

The Senate

Legal and Constitutional Affairs
Legislation Committee

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

September 2018

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Recommendations

Recommendation 1

2.62 The committee recommends that the Commonwealth Government give consideration to providing clear definitions of 'specified circumstances' in the legislation itself or in the Explanatory Memorandum for the purposes of making a call out of the Australian Defence Force.

Recommendation 2

2.63 The committee recommends that the Defence Amendment (Call out of the Australian Defence Force) Bill 2018 be passed.

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'.¹

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.²

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.³ 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

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.⁴

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.⁵

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.

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.⁶

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.

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.⁷

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.⁸

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.⁹

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.¹⁰ Proposed subparagraph 34(5)(b)(iv) operates to the same effect in relation to contingent call out orders (discussed below).¹¹

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.

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

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.¹³

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'.¹⁴ 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.¹⁵

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'.¹⁶

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

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.¹⁷

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.¹⁸ 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.¹⁹

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.²⁰

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.

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*.²¹

1.23 The Parliamentary Joint Committee on Human Rights has expressed a number of 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 of 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.²²

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.

21 Explanatory Memorandum, p. 5.

22 Explanatory Memorandum, p. 3

Chapter 2

Issues raised in evidence

2.1 This chapter considers the key issues raised in submissions to the inquiry, and in turn sets out the committee's views and recommendations.

General support for the proposed amendments

2.2 The majority of submitters broadly supported the bill's objective of streamlining call out orders of the ADF, in order to better protect the Australian population from acts of domestic violence, including terrorism.¹ As discussed below, some submitters also:

- suggested that the bill would better enable the ADF to apply its specialist skills and capabilities in responding to incidents of domestic violence, including terrorism;
- welcomed the clarity the bill would provide in relation to the use of lethal force;
- argued in support of the bill's provisions for an expansion of contingent call out; and
- noted that the bill would enhance the ADF's ability to respond to incidents across multiple jurisdictions.

Access to ADF specialist skills and capabilities

2.3 A number of submitters emphasised the importance of the ADF's specialist skills and capabilities in enhancing and complementing the work of State and Territory police during incidents of domestic violence and terrorism.²

2.4 For example, Mr Michael O'Connell AM APM submitted that, while there is a clear need for safeguards in relation to the call out of the ADF to protect citizens' rights, there may be circumstances where:

...the knowledge, skills and capabilities available to the ADF will provide either the better response to a terrorist or mass violence incident or enhance the police response to such.³

2.5 A similar argument was made by the Centre for Military and Security Law, which submitted that lowering the threshold for call out of the ADF:

1 See, for example, Northern Territory Police, *Submission 9*; Mr Michael O'Connell, *Submission 14*; Professor Rob McLaughlin, *Submission 1*; and Centre for Military and Security Law; *Submission 2*.

2 Explanatory Memorandum, p. 6; Attorney-General's Department, *Submission 8*, p. 4.

3 Mr Michael O'Connell, *Submission 14*, p. 2.

...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.⁴

Use of lethal force

2.6 In recognising the potential use of lethal force by ADF personnel as a consequence of the proposed amendments, a number of submitters described the safeguards contained in the bill as appropriate and necessary. The Centre for Military and Security Law argued:

[T]he 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.⁵

Contingent call out powers

2.7 Several submitters welcomed the expansion of contingent call out arrangements as a necessary step to provide for rapid responses to a domestic violence or terrorist incidents. For example, in supporting the expansion of the contingent call orders to include land and the maritime domain, the Centre for Military and Security Law noted:

[The proposal] 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.⁶

Multi-jurisdictional call out powers

2.8 As noted in the previous chapter, the bill's amendments are intended to offer the ADF flexibility and enhance its ability to respond to incidents across multiple jurisdictions.⁷ A range of submitters expressed their support for the proposed multi-jurisdictional call out powers, noting that incidents of domestic violence and terrorism can occur across jurisdictional boundaries.⁸

4 Centre for Military and Security Law, *Submission 2*, pp. 1–2.

5 Centre for Military and Security Law, *Submission 2*, p. 3.

6 Centre for Military and Security Law, *Submission 2*, p. 2.

7 The Hon. Christian Porter MP, Attorney-General, 'Second Reading Speech', *House of Representatives Hansard*, p. 28 June 2018, p. 12; Attorney-General's Department, *Submission 8*, pp. 5–6.

