

# Chapter 1

## Introduction

1.1 On 28 June 2018, the Senate referred the provisions of the Defence Amendment (Call out of the Australian Defence Force) Bill 2018 (the bill) to the Legal and Constitutional Affairs Legislation Committee for inquiry and report by 3 September 2018.

1.2 This report comprises two chapters. This chapter provides a summary of the bill, including its context and key provisions. The second chapter considers issues raised in submissions, and sets out the committee's conclusions and recommendations.

### Purpose and context of the bill

1.3 According to the Explanatory Memorandum (EM), the bill would amend Part IIIAAA of the *Defence Act 1903* in order to 'streamline the legal procedures for call out of the ADF and to enhance the ability of the ADF to protect states, self-governing territories, and Commonwealth interests, onshore and offshore, against domestic violence, including terrorism'. The EM further explains that the bill will also restructure Part IIIAAA to 'give effect to these amendments, remove repetition and ambiguity, and make the Part easier to use'.<sup>1</sup>

1.4 The amendments set out in the bill would implement the recommendations of the Review of Defence Support to National Counter-Terrorism Arrangements, and, as the EM puts it:

...complement efforts to enhance the Australian Defence Force's (ADF) posture and capability to respond to incidents of domestic violence and terrorism. The amendments will also implement measures to enhance the ability of the ADF to support state and territory law enforcement agencies in responding to domestic violence.<sup>2</sup>

1.5 The need for improved call out arrangements has been identified in other reviews. In particular, the State Coroner of New South Wales, in its inquest into the Lindt Café siege, found that existing arrangements for ADF call out in relation to terrorist incidents are inadequate.<sup>3</sup> The Coroner 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

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1 Explanatory Memorandum, p. 3.

2 Explanatory Memorandum, p. 2.

3 Australian Lawyers for Human Rights, *Submission 5*, p. 1; Michael O'Connell, *Submission 14*, p. 2.

determining whether to apply for Commonwealth assistance; and (ii) if so, what criteria ought to be stipulated.<sup>4</sup>

## Overview of the bill

1.6 To achieve the bill's purpose, the EM explains that the amendments to Part IIIAAA would:

- make it easier for states and territories to request ADF support by removing the threshold requirement that the states and territories 'are not, or are unlikely to be, able to protect themselves or Commonwealth interests against the domestic violence'. However, authorising Ministers will need to take into account the nature of the violence and whether the ADF would be likely to enhance the state and territory response when deciding whether the ADF should be called out;
- enhance the ability of the ADF to respond to cross-jurisdictional incidents by allowing for a Commonwealth interests order to authorise action in multiple jurisdictions, as well as the offshore area;
- authorise the ADF to respond to incidents that cross a border into a jurisdiction that has not been specified in an order, so long as it is for the purpose of protecting the interests specified in the order against the specified domestic violence;
- expand contingent call out to allow the ADF to be pre-authorised to respond to land and maritime threats, in addition to aviation threats;
- provide for contingent call out for the protection of states and territories;
- increase the requirements for the ADF to consult with state and territory police where it is operating in their jurisdictions;
- simplify, expand and clarify the powers of the ADF to search and seize, and to control movement during an incident;
- remove the distinction between general security areas and designated areas to reduce complexity and uncertainty;
- clarify that acting Ministers are to be treated as substantive Ministers for the purposes of expedited call out;
- add the Minister for Home Affairs as a named 'alternative' Authorising Minister for expedited call out; and
- make technical amendments to improve the clarity of the legislation.<sup>5</sup>

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4 State Coroner of New South Wales, *Inquest into the deaths arising from the Lindt Café Siege: findings and recommendations*, May 2017, Recommendations 26, 35; Law Council of Australia, *Submission 11*, p. 7.

5 Explanatory Memorandum, pp. 2–3.

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1.7 According to the EM, four principles underpin the proposed changes to call-out provisions. These are:

- The ADF should only be called out to assist civilian authorities.
- If the ADF is called out, civilian authorities remain paramount, but ADF members remain under military command.
- When called out, ADF members can only use force that is reasonable and necessary in all the circumstances.
- ADF personnel remain subject to the law and are accountable for their actions.<sup>6</sup>

### **Key provisions**

1.8 This part of the chapter summarises the key provisions of the bill. More detailed explanations are provided in the Explanatory Memorandum and in the submission provided by the Attorney-General's Department to this inquiry (submission 8).

#### ***Types of call out orders***

1.9 The bill would amend and restructure the provisions governing different types of call out, and set out four types of call out orders, as follows:

- Call out to protect Commonwealth interests (proposed section 33).
- Contingent call out to protect Commonwealth interests (proposed section 34).
- Call out to protect states and territories (proposed section 35).
- Contingent call out to protect states and territories (proposed section 36).

