *Defence Reserve Service (Protection) Act 2001* to any service rendered by Reserves under a Reserve Call Out order and not just CFTS.
- e. Modernise the language in Part III of the Act.
- f. Amend the CDF's delegation power in relation to Reserve Call Out to reflect the other changes to the Act.

3. Reserve Call Out is a mechanism to require members of the ADF Reserve forces to provide service, even though they have not volunteered. Ordinarily, members of the Reserves are only required to render service at times they have agreed (volunteer service, see section 26 of the Act), or during specified training periods (training service, see section 25 of the Act). This is in contrast to members of the Permanent forces, who have an ongoing obligation

to provide continuous full-time service, meaning they can be required by command to perform duty at any time (regardless of their ordinary hours of work).

4. Use of Reserve Call Out increases the size of the available force, such as when available full-time members or volunteers from the Reserves are not sufficient. It is a mechanism that is used only in exceptional circumstances, and can only be used in the circumstances outlined in subsection 28(3) of the Act. This includes circumstances involving civil aid, humanitarian assistance, medical or civil emergency or disaster relief (paragraph 28(3)(g)). It was used for the first time for this purpose during the 2019/20 bushfire disasters. In particular, a large scale Reserve Call Out was conducted in January 2020, in response to the rapidly worsening situation. All other assistance provided by ADF members in response to natural disasters has been provided by full-time members or Reserve members who had volunteered.

5. Defence's experience during January 2020 drew attention to ways in which the Reserve Call Out provisions could be improved. These changes will mean there is greater flexibility in implementing a Reserve Call Out, and provide greater consistency in the treatment of Reserve members providing assistance during a disaster – whether they have volunteered service or been called out.

## **SCHEDULE 2 – IMMUNITY**

6. ADF members, other Defence personnel and members of foreign forces performing activities in support of disaster preparedness, response or recovery are not afforded immunities from criminal or civil liability akin to those received by state and territory emergency services personnel performing similar activities in good faith. This presents some legal risk to those individuals.

7. The amendments in Schedule 2 insert a provision providing immunity, in certain cases, from civil and criminal liability for ADF members, other Defence personnel, and members of foreign forces who, in the good faith performance of duties, provide assistance in the preparation for, response to and recovery from a natural disaster or other emergency.

8. The immunity provision is enlivened by a direction from the Minister that the ADF or the Department is to provide such assistance, and in circumstances where the relevant duties are being performed in relation to that assistance.

## **SCHEDULE 3 – SUPERANNUATION AND RELATED BENEFITS**

9. Following the January 2020 Reserve Call Out, it was identified that there were some legislative gaps relating to superannuation and other related benefits for Reserve members providing service during a Reserve Call Out. Currently, Reserve members rendering voluntary CFTS are liable for tax and receive superannuation benefits. Reserve members rendering voluntary service other than CFTS (commonly referred to as 'Reserve days') do not pay tax on their Reserve income, and do not receive superannuation benefits in respect of that pay. However, under the existing legislation, Reserve members who render CFTS under a call out order are required to pay tax in respect of their service, while also not being entitled to superannuation and related benefits. This creates an undesirable outcome for members who provide service during a Reserve Call Out.

10. To address this, Schedule 3 makes amendments to the *Military Superannuation and Benefits Act 1991*, the *Australian Defence Force Superannuation Act 2015*, and the

*Australian Defence Force Cover Act 2015* to ensure Reserve members rendering CFTS will receive the same entitlement to superannuation and related benefits regardless of whether it was voluntary CFTS or not. This means that Reserve members who render service during a Reserve Call Out will receive the same superannuation and related benefits as Reserve members who provide equivalent service voluntarily.

11. These amendments will operate retrospectively, applying from the date of the first Reserve Call Out in November 2019. The retrospective operation of these provisions is beneficial to Reserve members who provided service during the Reserve Call Outs in the 2019/2020 bushfire disasters, and does not have a detrimental effect on anyone.

## **FINANCIAL IMPACT STATEMENT**

12. This Bill has no significant financial impact on Commonwealth expenditure or revenue.

## STATEMENT OF COMPATABILITY WITH HUMAN RIGHTS

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

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

1. This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the Bill**

2. This Bill includes several measures that will enhance Defence's capacity to provide assistance in relation to natural disasters and other emergencies. The mechanism Defence uses for providing assistance in a natural disaster or other emergency (not requiring the use of force) is the Defence Assistance to the Civil Community (DACC) policy. The measures in this Bill will enhance the ability to provide DACC assistance by:

- a. streamlining the process for calling out members of the ADF Reserves under sections 28 and 29 of the *Defence Act 1903* (the Act) (Schedule 1)
- b. providing ADF members, other Defence personnel and members of foreign forces with similar immunities to State and Territory emergency services personnel in certain cases while performing duties to support civil emergency and disaster preparedness, recovery and response (Schedule 2)
- c. amending ADF superannuation legislation to ensure that Reserve members who provide continuous full-time service following a call out under section 28 of the Act are appropriately covered for superannuation and related benefits (Schedule 3).