8 For example, the Centre for Military and Security Law, *Submission 2*, pp. 1–2; Mr Michael O'Connell AM APM, *Submission 14*, p. 2. Also referred to by the Hon. Christian Porter MP, Attorney-General, 'Second Reading Speech', *House of Representatives Hansard*, 28 June 2018, p. 12; Attorney-General's Department, *Submission 8*, pp. 5–6.

Issues raised and suggested amendments

2.9 Despite the support for the bill, as outlined above, some submitters made the case for a range of amendments to the bill as it is currently drafted. A summary of issues raised by submitters, and suggested amendments, is provided below.

Proportionality and human rights concerns

2.10 Some submitters argued that while it is important to acknowledge the ongoing issue of terrorism and the need to adapt to changes in terrorist methods, the proposed amendments contained in the bill may not be an appropriate and proportionate response to that challenge.⁹ Other submitters also raised human rights concerns, and suggested that the new powers the bill's measures would provide to the government and the ADF were excessive and disproportionate to the challenge at hand.¹⁰

2.11 The Joint Parliamentary Committee on Human Rights (PJCHR) also questioned whether the measures in the bill constituted a proportionate response to the apparent problems the bill was intended to address.¹¹

2.12 In contrast, the Explanatory Memorandum (EM) suggested that the measures contained in the bill are compatible with the Commonwealth Government's human rights obligations. In the context of protecting the Australian population from acts of significant violence, including terrorist incidents, it was argued that 'to the extent that they may limit human rights, such a limitation is necessary, reasonable and proportionate'.¹²

Changes to the threshold for call out

2.13 A number of submitters expressed their concerns about proposed sections 33 and 35 of the bill, which would remove the requirement that State and Territory authorities 'be unable, or likely to be unable', to manage a particular threat before a call out order is given. The bill would lower the threshold to whether the use of the ADF 'would likely enhance the ability of each of those States and Territories to protect the Commonwealth interest against the domestic violence' or 'to protect the State and Territory against the domestic violence'.¹³

2.14 Some submitters were concerned that under the lower threshold it may become routine for ministers to call out the ADF, even when circumstances might not

9 See, for example, Associate Professor Greg Carne, *Submission 16*, p.1, Civil Liberties Australia, *Submission 7*, pp. 12–13; Law Council of Australia, *Submission 11*, pp. 5–6 and 14; Australian Lawyers Alliance, *Submission 10*, pp. 4 and 9; Australian Lawyers for Human Rights, *Submission 5*; Mr Ian Brooke, *Submission 6*; Mr Joshua Badge, *Submission 13*.

10 Civil Liberties Australia, *Submission 7*; Australian Lawyers Alliance, *Submission 10*; Law Council of Australia, *Submission 11*; Associate Professor Greg Carne, *Submission 16*.

11 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report: Report 8 of 2018*, pp. 2–16.

12 Explanatory Memorandum, pp. 8 and 27. See also, proposed subsection 51N(3)(a)(i).

13 See sections 33 and 35 of the bill.

warrant call out.¹⁴ For example, Associate Professor Greg Carne, University of New England, argued:

[T]he Bill should not be crafted as a mechanism (however unintentionally and inadvertently) to allow military deployments into the domestic civilian sphere in other than extreme, essential and existential situations, such as terrorism situations beyond the capacity of well trained and equipped Federal, State and Territory police services.¹⁵

Circumstances where a callout order could be made

'Domestic violence'

2.15 The apparent lack of a clear definition of 'domestic violence' was raised as an issue by some submitters.¹⁶

2.16 For example, Mr Joshua Badge noted that the term 'domestic violence' was 'broad and subject to a high degree of interpretation'.¹⁷

