

# **Responses from legislation proponents — Report 12 of 2018**



MINISTER FOR INDIGENOUS AFFAIRS

Reference: MS18-004070

Mr Ian Goodenough MP  
Chair  
Parliamentary Joint Committee on Human Rights  
Parliament House  
CANBERRA ACT 2600

Dear Mr Goodenough

Thank you for your letter of 19 September 2018 about the Parliamentary Joint Committee on Human Rights' (the Committee) assessment of the Social Security Legislation Amendment (Community Development Program) Bill 2018 (the Bill).

As outlined in the Explanatory Memorandum to the Bill, the proposed amendments introduce reforms to the Community Development Programme (CDP) to increase support to the most vulnerable job seekers, and improve employment outcomes in remote Australia.

The Bill extends the targeted compliance framework (TCF) to CDP participants, with the exception of CDP participants undertaking subsidised employment. However, the Bill does not introduce the TCF. The TCF was introduced by the *Social Security Legislation Amendment (Welfare Reform) Act 2018*. Therefore, I have limited this response to the effect of the Bill rather than discussing the details of the TCF more generally.

The Government has been consulting with communities, job seekers and other stakeholders for a number of years on the CDP resulting in the program changes and new initiatives I announced at the 2019-19 Budget. At the 2017-18 Budget, the Government excluded the CDP from the TCF to allow for consultations and the development of a broader package of reforms which is now proposed in conjunction with the introduction of the TCF. designed to further increase job seeker engagement with the program, provide more support to vulnerable job seekers and create more pathways to jobs. These include a package of 6,000 subsidised jobs for CDP participants, reduced hours of participation, better access to health assessments, and increasing local control. These changes will ensure local job seekers are engaged, better supported and provided a clear pathway to a job.

The amendments promote the right to social security, the right to an adequate standard of living and the right to work. Furthermore, the amendments are consistent with the right to equality and non-discrimination and the right to equality before the law. The amendments are reasonable, necessary and proportionate to support job seekers in remote Australia and enhance their employment outcomes.

### *The right to social security and the right to an adequate standard of living*

The Bill promotes the right to social security and the right to an adequate standard of living, particularly as it is specifically designed to counter the risks of long-term unemployment and welfare dependency in remote job markets.

The proposed amendments are based on consultation and feedback received by the Department of the Prime Minister and Cabinet and will deliver a fairer and simpler arrangement for job seekers and CDP providers. Introduction of the TCF will remove penalties that CDP participants receive for one-off breaches of mutual obligation requirements. The new arrangements will also ensure that financial compliance penalties will focus on those who are persistently and wilfully non-compliant.

### *The right to equality and non-discrimination*

The Committee has suggested that the Bill may have a ‘disproportionate impact on Aboriginal and Torres Strait Islander Australians and job seekers living in remote Australia’ (paragraph 1.51, Committee Report 10 of 2018). This assertion is incorrect – CDP and the amendments proposed in the Bill apply equally to both Indigenous and non-Indigenous participants in remote Australia. Accordingly, both CDP and the Bill itself are consistent with the right to equality and non-discrimination.

### *The right to work*

As discussed in the Explanatory Memorandum, the Bill promotes the right to work. Schedule 1, Part 1, item 25 of the Bill inserts a new subsection 42AEA(4) in the *Social Security (Administration) Act 1999* to provide that an individual does not commit an unemployment failure if they are a declared program participant and become unemployed from subsidised employment as a result of a voluntary act or misconduct.

The Explanatory Memorandum also notes that the proposed subsidised jobs arrangement will include a requirement that where a participant voluntarily leaves a subsidised job or is dismissed due to misconduct, the participant will be prevented from taking up a place in subsidised employment for six months (paragraph 1.54, Committee Report 10 of 2018). This does not impact a CDP participant’s access to income support payments or ability to immediately re-engage with CDP. Rather, it is designed to ensure CDP participants can access long term employment and do not cycle through subsidised job placements.

To ensure there is flexible application of this arrangement that takes into consideration the individual circumstance of each CDP participant, it is not proposed that this requirement be enshrined in the CDP Bill. Rather, this would be outlined in policy guidance intended to support the interpretation and implementation of the subsidy. This policy guidance will include examples of when a six month preclusion period would not be appropriate – for example, where departure was related to workplace harassment of the employee. CDP providers are also required to discuss the appropriateness of any position with a CDP participant prior to placement in a subsidised job, giving CDP participants the best opportunities to succeed in their placements and move into long term employment.

In the event a CDP participant leaves a subsidised job, CDP providers will still be expected to continue working with local employers to seek opportunities for unsubsidised employment for CDP participants in their region. If a CDP participant leaves a position voluntarily or due to misconduct, they will still have access to unsubsidised employment opportunities.

Further information on the Bill's compatibility with human rights is provided at Attachment A. Thank you for the opportunity to address the matters raised by the Committee in relation to the Bill.