#### **Human rights implications**

3. This Bill promotes the following human rights: Article 7, ICESCR, the right to just and favourable conditions of work.

4. The amendments in the Bill will ensure that ADF Reserve members who render service as a result of a call out order by the Governor-General receive the same conditions of service as Reserve members who volunteer for service. This includes extending superannuation and related benefits to Reserve members who are called out for continuous full-time service (CFTS). At present, superannuation and related benefits are only paid to Reserve members who volunteer for CFTS, not members who provide CFTS following under a call out order.

5. The Bill also provides additional protections to ADF members and other defence personnel who are providing assistance in certain circumstances in a natural disaster or other emergency. The new provision will give these protected persons immunity from civil and criminal liability for good faith actions in the course of their duties. Immunity in these circumstances is analogous to provisions in State and Territory legislation for emergency services personnel performing similar functions.

## **Conclusion**

6. 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.

# DEFENCE LEGISLATION AMENDMENT (ENHANCEMENT OF DEFENCE FORCE RESPONSE TO EMERGENCIES) BILL 2020

## NOTES ON CLAUSES

### 1 Short title

1. This clause provides for the short title of the Act to be the *Defence Legislation Amendment (Enhancement of Defence Force Response to Emergencies) Act 2020*.

### 2 Commencement

2. This clause provides for the Act to commence on the day after it receives royal assent.

### 3 Schedules

3. This clause provides that that legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

## SCHEDULE 1 – CALLING OUT THE RESERVES

4. This Schedule makes amendments to the *Defence Act 1903* (the Act), streamlining the process for calling out the ADF Reserves and giving greater flexibility in how Reserve members are to give service during a call out. It also makes amendments to the *Defence Reserve Service (Protection) Act 2001*, reflecting the changes to the call out provisions in the Act.

5. Reserve Call Out is a two-step process. First, the Governor-General must make a call out order under section 28 of the Act, calling out some or all of the Reserves. Secondly, the Chief of the Defence Force (CDF) must specify the period during which a called out member is bound to render service under section 29. The Act currently specifies that Reserve members who are subject to a Reserve Call Out are liable to render continuous full-time service (CFTS). The amendments in this part will make changes to both steps in the Reserve Call Out process, and will remove references to CFTS.

### Part 1 – Amendments

#### Item 1

6. This item repeals and replaces paragraph 24(c) of the Act. Section 24 outlines the situations in which a member of the Reserves is bound to render continuous full-time service. Paragraph 24(c) currently states that members who are called out under Division 3 of Part III (i.e. subject to Reserve Call Out) or Division 1 of Part IV (which deals with liability to serve in the ADF in time of war) are liable to render CFTS. The new paragraphs reflect the removal of references to CFTS in relation to Reserve Call Out. The effect of new paragraph 24(c) provides that a Reserve member who is subject to a Reserve Call Out is only bound to render CFTS if their period of service is specified by the CDF to be a period of CFTS. Otherwise, the substance of section 24 remains unchanged.

## **Item 2**

7. This item repeals and replaces subsections section 28(1) and (2).
8. New subsection 28(1) provides for the Governor-General to make an order calling out some or all of the Reserves for service (a call out order). The new provision no longer specifies that service under a call out order is CFTS.
9. The new provision also replaces the requirement for the call out order to be published in the Gazette. Instead, call out orders will be notifiable instruments. This modernises the language used in these provisions, and also means that provisions relating to registration, commencement, amendment and revocation of notifiable instruments in the *Legislation Act 2003* and *Acts Interpretation Act 1901* will apply to a call out order.

## **Item 3**

10. This item repeals and replaces subsection 28(4), which provides for how the Governor-General is to receive advice before making a call out order.
11. New subsection 28(4) provides that in making or revoking a call out order, the Governor-General is to act on the advice of the Minister. New subsection 28(4A) provides that the Minister must consult the Prime Minister before giving advice to the Governor-General to make or revoke a call out order.
12. Previously, the Governor-General was required to act on the advice of the Executive Council, unless the Minister considered that, for reasons of urgency, the Governor-General should act on the advice of the Minister. This change is to ensure that, in the event a Reserve Call Out is required, it can be implemented without delay. In practice, the majority of situations in which a call out order would be considered are urgent situations.