2.17 In the absence of a clear definition for 'domestic violence' within the legislation, the PJCHR argued that there is a risk the term could be broadened to include 'a range of disturbances, such as political protest and civil disobedience'. This could result in the ADF being given unintended powers that is disproportionate to the provision's objective.¹⁸

2.18 Although the definition of 'domestic violence' is not found in the legislation itself, the EM states that 'domestic violence' is 'conduct that is marked by great physical force, and would include a terrorist attack or other mass casualty incident'.¹⁹

'Specified circumstances' in contingent call out

2.19 The bill includes provision for the contingent call out of the ADF to protect Commonwealth interests (section 34) or state and territories (section 36) if 'specific circumstances' arise. The Law Council noted that:

...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.²⁰

14 Law Council of Australia, *Submission 11*, p. 7.

15 Associate Professor Greg Carne, *Submission 16*, p. 2.

16 Mr Joshua Badge, *Submission 13*, pp. 1 and 3. See also Senate Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2018*, pp. 3–4; Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report: Report 8 of 2018*, p. 2.

17 Mr Joshua Badge, *Submission 13*, p. 3.

18 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report: Report 8 of 2018*, p. 8.

19 Explanatory Memorandum, p. 6.

20 Law Council of Australia, *Submission 11*, p. 8.

2.20 For the sake of clarity, the Law Council recommended that the EM be amended to include examples of what may constitute 'specified circumstances'.²¹

2.21 Similarly, Australian Lawyers for Human Rights referred to the lack of definition within the legislation of 'specified circumstances', and recommended that the government indicate, 'preferably within the text of the legislation', what events and circumstances might be considered 'specified circumstances' for the purposes of sections 34 and 36.²²

2.22 Further, to assess whether the call out of the ADF was justifiable in the circumstances, a number of submitters suggested including a retrospective review of its use through a parliamentary review mechanism.²³ Associate Professor Carne expressed support for regular and periodic review of contingent call out orders by several existing mechanisms, including by Parliamentary Committees. He also submitted that the review should 'guarantee a genuinely independent review of the Part—either as an ad hoc review or a five year review'.²⁴

Serious injury or death

2.23 Under proposed subsection 51N(3), the bill authorises the use of force by ADF personnel, including lethal force:

- in a call out order to protect life or prevent serious injury;
- to protect declared infrastructure against domestic violence or threat specified in the call out order;
- to allow measures to be taken against aircraft and vessels to give effect to the order; and
- if the person against whom force is used attempts to escape being detained and the member believes on reasonable grounds that the person cannot be apprehended in any other manner.

2.24 Several submitters expressed concerns about use of lethal force, and whether the bill was sufficiently clear in linking the use of such force to the protection of life.²⁵

2.25 In recognising concerns about the potential for 'a significant loss of life caused by the use of force', the EM states that the proposed changes are necessary, reasonable and proportionate to achieve their intended objectives. The EM also points

21 Law Council of Australia, *Submission 11*, p. 8.

22 Australian Lawyers for Human Rights, *Submission 5*, pp. 3 and 5.

23 Law Council of Australia, *Submission 11*, p. 8; Australian Lawyers for Human Rights, *Submission 5*, pp. 3 and 5; Associate Professor Greg Carne, *Submission 16*, p. 8.

24 Associate Professor Carne argued that the proposed subsection 51ZB, as currently drafted, lacks 'specificity, demonstrable independence from the Minister and balance'. See *Submission 16*, p. 8.

25 Law Council of Australia, *Submission 11*, p. 11; Name withheld, *Submission 12*, p. [2]; Centre for Military and Security Law; *Submission 2*, pp. 2–3.

to the multiple safeguards available, including requirements that apply to authorising Ministers in making call out orders.²⁶

Powers to detain persons and seize items

2.26 The PJCHR questioned whether measures in the bill that engage the right to liberty and right to freedom of movement are necessary. The PJCHR observed this right included the 'right not to be subject[ed] to arbitrary detention which requires that detention must be lawful, reasonable, necessary and proportionate in all the circumstances'.²⁷

2.27 Some submitters raised concerns regarding the broad definitions and their effect in relation to a 'person who may be detained' and 'thing that may be seized'.²⁸