Yours sincerely

NIGEL SCULLION

4 October 2018

## Attachment A: Further information on the compatibility of the Bill with human rights

### *Introduction of the TCF for CDP participants*

The Bill introduces the TCF for CDP participants. This will ensure that CDP participants will be subject to the same compliance framework as currently applies in regional and urban Australia from 1 July 2018. The application of the TCF for CDP participants will include a number of additional enhancements and broader program improvements including:

- A reduced role for Centrelink and a greater role for local CDP providers to work with CDP participants in the application of the TCF.
- A reduction in the number of mutual obligations hours from up to 25 hours per week, to up to 20 hours per week, depending on a CDP participant's assessed work capacity.
- Reductions to income reporting requirements from fortnightly to quarterly requirements for CDP participants who have mutual obligation requirements of between 0 and 14 hours per week.
- Medical evidence requirements for Employment Services Assessments (ESAt), will change to enable local health practitioners to provide health related evidence of a CDP participant's capabilities. This means that local health providers can provide the evidence required to reduce a CDP participant's mutual obligation requirements.
- CDP participants will continue to be exempt from changes enacted under the *Social Services Legislation Amendment (Welfare Reform) Act 2018* relating to the removal of exemptions for drug or alcohol dependence.
- CDP participants in a subsidised job will be exempt from the TCF.

### *Provision of 6,000 subsidised jobs in remote Australia*

The Government will work with communities to support 6,000 jobs for CDP participants. These new jobs will grow the size and capacity of the remote labour market and support the development of more local businesses. The subsidised jobs will commence from February 2019 and will mean CDP participants have access to real wages, equivalent to the minimum wage or above. These workers will also be paid superannuation and other entitlements by their employer. This supports the right to gain a living by working as these CDP participants will no longer have to rely on welfare as their only source of income.

The Bill facilitates the creation of new subsidised jobs which will provide a pathway to employment for CDP participants. These participants will gain the skills and experience necessary to transition into long term unsubsidised employment opportunities. CDP participants in subsidised employment will also be exempt from activity test requirements in social security law and applicable mutual obligation requirements under the TCF. The measures outlined in the Bill support free choice of employment by recognising that participation in subsidised employment is voluntary. This measure also promotes the right to work as a legitimate objective because it seeks to counter the risks of long-term unemployment and welfare dependency to the individual and Australian society generally.



**THE HON PETER DUTTON MP  
MINISTER FOR HOME AFFAIRS**

Ref No: MS18-007866

Mr Ian Goodenough MP  
Chair  
Parliamentary Joint Committee on Human Rights  
Parliament House  
CANBERRA ACT 2600

*Ian,*  
Dear Mr Goodenough

Thank you for your correspondence of 19 September 2018 requesting further information on the Australian Federal Police Regulations 2018.

I have attached my response to the Parliamentary Joint Committee on Human Rights' Report 10 of 2018, as requested in your correspondence.

Yours sincerely

PETER DUTTON

*05/10/18*

## ***Australian Federal Police Regulations 2018***

**1.12 The preceding analysis indicates that the Commissioner's power to direct immediate disposal of property that is 'offensive' may engage and limit the right to freedom of expression.**

**1.13 The Committee therefore seeks the advice of the Minister on the compatibility of the measure with this right. In particular, the Committee seeks the advice of the Minister as to whether the measure is a proportionate limitation (including information as to relevant safeguards to protect freedom of expression).**

I acknowledge that the AFP Commissioner's power to direct immediate disposal of 'offensive' property under paragraph 76(1)(b) of the Australian Federal Police Regulations 2018 (the Regulations) may engage the right to freedom of expression.

However, any limitations on this right are permissible under Article 19(3) of the International Covenant on Civil and Political Rights, as these limitations are clearly prescribed by law (under delegated legislation) and are rationally connected to, and necessary for, the legitimate objective of protecting public morals.

The power to dispose of 'offensive' property under paragraph 76(1)(b) of the Regulations ensures that the Australian Federal Police (AFP) is not compelled to preserve property that is objectively contrary to the standards of morality, decency and propriety generally accepted by a reasonable person. If this power was not provided, the AFP would be compelled to retain possession of material that may be unacceptably racist, violent or sexual in nature.

This can include, for example, child pornography and child abuse material. Under Article 34 of the Convention on the Rights of the Child, this material impinges on the rights of children to be safe from sexual exploitation and abuse, including exploitative use in pornographic materials. Any limitation on freedom of expression engaged by the destruction of these materials is justified by the preservation of these rights.

Paragraph 76(1)(b) of the Regulations is also proportionate in achieving the objective of protecting public morals as:

- the Commissioner must make an assessment as to whether they are 'reasonably satisfied' (emphasis added) that the property is 'offensive in nature', and property will not be 'offensive' merely because the Commissioner subjectively takes offence, and
- a person may claim the market value of the disposed property from the Commonwealth under section 77 of the Regulations if a State or Territory court decides that the property was not 'offensive' in nature.

The fact that the term 'offensive' is not defined allows community standards and common sense to be imported into a decision about whether property is in fact 'offensive' in nature. The term 'offensive' has been used, without being defined,

across the Commonwealth statute book, including in legislation prohibiting offensive names on passports, offensive business names and offensive victim impact statements.<sup>1</sup>

I have also approved a supplementary explanatory statement, which provides that, in assessing whether property is 'offensive in nature' under paragraph 76(1)(b) of the Regulations, the Commissioner may have regard to the following (non-exhaustive) factors:

- the standards of morality, decency and propriety generally accepted by reasonable adults
- the literary, artistic or educational merit (if any) of the property, and
- the general character of the property (including whether it is of a medical, legal or scientific character).

