



Law Council
OF AUSTRALIA

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

Senate Legal and Constitutional Affairs Legislation Committee

3 August 2018

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2018 Executive as at 1 January 2018 are:

- Mr Morry Bailes, President
- Mr Arthur Moses SC, President-Elect
- Mr Konrad de Kerloy, Treasurer
- Mr Tass Liveris, Executive Member
- Ms Pauline Wright, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the assistance of its National Criminal Law Committee, Military Justice Committee, National Human Rights Committee and the Law Society of South Australia in the preparation of this submission.

It also thanks the Attorney-General's Department and the Department of Defence for providing a briefing to Law Council representatives in relation to the Bill.

Executive Summary

1. The Law Council welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Legislation Committee's (**the Committee**) Inquiry into the Defence Amendment (Call Out of Australian Defence Force) Bill 2018 (**the Bill**).
2. The Law Council notes that the Bill follows the State Coroner of New South Wales *Inquest into the deaths arising from the Lindt Café Siege* (**the Lindt Siege Inquest**) in May 2017, which found that existing arrangements for the transfer of responsibility for terrorist incidents to the Australian Defence Force (**ADF**) were inadequate.
3. The Bill amends Part IIIAAA of the *Defence Act 1903* (Cth) (**the Act**) with the aim of streamlining the legal procedures for call out of the ADF to protect States', self-governing Territories', and Commonwealth interests, onshore and offshore, against certain incidences of violence, including terrorism. The Bill, if enacted, would:
 - make it easier for States and Territories to request ADF support by changing the legislative threshold from 'are not, or are unlikely to be, able to protect themselves or Commonwealth interests against domestic violence' to whether ADF support would be likely to enhance the State or Territory's ability to protect itself or Commonwealth interests prior to authorizing call out of the ADF;
 - expand the ADF's search and seize powers when operating under a call out order to enable the ADF to search for and seize things, and search for and detain people, that are likely to pose a threat to a person's life, health or safety, or to public health or safety;
 - enable the ADF to respond to multi-jurisdictional call out; and
 - expand pre-authorised contingent call outs beyond air threats to land and maritime domains.
4. The Law Council considers that, in non-war times, the ADF should only be called out into the States and Territories in exceptional circumstances. Each of the States and Territories have highly functioning operative police forces that are familiar with their local territories and have well developed legislative frameworks to regulate their powers. Further, the ADF have specialist capabilities developed for deployment extra-territorially and in times of war or national emergency which are equally well-defined in those circumstances.
5. The Law Council acknowledges that there may be specialist skills that the ADF can deploy in exceptional circumstances (e.g. sniper or bomb diffusing capabilities) to enhance State or Territory police force abilities where the protection of life may be required. However, the Law Council queries whether it is a necessary and proportionate response to domestic threats to have the ADF deployed on the ground in a domestic context in circumstances other than national emergencies (such as acts of terrorism). It is a different proposition to utilise a defence force within a country with robust borders and strong State and Territory police forces such as Australia when compared with countries where borders may be more amorphous and police forces ill-equipped to deal with domestic threats.
6. Other key recommendations of this submission include:
 - the threshold of 'a threat to a person's health or safety' should be rephrased to impose a higher threshold commensurate with the potential serious implications for the use of the powers;