2.28 For example, Associate Professor Carne commented that the definition of a 'person who may be detained' establishes 'a very low threshold', particularly when exercising powers of detention under proposed subsection 46 (7)(f) and proposed section 51P'.²⁹ Associate Professor Carne added:

The threshold for detaining a person (recalling that detention is by the ADF and not the AFP, State or Territory Police) should be raised by the inclusion of additional adjectival qualifiers before the word "threat" - such as serious, substantial or demonstrable - particularly as the referent categories are extremely broad - being a person's life, health or safety, or public health or public safety.³⁰

2.29 The Australian Lawyers Alliance also expressed concern about the broadness of the definitions of terms 'person who may be detained' and 'thing that may be seized'. The Alliance suggested the bill, as currently drafted, could allow the ADF detain a person or seize items 'in circumstances that are not connected to the domestic violence or threat specified in the call out order'.³¹

Powers to search and question

2.30 The bill would provide the ADF with certain powers it can exercise during call out, including powers to search locations, things and people, and to direct a person to answer a question or produce a document which is reasonably accessible to

26 Proposed section 46 further places restraints on the authorising minister and the ADF members. Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report: Report 8 of 2018*, p. 9; Explanatory Memorandum, pp. 9–10.

27 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report: Report 8 of 2018*, p. 11.

28 Definition contained in proposed section 31. Australian Lawyers Alliance, *Submission 10*, pp. 6–7; Name withheld, *Submission 12*, p. [2]; Law Council of Australia, *Submission 11*, p. 12.

29 Associate Professor Greg Carne, *Submission 16*, p. 2.

30 Associate Professor Greg Carne, *Submission 16*, p. 2.

31 Australian Lawyers Alliance, *Submission 10*, pp. 6-7.

the person (including identification).³² The creation of these powers was a cause for concern for some submitters.³³

2.31 The Australian Lawyers Alliance, for example, commented that the wording of proposed section 51A, which gives authorisation to search premises in a specified area, is too open to interpretation. It submitted that the bill should be amended to ensure there was a clear connection between the person who is likely to pose a threat, or thing in proposed subsection 51A(1)(b), with the domestic violence or threat specified in the call out order.³⁴ The Australian Lawyers Alliance added:

...that under s51A(2)(b)-(d) the search authorisation must relate to the call out order. [Furthermore], 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.³⁵

2.32 In relation to the right to remain silent, a number of submitters voiced concern that this right is restricted by proposed subsections 46(7)(h), 51D(2)(i), and 51L(3)(g). Submitters argued that these provisions limit the privilege against self-incrimination.³⁶

2.33 For example, Mr Badge proposed amendments be included to provide a right to 'reasonably refuse to answer such questions or produce such documents under proposed subsection 46(7) in relation to actions taken in proposed subsection 46(5) to protect against self-incrimination.'³⁷ As an alternative to the removal of these provisions, the Law Council suggested it should be made clear the provision 'may only be enlivened in an emergency' or 'compulsory questioning safeguards should be in place such as use and derivative use immunities'.³⁸

Restrictions on protest, assembly or industrial action

2.34 Some submitters raised concerns that the ambiguity of the language used under proposed section 39 could lead to a call out order being used to quell civil

32 Explanatory Memorandum, p. 13.

33 See, for example, Law Council of Australia, *Submission 11*, p. 9; Associate Professor Greg Carne, *Submission 16*, pp. 5–6; Civil Liberties Australia, *Submission 7*, p. 2.

34 Australian Lawyers Alliance, *Submission 10*, p. 7.

35 Australian Lawyers Alliance, *Submission 10*, p. 8.

36 Law Council of Australia, *Submission 11*, p. 12; Associate Professor Greg Carne, *Submission 16*, pp. 5–6, Civil Liberties Australia, *Submission 7*, pp. 10–11, Australian Lawyers for Human Rights, *Submission 5*, pp. 3–4.

