

Calling it out

Political goals of the Commonwealth's Call Out of Defence Reserves

The dramatic Call Out of Defence Reserves does not increase resources available for bushfire recovery. It serves the dual political purposes of the appearance of government action and raising the profile of Reserves. The precedent raises legal questions and could pave the way for employment of the Reserve in more ambiguous circumstances.

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Preface

The scale of the bushfires that have affected Australia during the last few months is mind-blowing. Over twenty-five people have died, almost two thousand homes have been destroyed, numerous agricultural and commercial enterprises have been ruined, and almost 11 million hectares have been incinerated. As the disaster climaxed between Christmas and New Year, the Prime Minister had just returned from holidaying in Hawaii, and the Commonwealth Government was disengaged and practically invisible. Public sentiment stirred the Prime Minister into action and, following a couple of unsuccessful visits to burnt-out towns and villages, and the negative publicity that followed, the Prime Minister needed a circuit-breaker. It came in the form of an (almost) unprecedented Call Out of the Australian Defence Force (ADF) Reserve. The Governor-General's approval for the Call Out of Reservists to support the efforts of the ADF to assist the Australian community in the aftermath of the bushfires was significant political theatre. It may also have met the Defence Minister's special interest in ensuring that the Reserve has greater prominence nationally. It was also unnecessary. Reservists have always been willing and able to volunteer their services to work with the ADF to assist the community in times of emergency. The Call Out also sets a precedent that could pave the way for new and 'innovative' employment of the Reserve in more ambiguous circumstances. Protecting farms against animal rights protesters comes to mind. The Call Out is a political and organisational gimmick that needs to be thought through.

Summary

In response to the bushfire crisis, the Commonwealth Government announced a “Call Out” of the Australian Defence Force (ADF) Reserve. Emphasis was placed on the “unprecedented” nature of this Call Out and the need for the Governor-General to approve it.

The announcement took state leaders and emergency service personnel by surprise and was not in response to any lack of resources by the ADF. Rather than providing actual assistance to these bodies, the announcement appears to have had political rather than practical purposes.

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.

Reservists have always been keen volunteers for such service. Indeed, the procedure documents that guide Defence Assistance to the Civil Community (DACC) make no mention of Call Out provisions. DACC arrangements were audited by the Australian National Audit Office in 2014, finding that existing procedures were “generally effective in guiding and enabling the provision of Defence assistance in response to emergencies.”

In addition to providing the Prime Minister with a dramatic announcement in response to a crisis that has seen him under political pressure, the Call Out serves to further the apparent goal of the Defence Minister of raising the profile of the Defence Reserve.

Minister Reynolds is a former army Reservist who has commented on the treatment of Reservists as “second class soldiers” and on “unhelpful cultural perceptions” of the Reserve within the ADF. The Minister flagged her intentions for a Call Out of the Reserve in late 2019, including an earlier Call Out she described as a “validation activity”.

While the 2020 Call Out has no practical impact on resources available for bushfire recovery, it has created potential problems.

First, it has brought into question the effectiveness of the current arrangements for the Commonwealth’s coordination body Emergency Management Australia (EMA).

EMA was moved from Attorney-General's Department to the Department of Home Affairs, where it appears to have lost prominence amid the Department's large bureaucracy.

Second, the Call Out raises legal questions around what legal powers of ADF personnel and reservists have under DACC arrangements. For example, could a Reservist lawfully direct a civilian not to drive down a closed road? What happens if the Reservist attempts to enforce the direction?

Finally, the Call Out sets a precedent that could pave the way for new and 'innovative' employment of the Reserve in more ambiguous circumstances where the Commonwealth may consider that it has interests that have priority over the interests of the States and Territories. The precedent set in this Call Out could provide a model for actions where ADF assistance to the civil community might be used as a disguise for ADF aid to the civil power.

Introduction

The Morrison Government came under criticism for insufficient action on Australia's 2019-20 bushfires, particularly following the Prime Minister's holiday in Hawaii during the early stages of the crisis. Under pressure to act, on 4 January 2020 the Prime Minister announced at a press conference at Parliament House that the Governor-General had authorised the "Call Out" of the Australian Defence Force (ADF) Reserve "to search and bring every possible capability to bear by deploying army brigades to fire affected communities across Australia".^{1, 2}

The Minister for Defence, Linda Reynolds, amplified the Prime Minister's statement at the same press conference.

