

Inquiry into the Defence Amendment (Call Out of the Australian Defence Force) Bill 2018

Submission to the Senate Legal and Constitutional Affairs
Legislation Committee

26 July 2018

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

¹ www.lawyersalliance.com.au.

Introduction

1. The Australian Lawyers Alliance (ALA) welcomes the opportunity to provide input to the Senate Legal and Constitutional Legislation's Committee review of the *Defence Amendment (Call Out of the Australian Defence Force) Bill 2018* ('the Bill').
2. In this submission, the ALA focusses on the particular wording of the following sections:
 - The section 31 definition for 'person who may be detained';
 - The section 31 definition for 'thing that may be seized';
 - Section 51A - Authorisation to search premises in specified area;
 - Section 51D - Powers relating to means of transport and persons in specified area.
3. The ALA is concerned that the wording of these sections, and particularly the use of the word 'or' within the sections, potentially significantly expands the power of the Australian Defence Force ('ADF') in a manner that was not intended by the legislation. The ALA is concerned that the effect is to extend ADF powers once they have been called out, potentially beyond the 'domestic violence' threat (as defined by cl 119 of the Constitution) and the threat specified in the call out order.
4. The ALA therefore disagrees with the Statement of Compatibility with Human Rights for the Bill that the provisions in the legislation are proportionate to the end sought to be achieved.

The purpose of the Bill

5. According to the Statement of Compatibility with Human Rights, the Bill has a number of objectives, including to:
 - Make it easier for states and territories to request ADF support by removing the threshold requirement that the states/territories 'are not, or are unlikely to be, able to protect themselves or Commonwealth interests against domestic violence' (as provided in clause 119 of The Constitution).

- Simplify, expand and clarify the powers of the ADF to search and seize, and to control movement during an incident.²
6. The Statement acknowledges that the act of calling out the ADF, and the powers that the ADF may be authorised to exercise under a call out, are significant. However, the circumstances in which a call out order might be made are extraordinary, and may only occur where domestic violence is occurring or likely to occur. Domestic violence refers to conduct that is marked by great physical force, and would include a terrorist attack or other mass casualty incident.³
 7. The Statement also notes that given the significance of the powers that the ADF may be authorised to exercise under a call out, there are a range of limitations and safeguards on their authorisation and use. In the first instance, the Governor-General and authorising Ministers may only decide to issue a call out order under proposed sections 33, 34, 35 or 36 where they are satisfied of a range of matters, including that domestic violence is actually occurring or likely to occur, and after considering the nature of that violence and whether ADF assistance would enhance the law enforcement response. They must also determine which specific types of powers are appropriate to make available to the ADF to respond to the violence. Once an order has been made, authorising Ministers must also authorise the ADF's exercise of certain powers.⁴
 8. The Statement assesses the legislative measures as proportionate. In most cases the justification for this position is on the basis of the procedural safeguards and limitations referred to above.
 9. The ALA notes however that the statutory drafting of the definitions and additional powers within the Bill come into effect once the call out has been authorised. This means that while the call out itself can only be made in circumstances involving 'domestic violence', the powers that can be exercised once the call out has been made are significantly broader and expand the powers and authority of the ADF into areas of state/territory criminal law procedure, beyond that for which the Bill is intended.

² Explanatory Memorandum, *Defence Amendment (Call out of Australian Defence Force) Bill 2018*, Statement of Compatibility with Human Rights, paragraph 10.

³ Ibid paragraph 11.

⁴ Ibid paragraph 12.

Definitions of ‘person who may be detained’ and ‘thing that may be seized’

10. Under s31 of the Bill:

- ***Person who may be detained***, in relation to a call out order, means a person:
 - (a) who is likely to pose a threat to any person’s life, health or safety, or to public health or public safety; or
 - (b) both:
 - (i) who has committed an offence, against a law of the Commonwealth, a State or a Territory, that is related to the domestic violence or threat specified in the call out order; and
 - (ii) whom it is necessary, as a matter of urgency, to detain.

Note: For paragraph (b), in order to detain a person, a member of the Defence Force must believe on reasonable grounds that the conditions in that paragraph have been met.

- ***Thing that may be seized***, in relation to a call out order, means a thing that:
 - (a) is likely to pose a threat to any person’s life, health or safety, or to public health or public safety; or
 - (b) is likely to cause serious damage to property; or
 - (c) is connected with the domestic violence or threat specified in the call out order, and that it is necessary, as a matter of urgency, to seize.

11. The ALA is concerned that the use of the word ‘or’ at the end of sub-paragraph (a) in relation to the definition of ***person who may be detained***, and at the end of sub-paragraph (b) in relation to the definition of ***thing that may be seized***, has the effect of potentially extending the powers of the ADF to detain persons or seize items in circumstances that are not connected to the domestic violence or threat specified in the call out order. The effect of this is to potentially expand the powers and authority of the ADF into areas of state/territory criminal law procedure. It is submitted that this is beyond the intention of the legislation, and therefore could not be considered a proportionate

measure to achieve the objective of the legislation of responding to, and protecting the Australian populace from acts of significant violence, including terrorism.