## **Item 4**

13. This item repeals subsections 28(5), (6) and (7), which provide for when a call out order commences and when a revocation takes effect. As a call out order will now be made by notifiable instrument, relevant provisions in the *Legislation Act 2003* and *Acts Interpretation Act 1901* will provide for the commencement and revocation of call out orders.

## **Item 5**

14. This item amends the heading for section 29 to reflect the language that will now be used in section 29.

## **Item 6**

15. This item amends subsection 29(1), which currently provides that a Reserve member covered by a call out order is bound to render CFTS for the period specified in writing by the CDF.
16. New subsection 29(1) will provide that a Reserve member covered by a call out order is bound to render service for the period or periods specified in writing by the CDF. This gives CDF more flexibility in how to use Reserve members covered by a call out order. For example, the CDF may specify that a Reserve member is to render service during a single period or multiple periods while the call out order is in effect. This amendment also removes the requirement that the period specified be a period of CFTS, meaning that the service provided by Reserve members covered by a call out order can be better tailored to the particular circumstances.

## **Item 7**

17. This item repeals subsections 29(2), (3), (4) and (5), replacing them with new subsections 29(2) and (3). Current subsection 29(2) provides that the period specified by the CDF in subsection 29(1) must start on the day the call out order takes effect. This requirement proved unworkable during the January 2020 Reserve Call Out – the CDF needs flexibility to specify periods that start on a later day. Further, current subsection 29(4), which provides that the specification of a period did not prevent the specification of further periods, created ambiguity as to whether periods specified by the CDF under subsection 29(1) needed to start on the day the call out order took effect, or not. These two subsections have not been replaced. The ability to specify multiple periods of service under a call out order is now included in subsection 29(1), which allows the CDF to specify a period or periods.

18. New subsection 29(2) has the same effect as existing subsection 29(3), confirming that the CDF cannot specify a period of service that extends beyond the end of the call out order.

19. New subsection 29(3) has the same effect as existing subsection 29(5), confirming that the existence of a Reserve Call Out would not change any other obligation on an ADF member to render service. For example, if a Reserve member had volunteered for CFTS under section 26 of the Act, they would still be required to render this service even if a Reserve Call Out was in effect.

## **Item 8**

20. This item amends paragraph 120A(3D)(b), which provides that the CDF may delegate the power to specify a period of service under subsection 29(1) to an officer. The amendment removes the reference to CFTS, reflecting the changes in subsection 29(1).

## **Items 9 to 17**

21. These items amend the *Defence Reserve Service (Protection) Act 2001* (Reserve Service Protection Act). The Reserve Service Protection Act provides a range of employment and other protections to Reserve members. Many of the protections, including the employment and education protections in Parts 5 to 7, apply in relation to any service provided by a Reserve member. However, the financial and bankruptcy protections in Parts 8 and 9 only apply to a Reserve member who is rendering CFTS under a call out order, or CFTS that is operational service. Similarly, the loans and guarantees in Part 10 are only available to Reserve members rendering CFTS under a call out order.

22. The amendments to the Act in this Schedule mean that a Reserve member who is rendering service under a call out order will not necessarily be rendering CFTS. The amendments to the Reserve Service Protection Act mean that Parts 8, 9 and 10 will apply to all Reserve members who render service under a call out order, regardless of whether that service is CFTS. This ensures that Reserve members who are subject to a Reserve Call Out will continue to receive the same protections under the Reserve Service Protection Act, notwithstanding the amendments in this Schedule to provide greater flexibility in how Reserve members serve under a call out order.

## **Part 2 – Application provisions**

### **Item 18 – Application of amendments**

23. This item provides that the amendments in Schedule 1 apply in relation to a call out order made on or after the Schedule commences (which will be the day after royal assent). In the unlikely event a Reserve Call Out is underway at the time Schedule 1 commences, the old

provisions will continue in relation to that Reserve Call Out until the call out order is revoked.

## **SCHEDULE 2 – IMMUNITY**

24. This Schedule inserts a new provision in the Act to give ADF members, other defence personnel and foreign armed forces immunity from civil and criminal suit in relation to actions done in good faith performance of their duties, where the duties are in relation to certain assistance provided in the context of a natural disaster or other emergency.

### **Item 1**

25. This item inserts a new definition in subsection 4 of the Act, defining ‘protected person’ by reference to new subsection 123AA(3).