37 Associate Professor Greg Carne, *Submission 16*, p. 6.

38 Law Council of Australia, *Submission 11*, p. 6.

protests or industrial action.³⁹ The PJCHR suggested that this could potentially infringe on the right to free speech, association and assembly.⁴⁰

2.35 Mr Badge argued that lethal force authorised against civilians should be curtailed and the 'contexts in which it is permissible must be defined and justified with greater clarity'.⁴¹

2.36 Associate Professor Carne and Civil Liberties Australia (CLA) echoed these concerns, with CLA noting that these rights are 'inherently bound in public protest, for which the call out section of the bill is at least partially targeted'.⁴²

2.37 The EM states:

[P]roposed paragraph 39(3)(b) prevents the CDF [Chief of the Defence Force] from utilising the ADF to stop or restrict any protest, dissent, assembly or industrial action. This prohibition is a safeguard against infringement on rights, including the right to peaceful protest and freedom of assembly.⁴³

2.38 However, the inclusion of exceptions in proposed subsection 39(3)(b) to this general prohibition raises the possibility of these restrictions occurring if there is a 'reasonable likelihood of serious damage to property' (subsection 3(b)(ii)).⁴⁴ Mr Badge argued that as the bill is currently drafted there is no lower or upper threshold for 'reasonable likelihood of serious damage to property'. Indeed, there is 'some ambiguity as to whether the ADF could be deployed in cases of violent or aggressive demonstration'.⁴⁵

2.39 Associate Professor Carne also submitted that the bill:

...provides for an inadequate default provision for the protection of protest, dissent, assembly or industrial action. This should be replaced with a proactive exclusion from the capacity to grant call out orders that have the likelihood, effect or consequence of deterring, stopping or restricting peaceable protest, dissent, assembly or industrial action.⁴⁶

39 Mr Joshua Badge, *Submission 13*, p. 2; Associate Professor Greg Carne, *Submission 16*, pp. 4–5; Mr Ian Brooke, *Submission 6*, p. 1; Civil Liberties Australia, *Submission 7*, pp. 5–6.

40 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report: Report 8 of 2018*, p. 12.

41 Mr Joshua Badge, *Submission 13*, p. 3.

42 Civil Liberties Australia, *Submission 7*, p. 3. CLA highlighted some past experiences when troops have been used by Australian governments to quell protests and industrial action, *Submission 7*, pp. 4–6.

43 Explanatory Memorandum, p. 51.

44 Explanatory Memorandum, p. 51. See also Mr Joshua Badge, *Submission 13*, p. 2.

45 Mr Joshua Badge, *Submission 13*, p. 2.

46 Associate Professor Greg Carne, *Submission 16*, p. 4.

2.40 Another concern identified in evidence received relates to the possible unintended use of proposed section 51L.⁴⁷ Under proposed section 51L, ADF members are authorised to take action to:

- prevent, or put an end to, damage or disruption to the operation of the declared infrastructure; and
- prevent, or put an end to acts of violence, or threats to a person's life; health or safety, or to public health or public safety.

2.41 Mr Badge suggested that the above provisions do not provide sufficient protection against their potential use in a call out to restrict a civil demonstration under the guise of protecting infrastructure.⁴⁸

Protections for ADF members when 'acting in good faith'

2.42 The bill includes protections for ADF members acting in good faith when exercising a power under call out. Section 51S of the bill provides that:

If, before, while or after exercising a power under any of Divisions 3 to 5 or this Division, a member of the Defence Force fails to comply with any obligation imposed under this Part that relates to the exercise of the power, the member is not, and is taken not to have been, entitled to exercise the power unless the member exercised the power in good faith.

2.43 According to the EM, this protection is intended to ensure ADF members are not prosecuted for 'a minor technical obligation, such as failing to wear a name badge'.⁴⁹

2.44 However, some submitters suggested that the protections might in fact provide ADF members with a broader immunity than was intended. For example, Australian Lawyers for Human Rights submitted that:

...in practice this is a wide exception to obligations on ADF members under the Bill. For example, clause 51S could mean that an ADF member can use force that is likely to cause the death of, or grievous bodily harm to, a person without complying with the restrictions on the use of force if they act in 'good faith'.

