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Submission to the Senate Standing Committees on Legal and Constitutional Affairs - Review of the *National Emergency Declaration Act 2020*

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I. The Problem

There has long been a gap in the law around emergency responses and the Australian Defence Force (ADF). As part of my National Library of Australia Fellowship in 2025, I came across the following remarks of Major-General Alan Stretton, reflecting on Cyclone Tracy to the National Press Club:

You are aware that, as we flew into Darwin on Christmas night, the Acting Prime Minister, Dr. Cairns, had a discussion by radio telephone with Dr. Patterson, who was on the plane. It was decided that the disaster in Darwin was of national dimensions and that the devastation was so complete that all red tape had to be cut and one man placed in charge, subject, of course, to ministerial direction. Now, at that time, no one was worried about the legal niceties. The only thing that mattered was the lives of the people of Darwin. You now know that, in fact, at that time I had no legal powers at all, although people assumed that I did. However, the situation in the Northern Territory has now been rectified, as since the disaster, the Legislative Assembly has passed the *Cyclone Disaster Emergency Ordinance 1975* which retrospectively authorises the action taken during the disaster.¹

There was a gap in the legislation then, as there is now. It is a completely unsatisfactory legal position for ADF members to go into an emergency, with no powers nor explicit immunities. The review of the *National Emergency Declaration Act 2020* (Cth) provides an opportunity to do so, on a wider scale than what has been offered so far. To do so would be both an appropriate use of federal legislative power, as well as clearly in-keeping with the constitutional frameworks imagined in 1901.

Section 119 of the *Constitution* has long been understood as a narrow and exceptional provision.² It obliges the Commonwealth, on the request of a State, to protect that State against invasion and domestic violence (even if that obligation has been expressly refused by the Commonwealth Government on occasion).³ Historically and doctrinally, “domestic violence” has been interpreted as referring to serious internal disorder of a kind approaching insurrection, rebellion, or widespread breakdown of civil authority. Recent reviews by Sophie Callan SC have confirmed this, even if the state-of-affairs can clearly occur across domains (including

¹ National Library of Australia TRC 323/A, pp 4 – 5.

² Peta Stephenson, ‘Fertile Ground for Federalism — Internal Security, the States and Section 119 of the Constitution’ (2015) 43 *Federal Law Review* 289; Cameron Moore, *Crown and Sword: Executive Power and the Use of Force by the Australian Defence Force* (ANU Press, 2017).

³ See Samuel White, *Keeping the Peace of the Realm* (LexisNexis, 2021); James Mortensen ‘Constitutions, “Domestic Violence” and the Use of Force by the Executive: A Historical Comparison between the US and Australia’ in Samuel White and Matthew Stubbs (eds), *Executive Power and the Royal Prerogative in the Commonwealth* (LexisNexis Australia, 1st ed, 2025).

cyber).⁴ It is a constitutional threshold deliberately set high, both because of its implications for federal balance and because of the deep sensitivities surrounding the domestic use of military force – current history within a similar federal system shows that clearly.

Contemporary emergencies, however, increasingly occupy a space well below this constitutional ceiling while nevertheless imposing demands that exceed the practical capacity of civilian authorities alone. At Federation, the divide of Federal and State power was different to that today, and the threats imagined were as well. Complex natural disasters, pandemics, systemic infrastructure failures, and complex cyber or supply-chain disruptions may cause nationally significant harm without involving violence, disorder, or any challenge to constitutional government. Yet these emergencies frequently require precisely the kinds of capabilities the ADF is uniquely placed to provide: strategic logistics, engineering support, aviation lift, medical capacity, communications, and disciplined command-and-control structures. The merit of using the ADF can be debated, but is ultimately a political decision. UNSW Canberra studies have shown that their use is a public expectation,⁵ and an increase in domestic operations would suggest that the ADF will be utilised accordingly. Yet the law (as well as publicly accessible doctrine) lags behind.

The constitutional problem is therefore not one of power, but of articulation. Below the threshold of section 119, Commonwealth action is generally justified through the executive power in section 61 of the *Constitution*, informed by residual prerogative authority and the implied nationhood power.⁶ This doctrinal foundation is orthodox and well established. As I have written elsewhere, and expanded upon through a National Library of Australia Fellowship, there have been over 16 occasions that the ADF has been used to enforce Commonwealth law but below the threshold of domestic violence.⁷

The *National Emergency Declaration Act 2020* was enacted against this backdrop. It represents a legislative acknowledgment that certain emergencies are national in character even when they do not engage the Constitution's most extreme mechanisms. This review provides an opportunity to bring coherence, transparency, and accountability to an area of practice that has otherwise developed through implication and convention.