This guidance makes it clear that whether property is 'offensive in nature' is an assessment which must be made on reasonable grounds, taking into account the nature of the material and standards accepted by reasonable adults.

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<sup>1</sup> *Australian Passports Act 2005* section 53, *Business Names Registration Act 2011* section 9 and *Crimes Act 1914* section 16AB(5).





**THE HON PETER DUTTON MP  
MINISTER FOR HOME AFFAIRS**

MS18-009356

Mr Ian Goodenough MP  
Chair  
Parliamentary Joint Committee on Human Rights  
Parliament House  
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*Ian.*

Dear Mr Goodenough

Thank you for your correspondence of 17 October 2018 requesting further information on the Crimes Legislation Amendment (Police Powers at Airports) Bill 2018.

I have attached my response to the Parliamentary Joint Committee on Human Rights' Report 11 of 2018 and a copy of the Australian Federal Police Code of Conduct, as requested in your correspondence.

I trust the information provided is useful.

Yours sincerely

PETER DUTTON

*30/10/18*

## ***Crimes Legislation Amendment (Police Powers at Airports) Bill 2018***

**1.53 The preceding analysis raises questions as to the compatibility of the measures with the right to privacy.**

**1.54 The committee therefore seeks the further advice of the minister as to this matter, including:**

- **whether the power in proposed section 3UQ(2)(b) of the bill to direct a person 'to do anything else' the constable or PSO considers on reasonable grounds to be necessary to facilitate the exercise of a power under proposed section 3UN is rationally connected to achieving the stated objective (including information as to what ancillary directions would be included in the scope of this power);**
- **whether the power to issue an identification direction under section 3UN(1)(b) is proportionate to the stated objective of the bill (including whether the power in proposed section 3UN(1)(b)(ii) to direct a person to provide identification where a constable or PSO considers on reasonable grounds it is necessary to give the direction to safeguard 'aviation security' is sufficiently circumscribed and accompanied by adequate safeguards); and**
- **whether the ancillary power in section 3UQ(2)(b) to direct a person to 'do anything else' the constable or PSO considers on reasonable grounds to be necessary to facilitate the exercise of a power under proposed section 3UN is proportionate (including whether the measure is sufficiently circumscribed and accompanied by adequate safeguards).**

### Identification direction – Proportionality

Although the power proposed in subsection 3UN(1)(b) (the power to give an identity direction) interferes with a person's privacy by requiring a person to produce identity documentation or, if this is not available, their name, address and date of birth (see subsection 3UN(2)), such an interference is proportionate. No further conduct can be compelled under this direction. This interference with a person's privacy is proportionate to the stated objective of the direction, namely to enhance safety and security in airports, and preserve national security, public order and the rights and freedoms of others.

Under subparagraph 3UN(1)(b)(i), a direction can be issued where a constable or protective service officer (PSO) suspects on reasonable grounds that the person has committed, is committing or intends to commit an offence against the law of the Commonwealth, or a law of a State having a federal aspect, punishable by imprisonment for 12 months or more. In these circumstances, the person subject to an identity direction poses a possible risk to airport safety and security, and the direction is necessary to allow a constable or PSO to quantify this risk as early as possible. It should also be noted that this power is currently available to constables under the Act, and is being expanded to enable PSOs to exercise this power.

PSOs also have counter-terrorist first response capability at major airports, so it is necessary for PSOs to be able exercise the powers prescribed in the Bill.

An identity direction can also be issued under subparagraph 3UN(1)(b)(ii) where it is considered on reasonable grounds to be necessary to safeguard 'aviation security', which is defined as the 'good order and safe operation' of a major airport, its premises, and flights to and from a major airport. The inclusion of the term 'good order' is designed to be interpreted in accordance with its ordinary meaning, and captures a wide range of disruptive behaviour that poses a risk to others in the aviation environment (including, but not limited to, criminal conduct).

By including the term good order, the intention of the Bill is to empower constables and PSOs to issue a direction where it is reasonably necessary to address risks to the peace, safety and security of all persons within the airport premises – for example, to deter or manage a public order disturbance. The measures in the Bill are not intended to interfere with peaceful assembly unless this assembly reaches the threshold of impacting the safe operation of an airport. Where an assembly reaches this threshold, constables and PSOs may exercise the powers to ensure the safety of those present on the airport premises.

The use of the words 'reasonable grounds that it is necessary' at subparagraph 3UN(1)(b)(ii) also ensures that the least rights restrictive approach is taken in issuing these directions. For example, it may be reasonably necessary to issue an identity check direction to a person who constantly requests security information from airport officials, but a move-on direction will likely be not reasonably necessary based on this behaviour alone. If further information is obtained about a person, revealing that they may pose a threat to a person arriving at the airport in the next two hours, a move-on direction for a three hour period may be necessary on reasonable grounds to ensure the good order and safe operation of the airport.