The term 'good faith' is abstract and has not been completely established within Australian law. The inclusion of this nebulous term in the Bill only serves to create confusion in the legal obligations of individual ADF members when they are exercising powers under the Bill.⁵⁰

47 Mr Joshua Badge, *Submission 13*, p. 2.

48 Mr Joshua Badge, *Submission 13*, p. 2

49 Explanatory Memorandum, p. 79.

50 Australian Lawyers for Human Rights, *Submission 5*, p. 3;

2.45 Likewise, the Law Council of Australia expressed its concern that 'such a provision may have the potential to grant immunity where actions may be considered...to be 'manifestly unlawful".⁵¹

2.46 Civil Liberties Australia argued that the standard for holding troops to account for their actions is too low. It argued that the standard should be measured against whether or not the circumstances were sufficient for the action taken.⁵²

2.47 Proposed section 51Z, which offers the defence of following superior orders in certain circumstances, also attracted the attention of several submitters. For example, Civil Liberties Australia claimed that it would provide a defence to 'any criminal act' committed by an ADF member who acted under the order of a superior.⁵³ For his part, Professor McLaughlin, Australian Centre for the Study of Armed Conflict and Society, suggested that the protection available should be tightened and clarified.⁵⁴

Other issues raised

Definition of substantive criminal law

2.48 The Law Council and Civil Liberties Australia suggested there was a need to clarify the bill's definition of 'substantive criminal law'. According to the Law Council, the definition in proposed section 31 includes confiscation proceedings, which are not regarded as 'a substantive matter of criminal law' and are 'typically civil proceedings'.⁵⁵

2.49 Civil Liberties Australia claimed the term, as it is used in the bill, is 'problematic because it is vague', adding:

...people might think something *is* a criminal offence, when it isn't. This means that higher criminal standards of evidence (beyond a reasonable doubt) or the rule against self-incrimination *don't* apply.⁵⁶

Timeframe order

2.50 The Law Council suggested changes be made to proposed subsections 33(5)(d)(ii) and 35(5)(d)(ii) so that an order makes it clear 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'.⁵⁷

51 Law Council of Australia, *Submission 8*, p. 10.

52 Civil Liberties Australia, *Submission 7*, pp. 6–7.

53 Civil Liberties Australia, *Submission 7*, p. 8.

54 Professor Rob McLaughlin, *Submission 1*, pp. 4–5.

55 Law Council of Australia, *Submission 11*, p. 8.

56 Civil Liberties Australia, *Submission 7*, p. 2.

57 Law Council of Australia, *Submission 11*, p. 10.

Making, varying and revoking call out orders

2.51 The Law Council submitted that proposed subsection 37(4) on making, varying and revoking call out orders be amended for clarity. As currently drafted, 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'.⁵⁸

2.52 As a proposed immunity, under proposed subsection 51S(2), explicitly applies to an invalidly made order, declaration or authorisation exercised in good faith. However, the Law Council noted that it is unclear whether this would also apply to a revoked or varied order.⁵⁹

Constitutional validity if a state withholds consent for use of the call out powers

2.53 A number of submitters raised the issue of constitutionality under proposed section 38, where an authorising Minister is able to make a call out order of the ADF without requiring a state or territory's request for assistance or for them to give their consent.⁶⁰

Committee view

2.54 The committee welcomes the government's reforms to streamline call out orders of the Australian Defence Force (ADF) to protect the Australian population from acts of domestic violence, including terrorism.

2.55 Ensuring the Australian population is protected from significant violence is paramount in the current challenging and complex threat environment. The measures in the bill would enhance the ability of the ADF to support State and Territory authorities to respond to domestic security incidents, particularly with respect to terrorism.

2.56 The committee recognises that this may, at times, warrant the use of force, including lethal force that is reasonable, necessary and proportionate to achieve the objective of saving lives and protecting Australians from significant violence. The committee regards these amendments as a positive development in realising this objective.