II. The Limits of Existing Statutory Frameworks and the Role of the NED Act

Part IIIAAA of the *Defence Act 1903* (Cth) provides a detailed and carefully constructed statutory framework for the call-out and use of the ADF in circumstances of serious domestic threat. For the most part, it is intended to resolve 'domestic violence' but, on occasion, it goes further.⁸ Its design reflects the gravity of the situations it is intended to address alongside a "deeply held, if imperfectly understood, reservation" about the use of the ADF domestically.⁹ The provision authorises coercive action, including the use of force, in aid of civil authorities. It is therefore rightly treated as exceptional, both legally and politically.

⁴ Sophie Callan SC, *Independent Review of Part IIIAAA of the Defence Act 1903 (Cth)* (Report, 20 December 2024) (tabled in Parliament, 20 December 2024) 40 [139]

⁵ Richard Dunley *et al*, *Public Attitudes towards the Australian Defence Force – Final Report* (Report, June 2025) 10 (noting that 83% of respondents supported the use of the ADF to assist Australian communities during national emergencies)

⁶ Samuel White, *Keeping the Peace of the Realm* (LexisNexis, 2021).

⁷ Samuel White, *Spontaneous Volunteers: The Applied History of Domestic Operations* (Occasional Paper No 27, Australian Army Research Centre, 17 December 2024).

⁸ See *Defence Act 1903* (Cth) s 33(1)(a)(ii).

⁹ Margaret White, 'The Executive and the Military' (2005) 28(2) *UNSW Law Journal* 438.

However, the very features that make Part IIIAAA appropriate for high-end contingencies render it an awkward fit for ‘routine’ emergency response (the paradox is intended). The overwhelming majority of domestic ADF deployments in recent years have not involved the enforcement of law, or the suppression of disorder. They have involved assistance: sandbagging, evacuations, airlift, medical support, debris clearance, and the restoration of essential services. Even in disaster responses, however, this has not always been their explicit role. The deployment of ADF troops, as a show of force and via their mere presence, can be de-escalatory through a deterrent effect – just see the pamphlet of Defence Aid to the Civil Power in 1980, which recommended the use of Armoured Vehicles and aircraft to deter crowds (‘the presence of which often has salutary effect on riotous crowds’).¹⁰

Whilst it is politically desirable to show the use of the ADF as just ‘business as usual’,¹¹ the current legal framework leaves ADF members exposed to unacceptable levels of legal uncertainty. There is no legal protection for an ADF member outside of being a ‘spontaneous volunteer’¹² yet who is neither spontaneous (it being planned) nor a volunteer (having been ordered). The language of voluntarism obscures the reality of command responsibility and risks shifting legal exposure onto individuals. It is wholly inappropriate to conceptualise these activities through the lens of Part IIIAAA, as this risks either overstating the nature of the emergency or normalising a statutory regime designed for the most extreme cases.

In practice, these deployments are instead justified through executive decision-making supported by intergovernmental arrangements and informal understandings of assistance to civil authorities. Responding to an emergency is, for the majority of cases, consented to by the State government (with some notable exceptions).¹³ While workable, this approach leaves significant questions unanswered. It provides limited clarity to Parliament, uneven reassurance to the public, and I would argue most importantly, insufficient legal certainty to ADF members themselves. It places a great deal of weight on constitutional implication rather than legislative choice. It also ignores best-practice models from the United Kingdom, which **does** offer statutory protection to their defence members.¹⁴

The NED Act sits precisely in this legal gap. Its threshold of “nationally significant harm” is deliberately calibrated to capture emergencies that demand national coordination without presupposing violence or disorder. Its declaration mechanism is time-limited, reviewable, and accompanied by reporting obligations. Yet the Act is notably silent on the role of the ADF, despite the fact that ADF involvement is often one of the most visible and consequential aspects of national emergency response.

¹⁰ Australian War Memorial, *AWM122, 68/1001*, Department of Defence, Joint Planning Committee records from joint military operations and plans, Australian Military Forces pamphlet, ‘Aid to the Civil Power’ (Jul 1965 – Sep 1970) pp 33 [43]; pp 47 [42] for aircraft.

