

Joshua Badge
Lecturer in Philosophy
School of Humanities and Social Sciences
Faculty of Arts and Education
Deakin University

29 July 2018

Defence Amendment Bill 2018 Inquiry
Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

RE: Defence Amendment (Call Out of the Australian Defence Force) Bill 2018

Thank you for the opportunity to submit comments and requests for clarification on the *Defence Amendment (Call Out of the Australian Defence Force) Bill 2018* and the proposed changes to the *Defence Act 1903*.

Ensuring the safety of Australian citizens is of great concern and streamlining the procedures to deploy the Australian Defence Force (ADF) may help achieve this objective. However, it is vitally important that the exercise of martial power remains within the appropriate scope and is subject to the appropriate checks and balances.

Due to time constraints I cannot provide a thorough overview of the minutiae of the Bill, however, I would like to submit a series of comments and requests for clarification.

The stated purpose of the Bill according to the *Explanatory Memorandum* is to assist the response to 'certain incidences of violence, including terrorism' which includes 'domestic violence'. I request clarification on the following points:

- i. What is the operational definition of 'terrorism' for the purposes of the Bill?
- ii. The *Explanatory Memorandum* states that it will enhance the ability of the ADF to respond to domestic violence including, but presumably not limited to, terrorism. What are some examples of the kind of domestic violence the Bill is intended for?
- iii. Section 11 of the *Explanatory Memorandum* explains that domestic violence refers to 'conduct marked by great physical force'. How is this criterion assessed? Further, what are the lower or upper thresholds for this definition?

Advocacy groups have suggested that the Bill could be used by an unscrupulous government to deploy the army to quell civil demonstrations. Section 276 of the *Explanatory Memorandum* declares that the ADF is to some extent prohibited from stopping or restricting protest, dissent, assembly or industrial action.

However, the same section refers to the right of 'peaceful protest' and so there is some ambiguity as to whether the ADF could be deployed in cases of violent or aggressive demonstration.

Further, Section 39 (3)(b) states that *may* restrict protest, dissent, assembly or industrial action if there is a 'reasonable likelihood' of 'serious damage to property'. I request clarification on the following points:

- iv. What protections exist to ensure that the ADF cannot be deployed in the case of a civil demonstration which authorising Ministers deem violent?
- v. Further to that point, what would prevent authorising Ministers from declaring anti-Government demonstrations as violent or posing a threat to property?
- vi. What protections exist to ensure that the ADF cannot be deployed in the cases involving unarmed citizens that could be deemed a riot or some other violent disturbance which meets the definition of 'conduct marked by great physical force'?
- vii. What is the lower and upper threshold of 'reasonable likelihood of serious damage to property'?

Section 51L of the Bill declares that the ADF is authorised to 'prevent or put an end to acts of violence' in the defence of 'declared infrastructure'. Further, section 51N Subsection 3 (a)(ii) states that a member of the Defence Force is authorised to use lethal force if it is necessary to protect 'declared infrastructure'. I request clarification on the following points:

- viii. What would prevent an authorising Minister calling out the army or another branch of the ADF to quell a civil demonstration under the pretence of protecting infrastructure?
- ix. What safeguards are there to prevent the use of lethal force against citizens, residents and non-citizens in cases where the ADF is deployed to protect declared infrastructure?

Sections 46 and 51 of the Bill grants new search and seizure powers to members of the ADF traditionally reserved for domestic law enforcement agencies. I request clarification on the following points:

- x. What grounds are there to render the distinction between an internally focused police force and an externally focused military force less distinct?
- xi. What cases have transpired where the ADF was prevented from fulfilling its functions by not having these powers?

Section 33, 34 and 35 pertaining to the call out of the Defence Force present a number of issues. I request clarification on the following points:

- xii. Section 33 (1)(ii) states that authorising Ministers may call out the ADF to 'offshore areas' where there is a threat to Commonwealth interests even if those interests are located elsewhere. What is the purpose of deploying the ADF to a location that is not the location of a threat to Commonwealth interests?
- xiii. Section 33 (2) states that the authorising Ministers may call out the ADF in cases where violence is 'likely to occur'. What are the criteria for the likelihood of 'domestic violence'?
- xiv. Several subsections to these sections state that the authorising Ministers must take into account the 'nature of the domestic violence'. Precisely what factors are included when making this determination?

Section 38 of the Bill authorises Ministers to call out the ADF in cases where a State or Territory *has not* requested assistance. Section 38 (3) also allows for an authorising Minister to call out the ADF without consulting the relevant State or Territory Government if it is to their 'satisfaction' that it is 'impracticable' to do so. I request clarification on the following points:

- xv. What justification is there for a federal minister to be permitted to unilaterally deploy the ADF without consulting the relevant State or Territory Government?
- xvi. What reason is there to provide authorising Ministers such broad discretionary powers?
- xvii. Further, with respect to the Northern Territory Emergency Response, what safeguards are there to prevent the authorising Ministers from deploying the ADF in such a way as might unfairly target or disadvantage a specific ethnic, cultural or religious group or minority?

Summary of Position

I am not convinced that the *Defence Amendment (Call Out of the Australian Defence Force) Bill 2018* includes sufficient protections for civil liberties and human rights. Several sections relating to the use of lethal force and the deployment of the ADF against civilians are circumventable or are contradicted by other sections.

Key terms, especially the notion of *domestic violence*, are broad and subject to a high degree of interpretation. Further, the discretionary powers granted by the Bill to authorising Ministers do not appear to be subject to an adequate level of oversight.

The Government must provide sufficient grounds for the granting of such broad powers. Further, the Government should provide justification for the concerning concentration of power in the office of Minister for Home Affairs.

Further, a greater amount of consideration must be given to Australia's recent history in relation to the domestic deployment of military forces. The damaging experience of the Northern Territory Emergency Response should give rise to a higher degree of caution in this regard.

Recommendations

- The Bill must provide unambiguous definitions of key terms, including but not limited to, the concepts of *terrorism* and *domestic violence*.
- The discretion of authorising Ministers to make determinations about the likelihood of damage to property should include an appropriate check or balance or some mechanism of oversight especially in relation to civil demonstrations.
- Significantly stronger protections for the rights of citizens and non-citizens must be enshrined in the legislation. The ADF should not be permitted to be deployed against citizens in any context except those relating to terrorism.
- Further, the authorisation of lethal force against civilians including citizens and non-citizens must be curtailed and the contexts in which it is permissible must be defined and justified with greater clarity.
- The ability of authorised Ministers to call out the ADF in instances where such assistance has not been requested has no obvious justification and should be removed or subject to more stringent oversight.
- The Government should provide an unambiguous justification for the provision of new powers to the ADF and the Minister for Home Affairs.

It is crucial that the changes proposed in the *Defence Amendment (Call Out of the Australian Defence Force) Bill 2018* do not undermine cherished civil liberties or established human rights norms. The safety

of Australian citizens is of great concern, but securing this interest should not come at the expense of rights of assembly, protest and civil disobedience. Rigorous protections of the rights of citizens and non-citizens in domestic and offshore contexts must be included in any proposed legislation with important exceptions for circumstances involving terrorism.

Regards,

Joshua Badge
Deakin University