The most significant announcement today is the call-out of the army reserves. At the Prime Minister's request early this morning, I signed an instrument requesting the Governor-General call out designated army reserve forces. . . . Can I say the Government has not taken this decision lightly. In fact, it is the first time that reserves have been called out in this way in living memory and, in fact, I believe for the first time in our nation's history. . . . So with the Governor-General's concurrence in the last hour, the compulsory call-out will give the CDF the authority to direct reservists to perform continual full-time service, to provide civil aid, humanitarian, medical, civil emergency and also disaster assistance.³

The Prime Minister's announcement appeared to take the NSW and Victorian Premiers by surprise, as well as the Commissioner of the Rural Fire Service of NSW.⁴ Nor was there anything to suggest that the Chief of the Defence Force (CDF) requested the Call Out, whether due to an insufficiency of ADF assets or a wish to provide an exercise opportunity for a large number of reservists.

¹ See "Australian Defence Force Reserve called in (sic) for bushfire effort, PM announces", The Canberra Times, 4 January 2020 <https://www.canberratimes.com.au/story/6566079/australian-defence-force-reserve-called-in-for-bushfire-effort-pm-announces/>

² Note that to date there is no evidence that brigades have been deployed.

³ Prime Minister of Australia (2020) *Press Conference – Australian Parliament House, Transcript*, <https://www.pm.gov.au/media/press-conference-australian-parliament-house>

⁴ See Latika Bourke, "'Disappointing': RFS boss says he heard of defence deployment from media, not PM", Sydney Morning Herald, 5 January 2020 <https://www.smh.com.au/politics/federal/disappointing-rfs-boss-says-he-heard-of-defence-deployment-from-media-not-pm-20200105-p53owi.html>

In contrast to the Call Out of the ADF Reserve by the Governor-General to respond to the bushfire crisis, deployments of the ADF to theatres of war – a matter of significantly greater national consequence – are not subject to similar dramatic actions. The Executive simply directs them to go, without the agreement of either the Parliament or the Governor-General. The dramatic Call Out of the ADF Reserve appears to have had political rather than practical purposes.

The Reserve and Call Out

A former Army reservist, the Minister for Defence appears to want to raise the profile of the Reserve. This is a worthy goal, as she outlined the 'poor relation' status of the Reserve, both within the ADF and in the broader community in a speech to the Defence Reserves Association national conference in August 2019. "I still think there is a significant cultural gap, a lot of bureaucratic blocks, and some very unhelpful cultural perceptions within and external to the ADF on the reserves".⁵ Just to ensure that everyone understood where she was coming from, she expatiated on her own experience.

When I was a Reservist, as the title implies, our role was still to backfill for the permanent members of the Australian Defence Force — the 'regular' members. Back then when I enlisted, we were still perceived as an expansion base. We were treated and spoken of as 2nd class soldiers, Chokkos.⁶ Back then, it wasn't easy – and also being a woman and a reservist – it was a bit of a double whammy. Our role was not always clearly defined, and work was not always guaranteed or valued. There was a perception we were less valued, less committed and less skilled than regular forces. This is quite absurd and insulting.

The ADF is fortunate to have a Minister who understands Reserve service. So it is hardly surprising that she would want to accord recognition to the support that the Reserve can provide to the regular ADF in situations such as those confronting the nation as it recovers from the bushfire catastrophe.

It would appear that a more prominent role for the Reserve was on the Minister's mind during the final months of 2019. Responding to a 'Dorothy Dixer' on 12 November 2019, the Minister said:

In addition to the 'call for' activities that we now have underway, I'm also working with Defence to work through how we can provide further response to larger, more severe and also more protracted natural disasters beyond, as I've

⁵ The Hon Linda Reynolds, speech to the Defence Reserves Association national conference, 17 August 2019 <https://www.minister.defence.gov.au/minister/lreynolds/speeches/defence-reserves-association-national-conference>

⁶ Short for 'chocolate soldiers', a derogatory term for reservists as chocolate 'melts under fire'.

said, the 'call for' arrangements. A broader response can include a compulsory call-out of Reserves if the situation requires. Reserve forces can be called out by the Governor-General in accordance with section 28 of the Defence Act. This mechanism has never been used. Defence is working through every aspect of such a call-out at the moment to ensure that we are prepared if required. Defence will continue tasking discrete elements of the Army Reserves, Navy Reserves and also Air Force Reserves using existing voluntary 'call for' arrangements, again as the circumstances require.

