



Australian
National
University

Centre for Military and
Security Law
ANU College of Law
(Bldg 5) Fellows Road
Canberra ACT 2600
Australia
<http://law.anu.edu.au/cmsl>

Dr Sean Turner
Committee Secretary
Senate Legal and Constitutional Affairs Legislation Committee

Email: legcon.sen@aph.gov.au

**SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS
LEGISLATION COMMITTEE: INQUIRY INTO THE DEFENCE AMENDMENT
(CALL OUT THE AUSTRALIAN DEFENCE FORCE) BILL 2018**

I refer to your letter/email dated 3 July 2018 in which you provided an invitation to make a written submission to the Legal and Constitutional Affairs Legislation Committee Inquiry into the Defence Amendment (Call out the Australian Defence Force) Bill 2018 ('the Bill'). The Centre for Military and Security Law, ANU College of Law, greatly appreciates the opportunity to provide this submission.

The potential for using the Australian Defence Force (ADF) to deal with situations where a response to incidents of domestic violence and terrorism is beyond the capability of Commonwealth, State and Territory law enforcement agencies has grown in recent years. The primary reasons for this growth have been an expanded view by successive Commonwealth governments regarding the appropriateness of using the ADF and its capabilities to deal with a variety of security risks¹ coupled with the increased risk of a major terrorist incident occurring in Australia.² However, caution should be exercised when considering if the ADF should be called upon to deal with any particular situation, as primary responsibility for the maintenance of law and order rests with civil law enforcement authorities. This point is made abundantly clear in the Bill, its accompanying Explanatory Memorandum, and the Joint Media Release of the Minister for Defence and Attorney-General.³

Nevertheless, it is conceivable that circumstances will arise where the unique capabilities available to the ADF will provide the best response to a terrorist or domestic violence incident. If such a situation arises, there are two primary legal basis by which the Commonwealth government can seek to authorise the deployment of ADF personnel and

¹ See Cameron Moore, *Crown and Sword: Executive Power and the Use of Force by the Australian Defence Force*, ANU Press 2017 pg 1-2

² The current National Terrorism Threat Level is PROBABLE:
<https://www.nationalsecurity.gov.au/securityandyourcommunity/pages/national-terrorism-threat-advisory-system.aspx>

³ Joint Media Release – Minister for Defence and Attorney-General – Defence Call Out Bill of 28 June 2018: <https://www.minister.defence.gov.au/minister/marise-payne/media-releases/joint-media-release-minister-defence-and-attorney-general>

assets within Australia⁴ to deal with incidents that would otherwise be dealt with by law enforcement authorities.

The first basis is to rely on the executive power available under section 61 of *The Constitution* whereby the executive arm of government could give a direction to the Chief of the Defence Force (CDF) to deploy the ADF within Australia for a specified purpose to deal with the threat.⁵ Prior to the insertion of Part IIIAAA into the *Defence Act 1903* in 2000⁶ so that the ADF could be deployed in support of the Sydney Olympic Games, the executive power was the only legal basis upon which the ADF could be (and indeed was) authorised to undertake what can be described as internal security operations. However, there are possible limitations that might inhibit the deployment of the ADF in Australia to deal with incidents of terror and domestic violence under the authority of the executive power now that a statutory regime under *Defence Act 1903* Part IIIAAA that governs the use of the ADF in such situations exists.⁷

The second basis, which has been used since the *Defence Act 1903* was amended in 2000, is to follow the statutory regime established by the insertion of Part IIIAAA. It is noted that Part IIIAAA has been amended a number of times since 2000 – most significantly in 2006 when amendments were made to deal with emerging terror threats that might affect the Melbourne Commonwealth Games.⁸ A few more minor amendments to Part IIIAAA occurred subsequently, and the consequent result has been legislation that has significant shortfalls in clarity due to the structure of the current Part IIIAAA, that this Bill now seeks to address.

Accordingly, the changes to the *Defence Act 1903* that are proposed in the Bill are **welcomed and supported**. Substantive comment on a number of discrete topics will be provided below.