The proposed identity check directions are therefore proportionate in achieving the legitimate objectives of enhancing safety and security in airports, and preserving national security, public order and the rights and freedoms of others.

#### Ancillary powers – Rational connection to objective and proportionality

The ancillary power at 3UQ(2)(b) only enables the constable or PSO to require a person to stop or 'do anything else' that they consider on reasonable grounds to be necessary to facilitate the exercise of a power under section 3UN (identity check directions). Since section 3UN(2) limits the ways in which a person can satisfy the identity direction, the ancillary powers at 3UQ(2)(b) can only be used to facilitate one of those means of evidencing identity. The ancillary power at 3UQ(2)(b) does not enable a constable or PSO to require a person to comply with visual identity checks. Identity can be substantiated by producing government-issued photographic identification, by producing up to two other forms of identification, or by providing name, address and date of birth.

These constraints ensure that the power is rationally connected to the identity check direction and the underlying objectives of this direction. It also ensures that this direction is proportionate, as a constable or PSO must choose the least intrusive means to ensure that an identity check is facilitated, as a more intrusive option is unlikely to be found to be necessary on reasonable grounds.

As outlined in the Explanatory Memorandum, these directions will not enable a constable or PSO to detain a person for the purposes of exercising their powers, or undertake any search and seizure of the person's property.

Ancillary powers that could fall within the limits of paragraph 3UQ(2)(b) include (but are not limited to) directing that a person: step to the side to ensure they are not disrupting an airport walkway during an identity check or remove an identity document from its opaque casing to ensure it can be properly examined.

These ancillary powers are therefore rationally connected to legitimate objectives underpinning identity check directions and are proportionate in achieving these objectives.

**1.68 The preceding analysis indicates that the measures in the bill engage and limit the right to freedom of movement. The committee seeks the further advice of the minister as to the compatibility of the measures with this right, in particular:**

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective (including how current laws are insufficient to address this objective);**
- **how the measures are effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation is a proportionate limitation on the right to freedom of movement, including whether: the power to issue a move-on and ancillary direction where a constable or PSO considers on reasonable grounds it is necessary to give the direction to safeguard 'aviation security' is sufficiently circumscribed and accompanied by adequate safeguards; and**
- **the ancillary power to direct a person to stop or 'do anything else' the constable or PSO considers on reasonable grounds to be necessary to facilitate the exercise of the move-on or identification direction is sufficiently circumscribed and accompanied by adequate safeguards.**

**1.69 The preceding analysis also indicates the ancillary powers to require a person to stop or 'do anything else' to facilitate the exercise of the identification and move-on directions powers may engage and limit the right to liberty. The committee therefore seeks the further advice of the minister as to the compatibility of the measures with this right.**

#### Right to freedom of movement

The powers prescribed by the Bill may engage the right to freedom of movement in some instances. However, it is permissible to limit this right in accordance with Article 12(3) of the International Covenant on Civil and Political Rights (ICCPR), as these limitations are prescribed by law and are rationally connected to achieving the legitimate objective of protecting national security, public order and the rights and freedoms of others.

The National Terrorism Threat Level has remained at 'Probable' since September 2014, based on credible intelligence assessed by Australia's security agencies that individuals or groups continue to have the intent and capability to conduct a terrorist attack in Australia. Since this time, there have been six attacks and fourteen major counter-terrorism disruption operations in response to potential attack planning in Australia.

Within this threat environment, airports and the aviation sector are an attractive high-profile and high-impact target for criminals and terrorists. A number of attacks on airports and planes have occurred overseas and, in 2017, alleged plans to carry out a potentially catastrophic attack on a plane departing from Sydney International Airport were discovered. Airports are also key locations for gang-related activity, such as illicit drug trafficking, and provide pathways for serious and organised crime groups to expand their operations at a domestic and international level.

The proposed move-on and ancillary powers achieve the legitimate objective of protecting national security by preventing terrorist attacks and upholding public order by providing constables and PSOs with a mechanism to disrupt criminal activity and conduct that may pose a danger to others. The proposed move-on power has been formulated to ensure that a constable or PSO must tailor their direction so that it is most appropriate in the circumstances and proportionate to the threat situation identified.

Allowing a move-on direction to extend to specified airports or flights ensures that, should a threat only arise in relation to a particular flight or airport, the scope of the direction can be confined to the particular area where the threat may arise. Permitting a constable or PSO to issue the direction for up to 24 hours also allows the direction to be catered to only the necessary time period in which a threat may arise.

As noted by this Committee, there is currently only a limited power under the *Aviation Transport Security Act 2004* for police to direct a person to move on from the premises of certain airports if they reasonably suspect the person is committing or has committed an offence against the Act. This power may only be exercised for the purpose of safeguarding against unlawful interference with aviation as defined in that Act, and does not extend to the commission of other offences or disruptive behaviour more generally.

Under section 3UQ, a constable or PSO may also direct a person to stop or do anything else that is reasonably necessary to facilitate the exercise of the identity checking or move-on power. As a police officer is required to have reasonable grounds to exercise this power, this threshold ensures that the officer must choose the least intrusive means to facilitate an identity check or move-on direction, as a more intrusive option is unlikely to be found to be necessary on reasonable grounds.