The Minister did not identify any inadequacy in the existing 'call for' provisions relating to Reserve service, and proffered nothing to substantiate the need for Call Out provisions. While the Government has placed some emphasis on the compulsory nature of a Call Out rather than the voluntary 'call for' provisions, there has been no suggestion that this makes any difference to the resources available. Reservists have always jumped at any opportunity for deployment. Historical precedent suggests that the ADF does not require Call Out arrangements for it to support disaster relief and emergency response activities. Previous major disaster relief activities, from Cyclone Tracy in 1974 to the north Queensland floods in February 2019 involved several thousand ADF personnel (often including Reservists)⁷, but Call Out was not considered necessary. Indeed, Call Out appears not to have even been contemplated. Following the Minister's speech, the ADF conducted what it termed "a validation activity" to trial the Minister's Call Out proposals in November 2019. At the Minister's request, the Governor-General enacted a limited Call Out of Reserves, covering twenty three people for ten days, to participate in Operation CIVIL ASSIST in support of the Queensland Fire and Emergency Service.⁸ It is important to note that this exercise was a proof of concept trial, rather than any evidence that the Call Out was needed in the first place.

With the November Call out completed, the Minister for Defence was able to use the bushfire catastrophe to make use of the now "validated" Call Out arrangements.

The 2020 Call Out appears not to have been in response to an explicit need, but an opportunity for the Government to give the impression of action on the bushfire crisis and an opportunity for the Minister to raise the profile of the Defence Reserve.

⁷ The Department of Defence Case Study "Operation VIC Fire Assist" details the involvement of Army Reserve personnel in the emergency response to the February 2009 fires in Yea and Alexandra
https://www.defence.gov.au/AnnualReports/08-09/vol1/ch09_07.htm

⁸ See Defence Reserves Support website Operation CIVIL ASSIST NOV 2019
https://webcache.googleusercontent.com/search?q=cache:-oSXNp6lD_UJ:https://www.defencereservessupport.gov.au/call-out-orders/operation-civil-assist-nov-2019/+&cd=1&hl=en&ct=clnk&gl=au

Examination of the roles of states, the commonwealth and the ADF in relation to emergency response strengthens this impression.

Roles in emergency response

At federation, the constitutional distribution of powers allocated defence to the Commonwealth, along with foreign affairs, the postal and telecommunications system, and various other activities that were national in character. Social policy responsibilities – education, health, roads and rail, infrastructure – remained with the States (Territories did not exist at the time).

THE ROLE OF THE STATES AND TERRITORIES

Responsibility for response to disasters lies clearly within the remit of the States and Territories. Nonetheless, experience has encouraged the Commonwealth to make prudent provision for support to the States and Territories in time of need. The experience of WW2 saw the emergence of state-based Civil Defence Organisations, which came into their own when the Black Tuesday bushfires devastated Hobart in February 1967. These Civil Defence Organisations subsequently morphed into the State Emergency Services (SES) or their equivalents, with the Commonwealth establishing the Natural Disaster Organisation (NDO) within the Department of Defence. The NDO did not control the State services, providing only some training and the ability to coordinate the delivery of Defence personnel and assets.

THE ROLE OF THE COMMONWEALTH

While the Commonwealth does not have constitutional powers with respect to the States and Territories in the management of emergencies, the Commonwealth does provide a vast array of services to Australia's citizens and has at its disposal financial and physical resources that enable the States and Territories better to meet their responsibilities. In the case of national disasters, these resources are generally provided by the ADF, with other Departments and Agencies playing particular roles as required.

Although procedures have been significantly streamlined in the intervening 45 years, the Commonwealth response to Cyclone Tracy illustrates that the Commonwealth is able to provide substantial resources without Call Out. While the head of the relatively new NDO, Major General Stretton, was a senior military officer, he led the disaster response without resort to martial law (for which he was criticized by some of his

military peers) or any other recourse to military power. While the lessons learnt from Cyclone Tracy have been widely studied, there has been no demand for Call Out, and certainly no suggestion that the Reserve should be Called Out.

The NDO was something of an orphan within the Defence organisation: it was not seen as a prestigious appointment for ADF personnel or civilian staff. In 1982, the Defence Review Committee chaired by Mr John Utz recommended that the Department of Prime Minister and Cabinet should oversee the development of planning for civil defence (i.e. the NDO).⁹ PM&C was reluctant to take on this new responsibility, and the recommendation did not survive the change of government in 1983.

After decades of low profile in the Defence Department, it was rebadged as Emergency Management Australia (EMA), placed under civilian management, and moved to the Attorney-General's portfolio in 2001. With the establishment of the Department of Home Affairs in 2018 EMA was transferred from the Attorney-General's Department and installed as a division within Home Affairs.