¹¹ Brock Millman, ‘HMG and the War Against Dissent, 1914–1918’ (2005) 40(3) *Journal of Contemporary History* 413, 418. This was reiterated by the Australian Government in its request for internal security measures after World War Two to not be discussed by radio and press. See the series of correspondence in NAA E/318/1/2 between the Prime Minister and relevant Managing Directors.

¹² *Royal Commission into National Natural Disaster Arrangements* (Report, 28 October 2020) 192 [7.29]

¹³ These exceptions include the 1949 Coalminer Strike and lack of consent by the New South Wales Government, and the 1953 intervention in the Bowen Wharf Strike without Queensland’s consent. See Samuel White, *Spontaneous Volunteers: The Applied History of Domestic Operations* (Australian Army Research Centre, Australian Army Occasional Paper No 27, 2024) for further specificity.

¹⁴ See the immunities offered under a Defence Council Order through the *Emergency Powers Act 1964* for non-military work, emergency regulations under the *Civil Contingencies Act 2004*; and see how they are operationalised under Ministry of Defence, *Joint Doctrine Publication 02 — UK Operations — The Defence Contribution to Resilience and Security* (3rd ed, February 2017) 32.

This silence does not prevent ADF deployment, but it does leave that deployment conceptually and legally under-specified. The Act could, without constitutional innovation, be extended to acknowledge and structure what already occurs in practice.

III. Legal Protection, Civil Liberties, and the Position of ADF Members

This submission proposes that the NED Act be amended to expressly recognise the use of the ADF in support of civil authorities during a declared national emergency, in circumstances that fall below the threshold of section 119 and do not engage Part IIIAAA. Such recognition would cover the full spectrum of ADF domestic operations, conditional on the pre-existing NED Act triggers, without displacing State responsibility for policing or public order. Rather, it would provide a clear statutory basis for assistance-focused ADF activity that is already occurring as a matter of routine.

Importantly, this would not expand Commonwealth power in any substantive sense – thus preserving the federal balance of power. The Executive already possesses the capacity to deploy the ADF in this way. What is lacking is a legislative framework that disciplines and explains that capacity. By anchoring ADF assistance to the formal declaration of a national emergency, Parliament would ensure that such deployments are linked to an identifiable threshold, limited in duration, and subject to post-hoc scrutiny.

Any discussion of domestic ADF use must take civil liberties concerns seriously. The presence of uniformed military personnel in civilian spaces carries symbolic and practical implications, even where their role is humanitarian. There is a legitimate public interest in ensuring that military assistance does not slide into militarisation of civil life, nor blur the distinction between defence and policing. Paradoxically, legal ambiguity increases rather than mitigates these risks as MAJGEN Stretton observed half a century ago. When the legal basis for ADF activity is unclear, it becomes harder to define limits, harder to allocate responsibility, and harder to assure the public that extraordinary measures are genuinely temporary. A clear statutory framework, tied to a defined emergency declaration and constrained to non-coercive functions, provides stronger protection for civil liberties than reliance on executive implication alone.

Section 123AA of the *Defence Act 1903* provides an important immunity for ADF members acting in good faith in the performance of their duties, but it should go further. There should be outlined explicit powers that the ADF has in an emergency, rather than an immunity. Explicitly linking ADF assistance under the NED Act to the operation of section 123AA would provide much-needed legal certainty. It would make clear that responsibility for emergency response rests with the Commonwealth, not with individual service members acting under orders in complex and often dangerous conditions. From a civil liberties perspective, this too is protective. Clear attribution of responsibility reduces the temptation to retrospectively individualise blame and reinforces democratic accountability at the executive and parliamentary level. It also enhances operational security and decisiveness, allowing ADF members to act effectively without hesitation born of legal uncertainty.

IV. Conclusion

The *National Emergency Declaration Act 2020* represents a thoughtful attempt to modernise Australia's emergency governance framework. However, its silence on the role of the ADF leaves unresolved a central feature of contemporary emergency response. By explicitly

providing for ADF assistance below the constitutional threshold of domestic violence, and by linking that assistance to existing immunities under the *Defence Act*, Parliament would not be expanding power so much as clarifying and disciplining it.

Such reform would respect constitutional boundaries, preserve civil liberties, protect ADF members, and align the law more closely with operational reality. Above all, it would ensure that decisions of genuine national significance are made visibly, accountably, and on terms set by Parliament rather than implication alone.