### **Items 2 and 3**

26. These items amend the delegation power in section 120A of the Act. New subsection 123AA(4) provides for the Secretary or the CDF to authorise a Commonwealth employee or member of a foreign armed force to provide relevant assistance under new subsection 123AA(1). This has the effect of these individuals becoming a ‘protected person’ for the purposes of subsection 123AA(1).

27. Item 2 inserts a new paragraph to enable the CDF to delegate the power in subsection 123AA(4) to an ADF member at or above the rank of Commodore (for an officer in the Navy), Brigadier (for an officer in the Army), or Air Commodore (for an officer in the Air Force).

28. Item 3 inserts a new subsection to enable the Secretary to delegate the power in subsection 123AA(4) to an SES employee in the Department.

### **Item 4**

29. Item 4 inserts new section 123AA, which is the substantive immunity provision.

30. New subsection 123AA(1) outlines the content of the immunity, and when it is available.

- a. The immunity applies to a ‘protected person’, which is defined in subsection 123AA(3). The immunity does not apply to the Commonwealth.
- b. The provision provides immunity from any liability, whether civil or criminal. This is analogous with the immunity available to emergency services in some States and Territories.
- c. The immunity only applies in relation to a protected person’s actions (or omissions), that are done in good faith in the performance (or purported performance) of their duties. The immunity does not apply in relation to actions that are not done in good faith, or which are clearly outside the protected person’s duties.
- d. Not all duties provided by a protected person are covered. In order to attract the immunity, the duties must be in respect of assistance that is:
  - i. By or on behalf of the ADF or the Department of Defence (new paragraph 123AA(1)(a)). The immunity is applicable only in relation to assistance provided by the ADF or Defence, and does not extend to assistance provided by the Commonwealth more generally.

- ii. Provided to the Commonwealth, a State or Territory, an authority or agency of one of those Governments, or members of the community (new paragraph 123AA(1)(a)). In this context, members of the community could include individuals, organisations or businesses.
- iii. Provided to prepare for a natural disaster or other emergency that is imminent, or to respond to one that is occurring or recover from one that occurred recently (new paragraph 123AA(1)(b)). The immunity only applies in the context of assistance given in relation to natural disaster or other emergency – not to assistance that might be provided in other contexts.
- iv. Provided at the direction of the Minister under subsection 123AA(2) (new paragraph 123AA(3)). Unless the Minister has given such a direction, the immunity does not apply.

31. New subsection 123AA(2) provides for the Minister to direct, in writing, the provision of assistance in relation to a natural disaster or emergency. Without a direction under this subsection, the immunity does not apply. The Minister may make a direction in one or both of two circumstances:

- a. The nature or scale of the natural disaster or other emergency makes it necessary, for the benefit of the nation, for the Commonwealth, through use of the ADF's or Department's special capabilities or available resources, to provide the assistance. The 2019/2020 bushfire disasters and the 2020 COVID-19 pandemic would clearly be within the scope of this provision, as would assistance provided in relation to the Black Saturday bushfires in Victoria in 2009 and the Townsville floods in 2019.
- b. The assistance is necessary for the protection of Commonwealth agencies, Commonwealth personnel or Commonwealth property. This could cover situations such as where part of the defence estate was threatened by an imminent or occurring natural disaster or emergency.

32. New subsection 123AA(3) defines 'protected person'. It includes members of the ADF (which includes both Permanent and Reserve members), APS employees in the Department, and people authorised under subsection (4) to perform duties in respect of the assistance being provided. Given how integrated the ADF is with APS and other defence personnel, especially in relation to some capabilities, it is desirable to extend the immunity beyond ADF members. While ADF members will form the largest group providing assistance of the sort outlined in section 123AA, other parts of the defence workforce may be providing that assistance in some cases.

33. New subsection 123AA(4) describes the people who can be included in the third category of 'protected person'. These are people, or classes of people, who are authorised by the CDF or Secretary to perform duties in respect of the provision of assistance mentioned in subsection 123AA(1). To be authorised under this subsection, the person must be either:

- a. A Commonwealth employee. APS employees in the Department are already included in the definition of 'protected person', so do not need to be separately authorised under this subsection.
- b. A member of the naval, military or air force of a foreign country, or a member of a foreign police force. Inclusion of foreign forces in this provision enables members of those forces to be given the same immunity as ADF members when

they have come to Australia to provide assistance in a natural disaster or other emergency, or are already embedded with ADF units.