#### ***Threshold for call out***

1.10 The bill would replace the existing threshold for the call out of the ADF, and the new threshold would apply consistently across the four types of call out set out in proposed sections 33 to 36. As the Attorney-General's Department explained in its submission:

The current threshold for call out requires authorising Ministers to be satisfied that a state or territory is not, or is unlikely to be, able to protect itself or Commonwealth interests from domestic violence. This threshold means that the Commonwealth could not call out the ADF under Part IIIAAA where the Commonwealth assesses that a state or territory has both the capability and capacity to resolve the incident. The affected state or territory needs to exhaust all other options, including support from other jurisdictions, before making a request for assistance from the Commonwealth. This threshold is not optimal for facilitating ADF involvement to complement or augment a civilian law enforcement response to a terrorist incident.

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6 Explanatory Memorandum, p. 3.

The Bill will replace the current threshold and allow the ADF to be called out where an incident is not beyond the capability and capacity of a state or territory, but where the ADF has relevant specialist capabilities that could assist. This will allow greater flexibility for the ADF to be used to provide the most rapid, effective or appropriate specialist support to the states and territories, while respecting the states' and territories' position as first responders.<sup>7</sup>

1.11 Authorising Ministers must satisfy themselves of various matters in calling out the ADF, including in relation to the 'nature' of the domestic violence that is occurring, and whether the utilisation of the ADF would be likely to enhance the ability of a state or territory to protect itself or the Commonwealth's interests.<sup>8</sup>

#### ***Call out in multi-jurisdictional incidents***

1.12 Proposed section 33 would also enhance the ADF's ability to respond to domestic violence that is occurring across multiple jurisdictions, including the offshore area, as well as domestic violence that may cross jurisdictional boundaries. As the Attorney-General's Department explained:

Currently, call out orders for the protection of Commonwealth interests in the onshore area are only able to specify a single state or territory in which domestic violence is occurring or likely to occur. Where domestic violence is occurring in multiple jurisdictions, or where a domestic violence incident crosses a border between jurisdictions, including the offshore area, the current structure of Part IIIAAA necessitates the making of two or more separate call out orders. This arrangement has the potential to cause significant delays in calling out the ADF.

Proposed section 33 will overcome this limitation by allowing a single call out order for the protection of Commonwealth interests to be made in relation to separate incidents of domestic violence occurring in multiple jurisdictions, threats in the offshore area, incidents that cross jurisdictional boundaries including the offshore area, or, all of the above.<sup>9</sup>

#### ***Increased consultation with state and territory authorities***

1.13 Proposed subparagraph 33(5)(b)(iii) will operate in conjunction with proposed section 38 to require consultation with all relevant states and territories when call out orders are made for the protection of Commonwealth interests.<sup>10</sup> Proposed subparagraph 34(5)(b)(iv) operates to the same effect in relation to contingent call out orders (discussed below).<sup>11</sup>

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7 Attorney-General's Department, *Submission 8*, p. 4.

8 The Hon. Christian Porter, Attorney-General, 'Second Reading Speech', *House of Representatives Hansard*, 28 June 2018, p. 10

9 Attorney-General's Department, *Submission 8*, pp. 5–6.

10 Attorney-General's Department, *Submission 8*, p. 6.

11 Attorney-General's Department, *Submission 8*, p. 7.

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1.14 Proposed section 40 expands the requirement for the ADF to assist and cooperate with police forces of the states and territories.<sup>12</sup>

### ***Contingent call out of the ADF***

1.15 'Contingent call out' refers to a pre-authorisation to call out the ADF contingent upon a specified circumstance arising. Such orders have been regularly made as part of security measures to protect major Commonwealth events (for example, the G20, Commonwealth Games, and the ASEAN summit) from circumstances involving air threats.<sup>13</sup>

1.16 Contingent call-out, as the Attorney-General explained in his second reading speech, 'removes any potential delay in seeking ministerial authorisation to act once an incident has taken place, and enables the ADF to already be on the scene, ready to assist the police response'.<sup>14</sup> As it currently stands, contingent call out is limited to aviation and the protection of Commonwealth interests. The bill would extend contingent call out so that is available to protect state and territory interests, whether in the land, air, or in the maritime domain.<sup>15</sup>

### ***Powers available to the ADF during a call out***

1.17 The bill would consolidate and reorganise the provisions that set out the powers available to the ADF during a call out into three distinct divisions:

- Special powers generally authorised by an authorising Minister (proposed Division 3).
- Powers exercised in specified areas (proposed Division 4).
- Powers to protect declared infrastructure (proposed Division 5).