EMA's key planning document is the Commonwealth Disaster Response Plan (COMDISPLAN), the latest version of which was finalised in 2017.¹⁰ COMDISPLAN outlines that EMA and the Crisis Coordination Centre's (CCC) roles are to respond to requests, with no apparent proactive role. COMDISPLAN also outlines the kinds of assistance that federal agencies can provide, including Defence which "has a range of military capabilities that may be called upon to provide assistance to the civil community in emergency situations, as required and as appropriate."

Despite claiming to "deliver programs, policies and services that strengthen Australia's national security and emergency management capability", EMA's role is limited to responding to requests. Detail on how it coordinates with the ADF, Defence and other agencies is unclear. What is clear is that EMA does not play a major proactive role in planning and administering emergency response, despite being the Commonwealth's designated emergency response body.

THE ROLE OF THE ADF

The ADF has a long tradition of assisting the civil community, whether in drought, flood or bushfire. The resources and personnel necessary for such assistance tasks are under

⁹ See Defence Review Committee, *The Higher Defence Organization in Australia*, Final Report, October 1982, recommendation 107, p. xxvi, and para 6.35, p. 195 <https://nla.gov.au/nla.obj-1458689972/view?partId=nla.obj-1462653871#page/n232/mode/1up>

¹⁰ Australian Government, *COMDISPLAN 2017: Australian Government Disaster Response Plan*, 20 December 2017 <https://www.homeaffairs.gov.au/emergency/files/plan-disaster-response.pdf>

the command of the CDF, who is legally able to direct the ADF as they see fit. Generally, the CDF's command powers are delegated to appropriate subordinate officers.

Plans for ADF assistance have been in place for decades. The ADF is a major national asset that affords government a 24/7 capacity to respond to issues where immediacy and resources are of the essence. Defence assistance comes in two major forms: assistance to the State law enforcement agencies, generally described as Defence Aid to the Civil Power (DACP); and assistance to disaster response, generally described as Defence Assistance to the Civil Community (DACC). There are numerous examples of ADF involvement in DACC responses, while DACP examples are rare.

DACP raises many constitutional and legal issues and as a result there are important Commonwealth Call Out provisions relating to the possible use of armed force against Australian citizens in extreme circumstances. These Call Out provisions were most recently amended in the 2018 amendments to the Defence Act 1903. The Reserve has never been subject to Call Out arrangements to aid the civil power: that is generally the task of the Special Air Service Regiment and the Commando regiments.

DACP raises critical legal issues that are beyond the scope of this discussion paper. They were well surveyed in Parliamentary Library publication some two decades ago,¹¹ and more recently by the Australian National Audit Office (ANAO).¹² DACP is not relevant to this particular Call Out.

The Call Out arrangements applicable to DACP are irrelevant in DACC situations such as the current bushfire crisis. In such emergencies there is no prospect of the use of armed force, but rather the provision of support from a disciplined, ready and able service under the control of the Commonwealth Government. The ADF has been providing such services for decades, generally in response to a request from the relevant State or Territory. In such situations where DACC is provided in response to a state request, the legal status of ADF personnel is clearer and has long precedent. The use of Call Out provisions without request from state and territory governments in a DACC situation raises legal issues around the powers of ADF personnel and reservists. In particular, how and if the ADF can direct members of the public. For instance, it is

¹¹ See "Call Out the Troops: an examination of the legal basis for Australian Defence Force involvement in 'non-defence' matters", Research paper 8 1997-98
https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/RP9798/98rp08

¹² See "Emergency Defence Assistance to the Civil Community", Australian National Audit Office, 16 April 2014 <https://www.anao.gov.au/work/performance-audit/emergency-defence-assistance-civil-community>

unclear whether a reservist deployed to a bushfire area could direct a civilian not to use a closed road and how or if they could enforce this direction. Such issues are beyond the scope of this paper, other than to note that there is potentially a huge range of such questions that could arise.

DACC is provided in accordance with longstanding arrangements set out in Defence Instruction (General) [DI(G)] OPS 05-1.¹³ It is a rather constrained document, and not one that would encourage any early requests to the ADF.

4. As a general principle, the provision of DACC should be regarded as the exception rather than the rule. Defence resources are intended to be used for Defence purposes only. Requests for DACC may receive favourable consideration if there is no suitable alternative source of assistance particularly in instances of emergency and for other requests where worthwhile training or public affairs benefits will accrue to Defence as a result of the provision of assistance.