34. New subsection 123AA(5) provides for the Minister to delegate the power to make a direction under subsection (2) to the Chief of the Defence Force or the Secretary. New subsection 123AA(6) states that the delegate must comply with any written directions of the Minister when exercising that power.

35. New subsection 123AA(7) confirms that a direction made by the Minister (or a delegate) under subsection (2) is not a legislative instrument. This provision is included to assist readers, as a direction under subsection (2) is not a legislative instrument within the meaning of subsection 8(1) of the *Legislation Act 2003*. This is because directions under subsection (2) do not determine or alter the law, only determine the particular circumstances in which the immunity in subsection 123AA(1) will apply.

36. New subsection 123AA(8) confirms that the existence of section 123AA does not prevent assistance being provided by or on behalf of the ADF or the Department in circumstances where the Minister has not provided a direction under subsection (2). This is to make absolutely clear that the insertion of this immunity provision does not affect the range of assistance that can be provided by the ADF or the Department, including in response to natural disasters and other emergencies.

### **SCHEDULE 3 – SUPERANNUATION AND RELATED BENEFITS**

37. Existing legislation for ADF superannuation only provides superannuation benefits to Reserve members who have volunteered for continuous full-time service. Reserve members who provide continuous full-time service (CFTS) following a call out order under section 28 of the Act are not, at present, entitled to superannuation and related benefits. This Schedule amends the *Australian Defence Force Cover Act 2015* (ADF Cover Act), the *Australian Defence Force Superannuation Act 2015* (ADF Super Act) and the *Military Superannuation and Benefits Act 1991* (MSB Act) so that Reserve members who are subject to a call out order receive the same superannuation benefits as Reserve members who provide service voluntarily.

38. These amendments will be applied retrospectively, so that Reserve members who were subject to call out orders in the 2019 / 2020 bushfires are eligible to receive superannuation payments in relation to that service.

#### **Part 1 - Amendments**

##### **Items 1 and 3**

39. These items amend the definition of ‘continuous full-time Reservist’ in the ADF Cover Act and ADF Super Act. The ADF Super Act provides for the provision of superannuation to certain ADF members, including Reserve members providing CFTS. The ADF Cover Act provides death and invalidity benefits for serving ADF Super members (replacing the ordinary insurance products provided by superannuation funds, but which aren’t provided to ADF members). The existing definition of ‘continuous full-time Reservist’ only includes Reserve members who volunteer for CFTS under section 26 of the Act. The new definition removes the requirement to volunteer, ensuring that Reserve members rendering CFTS under a call out order will receive the same benefits as a Reserve member who volunteers. That is, there will be no difference in benefits for Reserve members who volunteer and Reserve members who are called out.

## **Items 2 and 4**

40. These items repeal the definition of ‘defence service’ in the ADF Cover Act and ADF Super Act. This term was used in the previous definition of ‘continuous full-time Reservist’, but is no longer needed in the new definitions.

## **Item 5**

41. This item makes a consequential amendment to section 13(b) of the ADF Super Act. Section 13 provides arrangements for Reserve members who had volunteered for CFTS at the time the ADF Super Act commenced in 2016. This amendment preserves the existing position for Reserve members who were rendering CFTS at the commencement date in 2016.

## **Items 6 and 7**

42. These items amend sections 6 and 7 of the MSB Act to extend the definition of who is a member of the Military Superannuation and Benefits Scheme (MSBS). Under the amended definition of ‘member’ in section 6, Reserve members rendering CFTS for any reason (including under a call out order) are members. The exclusion in section 7(2)(b)(ii) is similarly amended.

## **Part 2 – Application provisions**

### **Item 8 – Application of amendments – definition of continuous full-time Reservist**

43. This item gives the amendments to the definition of ‘continuous full-time Reservist’ in the ADF Super Act and ADF Cover Act a retrospective effect, applying to any CFTS rendered by a called out Reserve member on or after 28 November 2019. Retrospective application of these amendments ensures that Reserve members who were called out during the 2019/2020 bushfire disasters were eligible for superannuation and related benefits. The retrospective application of these amendments has a beneficial effect on those members, and does not disadvantage any person.

### **Item 9 – Application of amendments – membership of Superannuation Scheme**

44. This item gives the amendments to the membership of MSBS in the MSB Act a retrospective effect, applying to any CFTS rendered by a called out Reserve member on or after 28 November 2019. Retrospective application of these amendments ensures that Reserve members who were called out during the 2019/2020 bushfire disasters were eligible for superannuation and related benefits. The retrospective application of these amendments has a beneficial effect on those members, and does not disadvantage any person.