1.18 The new divisions would apply to both the onshore and offshore areas to, as the Attorney-General's Department submitted, 'facilitate the ADF's ability to respond to multi-jurisdictional incidents, including in the offshore area. Currently, Part IIIAAA distinguishes between powers available in the onshore and offshore areas'.<sup>16</sup>

1.19 The Attorney-General explained the purpose of these changes in his second reading speech:

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12 For more detail, see Attorney-General's Department, *Submission 8*, pp. 8–9.

13 Attorney-General's Department, *Submission 8*, p. 6.

14 The Hon. Christian Porter, Attorney-General, 'Second Reading Speech', *House of Representatives Hansard*, 28 June 2018, p. 11.

15 The Hon. Christian Porter, Attorney-General, 'Second Reading Speech', *House of Representatives Hansard*, 28 June 2018, p. 11. For more detail, see Attorney-General's Department, *Submission 8*, pp. 6–7.

16 Attorney-General's Department, *Submission 8*, p. 9.

The bill expands the powers to prevent, put an end to, and protect people from acts of violence to also cover threats to a person's life or safety, or to public health or public safety.

This will make clear that the ADF can act in relation to generalised threats which may not be directed toward any specific person, but towards the community in general.

The amendments will also simplify, expand and clarify the powers of the ADF to search and seize, and to control movement during an incident.

For instance, the search powers currently available in specified areas focus predominantly on 'dangerous things'.

The amendments will allow the ADF to also search for people who pose a threat to a person's life, health or safety or public health or public safety.

These amendments have been carefully calibrated to ensure an appropriate balance between rights and powers in an emergency situation.<sup>17</sup>

### ***Inclusion of the Minister for Home Affairs as a named 'alternative' minister***

1.20 Proposed subparagraph 51U(2)(c)(iv) introduces the Minister for Home Affairs as a named alternative minister for the purposes of expedited call out.<sup>18</sup> The Attorney-General explained the rationale for the change in his second reading speech:

It is the case that, under the existing legislation, in a sudden and extraordinary emergency an expedited call-out made by the Prime Minister acting alone or, if the Prime Minister is unable to be contacted, the Minister for Defence and the Attorney-General acting together.

If only one of the authorising ministers can be contacted, an expedited call-out order can be made by either the Minister for Defence or the Attorney-General, together with an alternative minister, including the Deputy Prime Minister, the Minister for Foreign Affairs or the Treasurer.

In recognition of the key role that the Minister for Home Affairs plays in counterterrorism coordination, and as a member of the National Security Committee of Cabinet, the amendments will add the Minister for Home Affairs as a named alternative minister for the purposes of expedited call out.<sup>19</sup>

### ***Review of the Act***

1.21 Division 8 of the bill sets out the requirement for an independent review of the legislation at least every five years and provides accountability to Parliament through the Minister's tabling of the independent review report.<sup>20</sup>

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17 The Hon. Christian Porter, Attorney-General, 'Second Reading Speech', *House of Representatives Hansard*, 28 June 2018, p. 12.

18 Attorney-General's Department, *Submission 8*, p. 14.

19 The Hon. Christian Porter, Attorney-General, 'Second Reading Speech', *House of Representatives Hansard*, 28 June 2018, p. 12.

20 Attorney-General's Department, *Submission 8*, p. 14.

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## **Compatibility with human rights**

1.22 According to the EM, the bill is compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.<sup>21</sup>

1.23 The Parliamentary Joint Committee on Human Rights has expressed a number concerns about measures contained in the bill and has requested further information from the Attorney-General. These concerns are discussed in Chapter 2.

## **Senate Scrutiny of Bills Committee**

1.24 The Scrutiny of Bills Committee assesses legislative proposals against a set of accountability standards that focus on the effect of proposed legislation on individual rights, liberties and obligations and on parliamentary propriety. In *Scrutiny Digest* No. 8 of 2018, the Scrutiny of Bills Committee asked the Attorney-General for advice and further information on some aspects the bill. The Scrutiny of Bills Committee's concerns are discussed in Chapter 2.

## **Financial implications**

1.25 The EM states that the bill would have no financial impact.<sup>22</sup>

## **Conduct of the inquiry**

1.26 The committee advertised the inquiry on its website and wrote to relevant organisations inviting written submissions. The closing date for receipt of submissions was 31 July 2018. The committee received 16 submissions which are listed at Appendix 1 of this report.

1.27 The committee thanks all of the individuals and organisations that contributed to the inquiry.

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21 Explanatory Memorandum, p. 5.

22 Explanatory Memorandum, p. 3