The proposed ancillary power does not permit a constable or PSO to detain a person for the purpose of exercising their power, or undertake any search and seizure of the person's property. The intention of an ancillary direction is purely to enable an officer to direct a person to undertake reasonable and necessary steps to facilitate the exercise of an identity check or move-on direction – for example, an officer could direct a person to step to the side of a public walkway while conducting an identity check to ensure they are not disrupting others' use of the airport.

Further, the proposed move-on and ancillary powers may also protect the rights and freedoms of others present at an airport premises if, for example, a person's behaviour is affecting others use of the airport.

The powers prescribed in the Bill achieve the legitimate objective of protecting national security, public order and the rights and freedoms of others and are only exercisable in circumstances whereby it is reasonable and necessary to do so. To the extent that the powers may limit the right to freedom of movement under Article 12 of the ICCPR, such limitations are necessary and proportionate to achieving the legitimate objectives.

#### Right to liberty – right to security of the person and freedom from arbitrary detention

The scope of the ancillary powers prescribed in the Bill do not limit a person's right to security and freedom from arbitrary detention under Article 9 of the ICCPR, as the powers do not authorise a constable or PSO to arbitrarily or unlawfully arrest or detain a person under an ancillary direction.

The ancillary powers in the Bill can only be exercised by constables or PSOs where they consider on reasonable grounds that the exercise of these powers are necessary to facilitate an identity check direction or a move-on direction (see paragraphs 3UQ(1)(b) and (2)(b)). This ensures that a constable or PSO must choose the least intrusive means to ensure that these directions are facilitated, as a more intrusive option is unlikely to be found to be necessary on reasonable grounds.

These directions are also designed to achieve a narrowly defined outcomes, and detention will not be considered to be necessary on reasonable grounds to achieve these outcomes.

Identity check directions, for example, only compel a person to produce identity documentation or their name, address and date of birth (subsection 3UN(2)), which would typically occur within seconds.

Move-on directions, on the other hand, require a person to not take a specified flight, or leave and not re-enter airport premises, for a specified period (see subsection 3OU(3)). These directions are focused on expelling a person from a particular area, and do not enable detention of a person, which would be excessive, unnecessary and often counterproductive.

In addition, detention of a person would not be permitted under the ancillary powers as it would not be reasonably necessary to ensure compliance with these directions. A person must be put on notice that contravening a direction will constitute an offence and, if this direction is breached, a constable or PSO will be able to arrest a person to prevent further breaches from occurring.<sup>1</sup>

As the Bill only empowers a constable or PSO to issue an ancillary direction if they consider it to be necessary on reasonable grounds, the ancillary powers cannot be exercised in a manner that is arbitrary or unlawful. The scope of the ancillary powers prescribed in the Bill therefore do not limit a person's right to security and freedom from arbitrary detention under Article 9 of the ICCPR.

**1.77 The preceding analysis indicates that the measures in the bill may engage and limit the right to equality and non-discrimination.**

**1.78 The committee therefore seeks the advice of the minister as to the compatibility of the measures with this right, including:**

- **whether the measures in the bill are sufficiently circumscribed and accompanied by adequate safeguards to ensure that the powers in the bill are exercised in a non-discriminatory manner; and**
- **a copy of the AFP Code of Conduct, further information relating to the Behaviour Assessment and Security Questioning, and any other relevant information as to the professional standards and training that applies to AFP members and protective services officers to ensure that the powers in the bill will be exercised in a non-discriminatory manner.**

#### Rights of equality and non-discrimination

The measures in the Bill do not limit a person's right to equality and non-discrimination in accordance with Articles 2 and 26 of the ICCPR, as the circumstances in which a constable or PSO may lawfully exercise the powers do not differ on the basis of a person's age, gender, ethnicity, religious background or any other status.

To issue an identity check or move-on direction, a constable or PSO must have reasonable grounds for doing so which are linked to criminal activity or aviation security. By requiring a constable or PSO to have 'reasonable grounds' to issue a direction, this ensures that the powers are only exercised on the basis of objectively substantiated observations or intelligence relevant to aviation security or criminal conduct. A direction cannot be issued in the absence of such grounds, ensuring that the powers prescribed in the Bill will only be exercised in accordance with a constable or PSO's perception of a security risk or to preclude the commission of a crime.

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<sup>1</sup> Crimes Act 1914 section 3W (for constables) and section 14A Australian Federal Police Act 1979 (for PSOs).

Constables and PSOs are also required to adhere to their obligations under Commonwealth, State and Territory anti-discrimination legislation, broadly prohibiting officers from engaging in behaviour that constitutes discrimination and providing that all persons are to be equal before the law. These obligations, in conjunction with the safeguards prescribed in the Bill and provided through the training for constables and PSOs, will ensure that a person's right to equality before the law and to non-discrimination are not limited in a manner that is either directly or indirectly discriminatory.

### Behaviour Assessment and Security Questioning

The AFP's Behaviour Assessment and Security Questioning (BASQ) course was developed in 2011 from training material provided to the AFP by the Centre for Protection of National Infrastructure (CPNI) United Kingdom. It is based upon identifiable behaviours, which all have been extensively tested to be culturally neutral by CPNI, Portsmouth University and Essex Police Force.