- that paragraph (d) in the proposed definition of ‘substantive criminal law’ relating to the confiscation of property be removed;
- the Explanatory Memorandum to the Bill should be amended to provide for some examples of what may constitute ‘specified circumstances’. Guidelines should also be developed around the types of specified circumstances that might be seen to satisfy the requirements around the appropriate and proper use of the ‘specified circumstances’ provisions. Additionally, it may be appropriate for there to be an ex post facto review of the ‘specified circumstances’ to determine whether the calling out of the ADF was in fact justified;
- the effective abrogation of the right to silence in proposed paragraphs 46(7)(h), 51D(2)(i), 51L(3)(g) should be removed. In the alternative, the provision should be prefaced to make it clear that it may only be enlivened in an emergency. In the event that the paragraphs are not removed, compulsory questioning safeguards should be in place such as use and derivative use immunities;
- the Bill be amended to clearly articulate ADF members’ rights and responsibilities in circumstances where they acted and could not reasonably be aware of when an order was varied or revoked;
- proposed subparagraphs 33(5)(d)(ii) and 35(5)(d)(ii) be amended for clarity so that the order states that it ceases to be in force at the end of a specified period (which must be no later than 20 days after it is made), unless it is revoked earlier;
- that the provision be amended to clarify that proposed subsection 51S(1) only applies to situations where there may be minor or technical non-compliance with obligations as is the stated intent of the provision according to the Explanatory Memorandum of the Bill;¹
- that the link to the protection of life and serious grievous bodily harm be made explicit in relation to proposed subparagraph 51N(3)(iii);
- the Bill or Explanatory Memorandum should be amended to provide greater clarity as to what may be considered to amount to manifest unlawfulness. Further, an additional requirement for the defence should be that neither the order nor the action pursuant to that order amounts to a crime against humanity, a war crime, or is otherwise in breach of Australia’s international human rights obligations;
- the Committee inquire into the likely Constitutional validity of the Bill when powers may be used in absence of a State or Territory request/consent; and
- the Bill not be enacted until the issues noted in this submission, and any other issues identified by the Parliamentary Joint Committee on Human Rights (**PJCHR**) in relation to the Bill, have been subject to a structured proportionality analysis.

¹ Explanatory Memorandum, Defence Amendment (Call Out of Australian Defence Force) Bill 2018, 79 [446].

ADF Review

7. In the Lindt Siege Inquest, the State Coroner of New South Wales recommended:

... that the ADF Review confer with state and territory governments about the criteria governing applications for the ADF to be called out pursuant to the Defence Act 1903 (Cth) with a view to determining: (i) whether further guidance is required on the criteria to be used by states and territories in determining whether to apply for Commonwealth assistance; and (ii) if so, what criteria ought to be stipulated.²

8. The Law Council would be grateful for further information regarding the extent to which the States and Territories have been consulted in relation to the Bill and whether they are satisfied regarding the levels of guidance on the criteria to be used by them in determining whether to apply for Commonwealth assistance.

Exceptional circumstances

9. The Law Council is concerned at the removal of the requirement in proposed sections 33 and 35 of the need for State or Territory authorities to be unable, or likely to be unable, to deal with the particular threat. This raises the risk that ministers will feel it necessary to call out defence forces, on a routine basis, in order to enhance the State or Territory's ability to protect itself or Commonwealth interests without exceptional circumstances existing prior to authorising call out of the ADF. As noted, the Law Council considers that these powers should only be used in exceptional circumstances.

Recommendation

- **the ADF should only be called out into the States and Territories in exceptional circumstances.**

Threat to a person's health or safety

10. As noted, the Bill would expand the ADF's search and seize powers when operating under a call out order to enable the ADF to search for and seize things, and search for and detain people, that are likely to pose a threat to a person's life, health or safety, or to public health or safety.³ The Law Council considers that a threat to a person's health or safety may include low level threats and potentially be so broad that the call out of the ADF may not be necessary or proportionate.

Recommendation

- **the threshold of 'a threat to a person's health or safety' should be rephrased to impose a higher threshold commensurate with the potential serious implications for the use of the powers.**

² State Coroner of New South Wales, *Inquest into the deaths arising from the Lindt Café Siege: findings and recommendations*, (May 2017), Recommendation 26, 35.

³ Defence Amendment (Call Out of the Australian Defence Force) Bill 2018, ss 31, 46(5)(c)(ii), 51A(1)(a)-(b), 51D(1)(a)-(b), (d), 51L(2)(b)(ii), (c)(ii), 51P(b)(i), 51Q(2)(b)(i).

Definition of substantive criminal law

11. The definition of 'substantive criminal law' in proposed section 31 includes (d) 'providing for the confiscation of property used in, or derived from, the commission of an offence'. The extant section 51 of the Act also includes a similar definition. However, the Law Council notes that confiscation proceedings are typically civil proceedings and not regarded as a substantive matter of criminal law.