The DI(G) sets out three major categories of counter disaster and emergency assistance:

- emergency assistance for a specific task(s) provided by Local Commanders/Administrators, from within their own resources, in localised emergency situations when immediate action is necessary to save human life, alleviate suffering, prevent extensive loss of animal life or prevent widespread loss/damage to property.
- emergency assistance, beyond that provided under Category 1, in a more extensive or continuing disaster where action is necessary to save human life or alleviate suffering, prevent extensive loss of animal life or prevent loss/damage to property, and when State/Territory resources are inadequate.
- assistance associated with recovery from a civil emergency or disaster, which is not directly related to the saving of life or property.

Clearly all three categories of assistance have been invoked in the current bushfire crisis. The DI(G) makes no mention of Call Out. The resources and personnel necessary for emergency assistance are under the command of the CDF. In previous major disaster relief activities, from Cyclone Tracy in 1974 to the north Queensland floods in February 2019, several thousand ADF personnel were involved without Call Out.

¹³ A copy of the document is at

http://www.floodcommission.qld.gov.au/__data/assets/file/0005/7673/Paule_Kevin_attachment.pdf

Evidently, there was no need, since Reservists are keen volunteers for service. As David Solomon, a former senior journalist, has pointed out, the Constitution and the Defence Act 1903 are silent on the circumstances under which the Reserve may be called out. While one might reasonably assume that Call Out is intended to supplement the standing force in times of defence emergency, whether it extends to civil emergency is moot.¹⁴

Assistance by the ADF has appeared efficient and effective, both before and since the Prime Minister's announcement of the Call Out. HMAS Choules and Adelaide, helicopters and military vehicles have provided important evacuation and support services to the State authorities. In its audit of emergency Defence assistance to the civil community in 2014 mentioned earlier, the ANAO judged that "overall, Defence's emergency DACC procedures are generally effective in guiding and enabling the provision of Defence assistance in response to emergencies". The current deployment and employment of ADF capabilities appears to reinforce the ANAO's view.

¹⁴ See David Solomon, "Morrison's scary words on deployment of troops . . .", John Menadue – Pearls and Irritation, 17 January 2020 <https://johnmenadue.com/david-solomon-morrisons-scary-words-on-deployment-of-troops/>

Conclusion

If the Call Out of reservists is unnecessary in any practical sense, it raises the question of why it happened. The answer appears to be that it gave the Prime Minister a dramatic announcement, at a time when his personal engagement with the unfolding tragedy and the thousands of people affected was wanting. As a policy initiative, its effects are nugatory. But as a political action, it is effective since it gives the impression of forward movement.

The Call Out also provided the Minister for Defence a platform on which to advance recognition of the Defence Reserve. While this at least may be a laudable goal, the Call Out sets a precedent and precedent can be dangerous where it is not simply ambiguous.

The Call Out brings into question the legal underpinnings of ADF assistance to the civil community which has hitherto operated on a 'best endeavours' basis, without much in the way of substantiated legal policy. These legal uncertainties were well analysed in a Parliamentary Library research paper prepared over two decades ago, mentioned earlier. And while legal uncertainty is no defence of inaction, Call Out certainly brings the legal issues into greater relief. Associate Professor David Letts has drawn attention to the uncertain legal status of ADF personnel undertaking DACC.¹⁵

The Call Out also raises concerns about the Government's potential reliance on the ADF in other situations where the Commonwealth may consider that it has interests that have priority over the interests of the States and Territories. This Call Out could serve as a precedent for the Call Out of the ADF Reserve in more ambiguous circumstances, where the line between assistance to the civil community and aid to the civil power is less clear. If the current Call Out is, on a technical basis, quite unnecessary for the effective employment of ADF personnel, regular or reservist, in assistance operations, then any such future Call Out is also likely to be unnecessary. Such a Call Out may well constitute a perverse politicisation of the ADF, in that the ADF could be employed to achieve domestic political ends. In a constitutional democracy, that is to be avoided at all costs.

A final unintended consequence of the Call Out is to bring into question the effectiveness of the current EMA arrangements, the management of EMA, and the

¹⁵ See David Letts, "Sending in the military? First let's get some legal questions straightened out", The Canberra Times, 8 January 2020 <https://www.canberratimes.com.au/story/6570161/sending-in-the-military-first-lets-get-some-legal-questions-straightened-out/>

utility of relocating the EMA from Attorney-General's to Home Affairs, where it appears to have lost prominence amid the Department's large bureaucracy. Perhaps one task of the projected Royal Commission might be to recommend improved ways for the Commonwealth to be involved in disaster responses, and the appropriate administrative arrangements to support the efficient and expeditious management of the Commonwealth's responsibilities.