Currently, the AFP runs one BASQ training course on an as-needed basis, including for new AFP Members and PSOs that are recruited to work in airports. The content of the BASQ course teaches officers to understand and consider the impacts of unconscious bias and stereotyping in carrying out their duties. The BASQ indicators are culturally-neutral and ensure that officers act on objective criteria based on non-demographic factors.

The initial level one BASQ training course includes three days of formal training in theory and practice. Ongoing practical on the job training is also delivered. The course itself is continually refined in accordance with identified best practice. A second course, which will operate as both refresher training and advanced training, is currently being developed.

### Professional standards

AFP Members and PSOs are subject to a comprehensive professional standards regime, including the AFP Code of Conduct (attached). The Code of Conduct requires all AFP appointees to act without discrimination or harassment in the course of AFP duties. Officers that use the powers in this Bill to target minority communities will be acting unlawfully and subject to the AFP's professional standards regime, which may result in disciplinary action, including termination.

AFP Members and PSOs are also subject to reporting requirements and complaint mechanisms as well as extensive independent oversight from the Commonwealth Ombudsman, the Australian Commission for Law Enforcement Integrity, this Committee, the Parliamentary Joint Committee on Law Enforcement, the Senate Standing Committee on Legal and Constitutional Affairs. Use of powers is also tested whenever evidence derived from those powers is led in court.

### Training

In accordance with standard practices for new police powers, a training package will be provided to officers affected by the amendments covering the new legislation. As part of that training package, AFP Members and PSOs will be given examples and scenarios that may be anticipated with a recommended course of action in response. The governance surrounding the application of the powers, recording and accountability mechanisms administering the legislation will form part of this package. The training will emphasise the legislative thresholds required to use the powers, which must be based on objective information. The AFP does not conduct a stand-alone course on anti-discrimination, as this training is provided in the context of the BASQ training.

The professional standards policies and training requirements applicable to State and Territory police officers are jurisdictionally specific, therefore it will be the responsibility of each State and Territory to determine the extent to which their officers receive guidance and training on exercising their powers in a non-discriminatory manner.

**1.81 The preceding analysis indicates the measures may engage and limit the right to freedom of expression and the right to freedom of assembly. The statement of compatibility does not acknowledge these rights may be engaged and limited by the bill. The committee therefore seeks the advice of the minister as to the compatibility of the measures with this right, including:**

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is a reasonable and proportionate measure for the achievement of that objective.**

#### Rights to freedom of expression and freedom of assembly

If the proposed identification, move-on and ancillary directions do limit the right to freedom of expression and the right to freedom of assembly, they do so in a way that is reasonable and proportionate to achieve the legitimate objectives of enhancing safety and security in airports, and preserving national security, public order and the rights and freedoms of others.

As outlined in the Explanatory Memorandum, there is a rational connection between these objectives and the amendments as constables and PSOs do not currently have adequate powers to engage with persons at airports to assess a potential risk or threat at the earliest opportunity, and the proposed amendments to enable a constable or PSO to issue directions will effectively address this deficiency.<sup>2</sup>

For example, the current identity check directions under subsection 3UM(1) of the Crimes Act 1914 may not allow a constable or PSO to check the identity of a person who is taking photos and videos of airport security features for several hours as, while this behaviour is suspicious, the person's conduct cannot be linked to a specific criminal offence punishable by twelve months imprisonment or more.

In July 2017, plans to carry out a potentially catastrophic attack on a plane departing from Sydney International Airport were discovered. After the arrest of the suspects, AFP officers reviewed the CCTV footage of the suspects at the airport and identified a number of unusual behaviours. Had officers on the ground at the airport observed those behaviours at the time they would not have had legal basis under the existing laws to require the suspects to provide evidence of their identity. The alleged plot was ultimately uncovered through other intelligence. The alleged offenders are currently before the courts in relation to charges for terrorism offences.

Under the revised identity check directions a constable or PSO will be permitted to issue an identity check direction because it is necessary to safeguard aviation security. This identity information could then be checked against intelligence holding to determine whether the person is a known person of interest.

I understand, however, that the Committee is particularly concerned about whether issuing an identity direction or move-on direction under subparagraphs 3UN(1)(b)(ii) or 3UO(1)(b)(iii) is a limitation on the rights to freedom of expression and assembly that is reasonable and proportionate in achieving the above objectives.

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<sup>2</sup> See paragraphs 4-15 of the Explanatory Memorandum.



These subparagraphs only allow a direction to be issued where a constable or PSO considers on reasonable grounds that it is necessary to safeguard 'aviation security'. The Committee has pointed out that 'aviation security' includes 'the good order' of an airport, and have raised concerns that this could allow for the disruption of peaceful protests.

As outlined above, however, the term 'good order' will be interpreted in accordance with its ordinary meaning, and capture a wide range of disruptive behaviour that poses a risk to others in the aviation environment (including, but not limited to, criminal conduct).