Recommendation

- **that paragraph (d) in the proposed definition of 'substantive criminal law' relating to the confiscation of property be removed.**

Specified circumstances

12. Proposed section 34 of the Bill would provide for the contingent call out of the ADF to protect Commonwealth interests, and would allow such an order to be made if 'specified circumstances' arise. However, neither the Bill nor the Explanatory Memorandum provide a definition of 'specified circumstances' which justify, by reason of urgency, the impracticality of orders to be made in the usual circumstances.
13. Similarly, proposed section 36 which provides for contingent call out of the ADF to protect States and Territories also makes reference to 'specified circumstances' as a basis for making the order (i.e. as such circumstances would make it impracticable to make an order in the ordinary way).
14. Following the Lindt Siege Inquest, the Law Council understands the importance of permitting urgent action where specified circumstances arise and where the Chief of the Defence Force is satisfied that those circumstances exist.

Recommendation

- **while these circumstances may not be able to be clearly set out in the primary legislation, the Law Council recommends that the Explanatory Memorandum to the Bill should be amended to provide for some examples of what may constitute 'specified circumstances'. Guidelines should also be developed around the types of specified circumstances that might be seen to satisfy the requirements around the appropriate and proper use of the 'specified circumstances' provisions. Additionally, it may be appropriate for there to be an ex post facto review of the 'specified circumstances' to determine whether the calling out of the ADF was in fact justified.**

Additional powers

15. The Law Council notes proposed section 46 of the Bill which prescribes the special powers generally authorised by the Minister, in particular proposed subsection 46(7) of the Bill which provides 'additional powers' to a member of the ADF. Additional powers include the power to 'direct a person to answer a question put by the member, or to produce to the member a particular document that is readily accessible to the person,

(including by requiring the person to provide identification to the member)'. Similar powers are found in proposed paragraphs 51D(2)(i) and 51L(3)(g).

16. The Law Council further notes that these powers are not limited to questions in relation to proof of identity and go well beyond the powers available to police officers in for example South Australia under the *Summary Offences Act 1953* (SA). State and Territory police forces that confront dangerous situations on a daily basis, including life threatening events, generally do not have powers that effectively enable a complete abrogation of the right to silence.
17. The common law privilege against self-incrimination provides that a person cannot be required to answer questions or produce material which may tend to incriminate them.⁴ The common law privilege against self-incrimination and against penalty is a substantive right of long standing, applicable to criminal and civil penalties and forfeiture. It is deeply ingrained in the common law and is not to be taken to be abrogated by statute except in the clearest terms.⁵ Its protection is required by the *International Covenant on Civil and Political Rights*⁶ and is protected under Australia's legislative framework.⁷ The privilege is part of the right to silence.
18. The 2016 Australian Law Reform Commission's (**ALRC**) *Traditional Rights and Freedoms – Encroachments on Commonwealth Laws Report* noted that legislative provisions that abrogate the privilege against self-incrimination require further review including 'whether its abrogation in Commonwealth laws has been appropriately justified, and whether statutory immunities offer appropriate protection'.⁸ The ALRC Report cited particularly those that provide only use immunity, for example *Australian Crime Commission Act 2002* (Cth) section 30.⁹

Recommendation

- **effective abrogation of the right to silence in proposed paragraphs 46(7)(h), 51D(2)(i), 51L(3)(g) should be removed. In the alternative, the provision should be prefaced to make it clear that it may only be enlivened in an emergency. In the event that the paragraphs are not removed, compulsory questioning safeguards should be in place such as use and derivative use immunities.**

⁴ *Sorby v Commonwealth* (1983) 152 CLR 281; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328.

⁵ *Smith v Read* (1736) 1 Atk 526 at 527; [26 ER 332]; *R v Associated Northern Collieries* (1910) 11 CLR 738 at 742, 744; *Sorby v Commonwealth* (1983) 152 CLR 281, 309–310 and 316; *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543, 554; *Rich v ASIC* (2004) 220 CLR 129, 141–143.

⁶ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14(3)(g).

⁷ *Evidence Act 1995* (Cth), 1995 (NSW), 2001 (Tas), 2008 (Vic), 2011 (ACT), *Evidence (National Uniform Legislation) Act* (NT), ss128, 128A; *Human Rights Act 2004* (ACT), 22(2)(i); *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 25(2)(k). See also *Australian Securities and Investments Commission Act 2001* (Cth), s 68; *Banking Act 1959* (Cth), s 52F; *Competition and Consumer Act 2010* (Cth), ss 155(7), 155B, 159; *Corporations Act 2001* (Cth), ss 597(12) and (12A), *Work Health and Safety Act 2011* (Cth), s 172; *Royal Commissions Act 1903* (Cth), ss 6A(3), (4).