2.57 The committee notes a general agreement among most submitters that current legislation under Part IIIAAA does not adequately recognise nor address the difficult and complex security environment within which State and Territory authorities can rapidly respond to domestic violence or terrorist incidents. To this end, the committee appreciates the need to make it easier for States and Territories to access the ADF's specialist skills and capabilities in responding to such threats. The bill would achieve this by simplifying and clarifying the process for the call out of the ADF, and thereby

58 Law Council of Australia, *Submission 11*, p. 10.

59 Law Council of Australia, *Submission 11*, p. 10.

60 Law Council of Australia, *Submission 11*, Mr Joshua Badge, *Submission 13*, p. 3; Civil Liberties Australia, *Submission 7*, p. 7.

enhancing the ADF's ability to protect States, Territories, and Commonwealth interests, onshore and offshore, against domestic violence and terrorism. The committee considers that the ADF can and does complement and enhance the highly capable police forces of States and Territories in such circumstances.

2.58 The committee notes some issues identified by submitters and comments made by parliamentary committees on human rights and scrutiny of bills regarding proportionality and the possible need for clearer definitions and tighter safeguards against unintended consequences. Some of these concerns include the circumstances in which the ADF is called out, the ADF's use of lethal force as measured against proportionality, and matters relating to accountability and authorisation.

2.59 The committee is satisfied that the bill includes strong safeguards to ensure that call out of the ADF would only occur in limited circumstances, and that appropriate protections apply to the exercise of the ADF's powers under a call out order.

2.60 The committee also considers that the government might consider providing a clearer definition of 'specified circumstances' in relation to contingent call out, either in the Explanatory Memorandum or in the legislation itself.

2.61 The committee recommends that the bill be passed subject to the Commonwealth government's consideration of the committee's recommendations.

Recommendation 1

2.62 The committee recommends that the Commonwealth Government give consideration to providing clear definitions of 'specified circumstances' in the legislation itself or in the Explanatory Memorandum for the purposes of making a call out of the Australian Defence Force.

Recommendation 2

2.63 The committee recommends that the Defence Amendment (Call out of the Australian Defence Force) Bill 2018 be passed.

Senator the Hon Ian Macdonald

Chair

Australian Greens dissenting report

1.1 The Greens acknowledge the extensive work of the Committee in this inquiry, and thank everyone who made a public submission.

1.2 The Australian Greens agree with the Australian Lawyers for Human Rights who submitted:

The deployment of the ADF on to the streets of Australia and the powers that the ADF is authorised to use under the Bill are serious issues.¹

1.3 Civil Liberties Australia noted the Explanatory Memorandum for this bill failed to recognise its implications on rights freedom of association and free speech, and as such, recommended that:

The Committee returns the bill for re-briefing and re-drafting in relation to the human rights implications and to other problems identified in this submission.²

1.4 The Australian Greens share this concern.

1.5 The Law Council of Australia further recommended that the Explanatory Memorandum to the bill be amended:

...to provide for some examples of what may constitute 'specified circumstances'.³

1.6 This further supports concerns shared by legal and human rights stakeholders regarding the drafting and scrutiny of this bill.

1.7 The Australian Greens agree with the Australian Lawyers for Human Rights' submission that it:

...does not believe that the Bill should be enacted in its current form.⁴

Recommendation

1.8 The recommendation of the Australian Greens is that this bill should not proceed.

1 Australian Lawyers for Human Rights, *Submission 5*, p. 2.

2 Civil Liberties Australia, *Submission 7*, p. 4.

3 Law Council of Australia, *Submission 11*, p. 8.

4 Australian Lawyers for Human Rights, *Submission 5*, p. 2

Senator Nick McKim
Australian Greens

Appendix 1

Submissions

- 1 Professor Rob McLaughlin
- 2 Centre for Military and Security Law
- 3 Miss Shannon Reid
- 4 Inspector-General of Intelligence and Security
- 5 Australian Lawyers for Human Rights
- 6 Mr Ian Brooke
- 7 Civil Liberties Australia
- 8 Attorney-General's Department
- 9 Northern Territory Police
- 10 Australian Lawyers Alliance
- 11 Law Council of Australia
- 12 Name Withheld
- 13 Mr Joshua Badge, Deakin University
- 14 Mr Michael O'Connell AM APM
- 15 Mr Brendan Dwyer
- 16 Associate Professor Greg Carne