By including the term 'good order' in the definition of 'aviation security', the intention of the Bill is to empower constables and PSOs to issue a direction where it is reasonably necessary to address risks to the peace, safety and security of all persons within the airport premises – for example, to deter or manage a public order disturbance. The measures in the Bill are not intended to interfere with peaceful assembly unless this assembly reaches the threshold of impacting the safe operation of an airport. Where a protest reaches this threshold, constables and PSOs may exercise the powers to ensure the safety of those present on the airport premises.

The use of the words 'reasonable grounds that it is necessary' at subparagraphs 3UN(1)(b)(ii) and 3UO(1)(b)(iii) ensure that the least rights restrictive approach is taken in issuing these directions. For example, it will not be reasonably necessary to issue an identity check direction or move-on direction to a person who is engaging in a peaceful protest on airport premises. If the protest severely impedes the movement of people in or out of the airport, and individuals involved in the protest pose a risk to people's safety, it may be reasonably necessary for a constable or PSO to issue a move-on direction that those individuals leave the airport premises for a one hour period.

During this period, the protesters will be able to continue to express their opinion and assemble, but not in a way that impedes the good order of the airport and the movement of others.

To the extent this limits the right to expression and assembly, it is therefore reasonable and necessary to achieving the objective of public order (safety at the airport) and also to protecting the rights and freedom others (such as the rights to freedom of movement – airport ingress and egress unimpeded by a large group of protestors).



## AFP Code of Conduct

Adhering to the AFP Code of Conduct in this section is fundamental to complying with the professional standards of the AFP.

- An AFP appointee must act with due care and diligence in the course of AFP duties.
- An AFP appointee must act with honesty and propriety in the course of AFP duties.
- An AFP appointee must act with fairness, reasonableness, courtesy and respect, and without discrimination or harassment, in the course of AFP duties.
- An AFP appointee must comply with all Australian laws. For this purpose, Australian law means:
  - any Act, or any instrument made under an Act
  - any law of a state or territory, including any instrument made under such a law.
- An AFP appointee must comply with any lawful direction given by a person who has the authority to give such direction.
- An AFP appointee must disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) connected to their AFP duties or employment.
- To gain, or seek to gain, a benefit or advantage for the appointee or for any other person, or for any other improper purpose an AFP appointee must not improperly use:
  - information obtained directly or indirectly as a result of AFP duties or employment
  - duties, status, power or authority as an AFP appointee.
- An AFP appointee must use and manage Commonwealth resources in a proper manner.
- An AFP appointee must behave in a way that upholds the good order, discipline and security of the AFP.
- An AFP appointee must behave in a way that upholds the AFP Core Values, and the integrity and good reputation of the AFP.
- While deployed overseas, an AFP appointee must behave in a way that upholds the good reputation of Australia.



**The Hon Christian Porter MP**  
Attorney-General

MC18-008744

Mr Ian Goodenough MP  
Chair  
Parliamentary Joint Committee on Human Rights  
Parliament House  
CANBERRA ACT 2600  
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Dear ~~Mr Goodenough~~ 

Thank you for your letter of 22 August 2018 in relation to the issues that the Parliamentary Joint Committee on Human Rights (the Committee) identified in Report 8 of 2018 regarding the Defence Amendment (Call Out of the Australian Defence Force) Bill 2018. I appreciate the Committee providing an extension for a response until 17 September.

I offer the enclosed information for the Committee's consideration.

I appreciate the Committee's consideration of the Bill, and trust this information will be of assistance.

Yours sincerely

  
**The Hon Christian Porter MP**  
Attorney-General

Encl. Response to the Parliamentary Joint Committee on Human Rights

## **Response to the Parliamentary Joint Committee on Human Rights in relation to the Defence Amendment (Call Out of the Australian Defence Force) Bill 2018**

### **Use of force – Compatibility of the measure with the right to life**

#### **Committee Comment**

The committee requests advice as to whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective (including how current laws are insufficient to address this objective).

#### **Response**

As noted in the Explanatory Memorandum, the Bill pursues the legitimate objective of protecting the Australian populace from acts of significant violence. Amongst other things, the Bill will update the provisions of Part IIIAAA of the *Defence Act 1903* to ensure that they are adapted to the contemporary threat environment, giving effect to the recommendations of the Review of Defence Support for National Counter-Terrorism Arrangements. Australia's threat environment has evolved significantly since the call out order regime was last reviewed in 2005. The terror threat Australia faces today is greater and more complex than what it faced when these laws were introduced almost 20 years ago. While more traditional bomb attacks, as seen in the Manchester bombing in May 2017, continue to pose a risk, recent events overseas offer an insight into the risks of violence with which this Bill is designed to deal. The Borough Market attacks in London in June 2017 and the events in Paris involving the Bataclan Theatre in November 2015 were both characterised by highly mobile attackers that moved quickly between locations and premises across large areas. The changes to powers in proposed Divisions 3 and 4 of the Bill are aimed at these kinds of events.