⁸ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments on Commonwealth Laws*, Report No 129 (2016), 18.

⁹ *Ibid* 24.

Making, varying and revoking call out orders

19. Proposed subsection 37(4) states that a variation or revocation of a call out order takes effect when the order is varied or revoked. However, it is not clear what will happen to ADF members who are on the ground that engage in certain actions based on the belief that orders (which have in fact been recently varied or revoked) are still in place. There is a proposed immunity under proposed subsection 51S(2), but only for the exercise of a power where the order, declaration or authorisation was *invalidly* made and the power was exercised in good faith. An 'invalid order' does not explicitly include a revoked or varied order.

Recommendation

- **the Bill be amended to clearly articulate ADF members' rights and responsibilities in circumstances where they acted and could not reasonably be aware that an order had already been varied or revoked.**

Timeframe for order

20. Proposed subparagraphs 33(5)(d)(ii) and 35(5)(d)(ii) note that the order must state that it 'ceases to be in force at the end of a specified period (which must not end more than 20 days after it is made), unless it is revoked earlier'.

Recommendation

- **proposed subparagraphs 33(5)(d)(ii) and 35(5)(d)(ii) be amended for clarity so that the order states that it ceases to be in force at the end of a specified period (which must be no later than 20 days after it is made), unless it is revoked earlier.**

Protections for ADF members when acting in good faith

21. Proposed subsection 51S(1) would mean that an ADF member who does not comply with an obligation but nonetheless acts in good faith will not be held to be criminally and civilly liable for their actions. The Law Council understands that this may be necessary to guard against situations where there may be minor or technical non-compliance with obligations. However, the Law Council is concerned that such a provision may have the potential to grant immunity where actions may be considered for example to be 'manifestly unlawful'.

• Recommendation

- **that the provision be amended to clarify that proposed subsection 51S(1) only applies to situations where there may be minor or technical non-compliance with obligations as is the stated intent of the provision according to the Explanatory Memorandum of the Bill.¹⁰**

¹⁰ Explanatory Memorandum, Defence Amendment (Call Out of Australian Defence Force) Bill 2018, 79 [446].

Serious injury or death

22. Proposed section 51N requires that the use of force utilised by an ADF member be 'reasonable and necessary' under a call out order. The Law Council supports such proportionality in use of force provisions. However, the linkage of certain provisions in the Bill to serious injury or death (the stated intention of the exercise of many powers under the Bill)¹¹ could be improved.
23. Proposed subparagraph 51N(3)(iii) would appear to permit the use of lethal force or force likely to cause grievous bodily harm to a person where it is 'reasonable and necessary' to give effect to the order under proposed paragraphs 46(5)(d) and (e). These paragraphs allow measures to be taken against aircraft and vessels. Ministerial authorisation is required on the basis of the Minister being satisfied that taking the measure is 'reasonable and necessary', or for a contingent call out order would be reasonable and necessary if the circumstances specified in the order were to arise. There is no specification for there to be a serious threat of injury or death.
24. It is particularly important that such a specification be clear given that the first Independent National Security Legislation Monitor recommended that:

*The provisions of Division 3B of Part IIIAAA of the Defence Act should be amended so as to exclude from the range of permissible measures against aircraft any action calculated to kill innocent passengers and crew.*¹²

Recommendation

- **that the link to the protection of life and serious grievous bodily harm be made explicit in relation to proposed subparagraph 51N(3)(iii).**

Constitutional validity

Recommendation

- **the Committee inquire into the likely Constitutional validity of the Bill when powers may be used in absence of a State or Territory request/consent.**

¹¹ Explanatory Memorandum, Defence Amendment (Call Out of Australian Defence Force) Bill 2018, [23], [301]-[308].

¹² Independent National Security Legislation Monitor Bret Walker SC, *Annual Report* (28 March 2014) Recommendation II/1, 7.