12. The ALA recommends that the word 'or' as identified above, should be replaced with the word 'and'. This would have the effect of connecting the **person who may be detained** or the **thing that may be seized** with the domestic violence or threat specified in the call out order. This would be a proportionate and reasonable provision to securing the objectives of the legislation.

Section 51A — Authorisation to search premises in specified area

13. The ALA has similar concerns about the wording of s51A — Authorisation to search premises in a specified area. Section 51A states:

(1) The Chief of the Defence Force, or an authorised Defence officer, (the **authorising officer**) may give an authorisation (a **search authorisation**) if, while the Defence Force is being utilised under a call out order, the authorising officer believes on reasonable grounds that, on any premises in the specified area, there is:

(a) a person who is likely to pose a threat to:

(i) any person's life, health or safety; or

(ii) public health or public safety; or

(b) a thing that is likely to:

(i) pose a threat to any person's life, health or safety; or

(ii) pose a threat to public health or public safety; or

(iii) cause serious damage to property; **or**

(c) a person or thing connected with the domestic violence or threat specified in the order.

14. For the reasons indicated above, the ALA submits that the use of the word 'or' as identified above in s51A(1) (i.e. at the end of s51A(1)(b)(iii)) is not proportionate to achieving the aims of the legislation, and should be replaced with the word 'and'. This will have the effect of requiring a connection between the person who is likely to pose a threat, or the thing that is referred to in s51A(1)(b), with the domestic violence or threat specified in the call out order.

15. The ALA notes that under s51A(2)(b)-(d) the search authorisation must relate to the call out order. However, the ALA submits that given the significant nature of this additional authority for the ADF, it is essential that the basis of making a search authorisation under s51A(1) must include a connection between the person who is likely to pose a threat, or the thing that is referred to in s51A(1)(b), with the domestic violence or threat specified in the call out order.

Section 51D — Powers relating to means of transport and persons in specified area

16. The ALA has similar concerns about the wording of s51D — Powers relating to means of transport and persons in specified area. Section 51D states:

(1) This section applies if a member of the Defence Force who is being utilised under a call out order believes on reasonable grounds that there is in a specified area:

(a) a person who is likely to pose a threat to:

(i) any person's life, health or safety; or

(ii) public health or public safety; or

(b) a person who has in the person's possession a thing that is likely to:

(i) pose a threat to any person's life, health or safety; or

(ii) pose a threat to public health or public safety; or

(iii) cause serious damage to property; or

(c) a person connected with the domestic violence or threat specified in the order; or

(d) a thing that is likely to:

(i) pose a threat to any person's life, health or safety; or

(ii) pose a threat to public health or public safety; or

(iii) cause serious damage to property; or

(e) a thing connected with the domestic violence or threat specified in the order.

17. For the reasons indicated above, the ALA submits that the use of the word 'or' as identified above in s51D(1) (i.e. at the end of s51D(1)(b)(iii) and at the end of s51D(1)(d)(iii)) is not proportionate to achieving the aims of the legislation, and should be replaced with the word 'and'. This will have the

effect of requiring a connection between the person referred to in s51D(1)(a) and (b), or the thing that is referred to in s51D(1)(d), with the domestic violence or threat specified in the call out order.

18. The ALA notes that under s51D(2)(h), s51D(3)(c) and (d), and s51D(5)(b) and (c), that the powers relating to means of transport and persons in a specified area must relate to the call out order. However, the ALA submits that given the significant nature of this additional authority for the ADF, it is essential that the reasonable ground that form the basis for the exercise of this authority under s51D(1) must include a connection between the person who is likely to pose a threat, or the thing that is referred to in s51D(1)(b), with the domestic violence or threat specified in the call out order.

Conclusion

19. The ALA appreciates the difficult and complex contemporary security environment within which the state and territory police and ADF personnel have to operate in order to respond to, and protect the Australian populace from acts of significant violence, including terrorism. In this context the ALA appreciates the need to make it easier for states and territories to request ADF support to secure this objective.
20. The ALA agrees with the Statement of Compatibility with Human Rights that the act of calling out the ADF, and the powers that the ADF may be authorised to exercise under a call out, are significant, and that therefore such a call out order should only be made in extraordinary circumstances. In addition, given the significant additional powers and authority that the ADF will be able to exercise in such circumstances, the ALA considers it essential that the legislation contain stringent safeguards to ensure that the basis on which this authority and additional powers are exercised is connected with the domestic violence or threat specified in the call out order.
21. The ALA is particularly concerned that the legislative drafting needs to make absolutely clear and beyond doubt that in relation to the powers of detaining persons and the seizure of items, that under the legislation, any person who may be detained or thing that may be seized, is connected to the domestic violence or threat specified in the call out order. This would be a proportionate and reasonable provision to securing the objectives of the legislation.