The first topic is the removal of what is described in the Explanatory Memorandum as “the threshold requirement” that “states and territories ‘are not, or are unlikely to be, able to protect themselves or Commonwealth interests against the domestic violence.’” The proposed amendment reflects the possibility that it may be appropriate to use special skills, equipment or capabilities possessed by the ADF in circumstances that would result in the most effective response to an incident. An implicit element of such a response is the understanding that there may be a need for the ADF to use coercive powers in relation to the civilian population and/or those who are responsible for the incident. The Bill contemplates such a situation and provides **appropriate safeguards and protections** among its proposed amendments.

⁴ This submission is not concerned with the deployment of the ADF in Australia in circumstances where the laws of armed conflict would apply as *The Constitution* has a number of provisions that directly deal with that situation. For example, the combined effect of sections 51(vi), 114 and 119 is to authorise the use of the ADF for the defence of the Commonwealth and protection of the states against invasion as well as placing this responsibility solely with the Commonwealth

⁵ See David Letts and Rob McLaughlin, *Call-Out Powers for the Australian Defence Force in an Age of Terrorism: Some Legal Implications*, (2016) 85 AIAL Forum at 65-66

⁶ *Defence Legislation Amendment (Aid to Civilian Authorities) Act 2000 No. 119, 2000*

⁷ Compare the approach adopted by French J. in *Ruddock v Vadarlis* [2001] FCA 1329 at paras 199 – 205 and French CJ. in *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1 at paras 40 – 42 with that of Kiefel J. in *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1 at paras 281 – 284; see also Letts and McLaughlin, above n5 at 65-67

⁸ *Defence Legislation Amendment (Aid to Civilian Authorities) Act 2006 No. 3, 2006*

The second topic is the expansion of contingent call-out powers to cover maritime and land threats in addition to the power that already exists in relation to aviation threats. This is a welcome proposal, as it recognises that security threats are not one-dimensional and the legal basis for response to a potential threat should not be limited to any particular operating environment. Indeed, the possibility of a coordinated terror attack, such as that which occurred in Mumbai in November 2008, is precisely the type of scenario that the proposed amendments will now make it easier to plan for and address. Similar considerations arise in terms of dealing with potential vehicle-borne and vessel-borne explosive attacks, and the ability to use contingent call out powers to pre-position ADF personnel and assets to deal with such threats is **supported**.

The third issue relates to the enhancements to the current legislation that will occur as a result of the inclusion of proposed section 51N which deals with the use of reasonable and necessary force. The potential for the use of force by the ADF during a call out, particularly in response to a terrorist incident, is one aspect of the legislation that deserves close scrutiny. The current legislation already contains a provision (section 51T) that deals with the use of force by the ADF but the proposed amendments are a significant improvement on the current legislation as they simplify and clarify the circumstances in which force, including lethal force, can be used. In essence, the Bill provides that the only circumstance in which the use of lethal force can be justified is where the use of such force is linked to the protection of life. This area is one that is most likely to create controversy in its application, especially in the circumstances contemplated by the combined effect of proposed section 46(5)(d) and section 51N(3)(a)(iii) where death or grievous bodily harm to innocent that are not perpetrating a terrorist act, may arise through the destruction of an aircraft or vessel. Although there are, quite properly 'multiple safeguards' that surround the exercise of this power, the inclusion of an additional measure relating to the anonymity of any ADF member who is ordered to destroy an aircraft or vessel is **recommended**. In terms of practical implementation, if the Bill is passed there will need to be significant effort placed on scenario training to ensure that the legal effect of proposed section 51N is clearly understood by those who are likely to be responsible for its operationalisation.

Finally, the amendment in the Bill via proposed section 51ZB that provides for an independent review of Part IIIAAA of the *Defence Act* at least every 5 years, and subsequent tabling of the written report produced by that review in the Parliament, is a significant and necessary check on operation of the legislation. This part of the Bill is also strongly **supported**.

Associate Professor David Letts
Director
Centre for Military and Security Law
ANU College of Law

26 July 2018