Human rights considerations

25. The Law Council has not had the opportunity to conduct a detailed human rights analysis of the Bill. Nonetheless, it appears that a number of the Bill's provisions place limitations on human rights, including the following:

- The Bill's expansion of the ADF's search and seize powers when operating under a call out order to enable the ADF to search for and seize things, and search for and detain people, that are likely to pose a threat to a person's life, health or safety, or to public health or safety, involve restrictions on the freedom of movement (recognised in article 12 of the *International Covenant on Civil and Political Rights (ICCPR)*)¹³ and the right to privacy (recognised in article 17 of the ICCPR).¹⁴
- The lack of any definition in the Bill or Explanatory Memorandum of 'specified circumstances' in which an order for the call out of the ADF to protect Commonwealth interests may be made may present questions in terms of arbitrariness and compliance with article 19(1) of the ICCPR, which provides:

*Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*¹⁵

- The additional powers provided to a member of the ADF in proposed subsection 46(7) of the Bill, including the power to 'direct a person to answer a question put by the member, or to produce to the member a particular document that is readily accessible to the person, (including by requiring the person to provide identification to the member) (and similar powers in proposed paragraphs 51D(2)(i), 51L(3)(g)) limit the privilege against self-incrimination (see article 14(3)(g) of the ICCPR).¹⁶

26. The United Nations Human Rights Committee has confirmed that where a State party makes any restrictions on rights under the ICCPR which are derogable, it must 'demonstrate their necessity' and only take 'such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights'.¹⁷

27. Since its establishment by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), the Parliamentary Joint Committee on Human Rights (**PJCHR**) has consistently applied a proportionality analysis to provisions which appear to limit human rights. Where a provision appears to limit rights, the PJCHR considers three key questions:

- whether and how the limitation is aimed at achieving a legitimate objective;
- whether and how there is a rational connection between the limitation and the objective; and

¹³ *International Covenant on Civil and Political Rights*, opened for signature, 999 UNTS 171 (entered into force 23 March 1976 art 12

¹⁴ *Ibid* art 17.

¹⁵ *Ibid* art 19(1).

¹⁶ *Ibid* art 14(3)(g).

¹⁷ United Nations Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 2187th mtg, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004), [6].

- whether and how the limitation is proportionate to that objective.¹⁸
28. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations as to how the measures are likely to be effective in achieving the objective sought.¹⁹
29. To determine whether there is a rational connection between a limitation and its objective, the Attorney-General Department's guidance for those who have a role in Commonwealth legislation, policy and programs suggests the following questions may be useful:
- Will the limitation in fact lead to a reduction of that problem?
 - Does a less restrictive alternative exist, and has it been tried?
 - Is it a blanket limitation or is there sufficient flexibility to treat different cases differently?
 - Has sufficient regard been paid to the rights and interests of those affected?
 - Do safeguards exist against error or abuse?
 - Does the limitation destroy the very essence of the right at issue?²⁰
30. In considering whether a limitation on a right is proportionate to its objective, the PJCHR has identified some factors that might be relevant to include:
- whether there are other less restrictive ways to achieve the same aim;
 - whether there are effective safeguards or controls over the measures, including the possibility of monitoring and access to review;
 - the extent of any interference with human rights – the greater the interference the less likely it is to be considered proportionate; and
 - whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case.²¹
31. Accordingly, the Law Council recommends that the Bill not be enacted until these issues, and any other issues identified by the PJCHR in relation to the Bill, have been subject to a structured proportionality analysis.

¹⁸ Parliamentary Joint Committee on Human Rights, *Annual Report 2012-2013* (December 2013) [1.53]; Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (June 2015) [1.15]. These are also reflected in the Law Council of Australia, *Policy statement on human rights and the legal profession: Key principles and commitments* (May 2017).

¹⁹ Parliamentary Joint Committee on Human Rights *Guidance Note 1: Drafting statements of compatibility* (December 2014), 2.

²⁰ Attorney-General's Department, 'Permissible limitations' Australian Government <<https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Permissiblelimitations.aspx>>.

²¹ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Guide to Human Rights* (2015) [1.21].

Recommendation

- **the Bill not be enacted until the issues noted in this submission, and any other issues identified by the PJCHR in relation to the Bill, have been subject to a structured proportionality analysis.**