The amendments to the threshold for calling out the ADF will ensure that the Commonwealth can more easily respond to requests from states and territories for ADF assistance. The current threshold requires authorising Ministers to be satisfied that a state or territory is not, or is unlikely to be, able to protect themselves or Commonwealth interests against the domestic violence. This threshold means that the Commonwealth would 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. In turn, this limits the ADF's ability to complement or augment a state or territory law enforcement response. For example, the ADF may be called out to assist a state or territory to deal with an attack by a hijacked aircraft where the relevant state or territory has limited, or no, capability to respond to such an airborne attack and the ADF has this capability.

Under the proposed new threshold, authorising Ministers will instead 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 to call out the ADF. This amendment will allow greater flexibility for the ADF to provide the most rapid, effective and appropriate specialist support to the states and territories, upon request. Crucially, the new threshold will respect the states' and territories' position as first responders by requiring an assessment of the potential benefit of ADF assistance to the requesting state or territory.

It is important to note that none of these changes will affect the fundamental role of the ADF in these situations. The ADF will not be deployed in preference to state and territory law enforcement. It is there to assist civilian authorities, not replace them. This is a key principle of call out that underpins this Bill. Under the amendments, states and territories will retain responsibility as first responders for domestic security incidents. State and territory police forces will be well-equipped to respond to many domestic terrorism incidents, and will continue to play this primary role alongside any deployment of ADF members.

As far as reasonably practicable, and even after it has been called out, the ADF will not act unless the relevant state or territory police force formally requests assistance. This ensures that any action involving the use of force is limited and only employed where it is reasonable and necessary, and required in the context of the ADF assisting state and territory law enforcement.

### **Committee Comment**

The Committee requests advice as to how the measure is effective to achieve (that is, rationally connected to) that objective (in each of the circumstances where use of lethal force is permissible).

### **Response**

The use of lethal force in specific circumstances is rationally connected to achieving the legitimate purpose of protecting others' lives.

The amendments to Part IIIAAA retain the existing legislative framework in relation to use of force. The current powers authorising the use of force are sufficient to achieve the above objective. Proposed section 51N, which authorises ADF members to use force, and places limitations on the situations in which they can use lethal force, or force that may cause grievous bodily harm, largely replicates current section 51T.

Section 51N of the Bill authorises a member of the ADF who is being used under a call out order to use lethal force in three limited circumstances when exercising powers under proposed Divisions 3, 4 or 5.

First, proposed subparagraph 51N(3)(a)(i) provides that an ADF member can use force that is likely to cause the death of, or grievous bodily harm to, the person where the member believes on reasonable grounds that it is necessary to protect the life of, or to prevent serious injury to, a person (including the member). The taking of this measure is explicitly and rationally connected to protecting others' lives. It permits the use of lethal force for the purposes of self-defence or the defence of others, so long as it is reasonable and necessary in the circumstances.

Second, proposed subparagraph 51N(3)(a)(ii) provides that an ADF member can use force that is likely to cause the death of, or grievous bodily harm to, another person where the ADF member believes on reasonable grounds that using such force is necessary to protect declared infrastructure against the domestic violence or threat specified in the call out order.

Infrastructure can only be 'declared infrastructure' under proposed section 51H if there is a threat of damage to it or disruption of its operations, and that damage or disruption would directly or indirectly endanger the lives of, or cause serious injury to, other persons. The use of lethal force where there is a nexus between the threatened damage or disruption of the declared infrastructure and the risk of death or serious injury of others is rationally connected to protecting others' lives. Once the infrastructure is 'declared infrastructure', proposed subparagraph 51N(3)(a)(ii) makes clear that an ADF member can only use lethal force if the threat of, or incident of, domestic violence specified in the call out order arises and poses a threat to that infrastructure and therefore directly or indirectly endangers the lives of others.

Third, proposed subparagraph 51N(3)(a)(iii) provides that an ADF member can use force in such a way that is likely to cause the death of, or grievous bodily harm to, a person when taking measures against an aircraft or vessel (up to and including destroying that aircraft or vessel) if doing so would be reasonable and necessary to give effect to the order under which the member is acting. Proposed subsection 46(6) adds further limitations on any measure (including use of force) taken against an aircraft or vessel.

There will be some circumstances where the use of lethal force would require a decision to destroy an aircraft or vessel. The question of whether it is reasonable and necessary to use

lethal force, or for the Minister to authorise the taking of measures involving the use of lethal force under proposed subsection 46(3), would need to take into account the potential consequences of not taking action and whether the aircraft or vessel posed a threat to the life or safety of others. The use of lethal force understood in this light is rationally connected to protecting others' lives.

There is an additional restriction for each of the three circumstances where the person against whom force is to be used is attempting to escape being detained by fleeing. Proposed paragraph 51N(3)(b) provides that the ADF member must not do anything that is likely to cause the death of, or grievous bodily harm to, the person unless that person has, if practicable, been called on to surrender and the ADF member believes on reasonable grounds that the person cannot be apprehended in any other manner. An ADF member cannot use lethal force against such a person, unless the requirements of proposed subparagraph 51N(3)(a)(i), (ii) or (iii), and those of proposed paragraph 51N(3)(b) are met.

### **Committee Comment**

The committee requests advice as to whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether the measure is sufficiently circumscribed and is the least rights restrictive approach; whether there are sufficient safeguards; whether what amounts to 'domestic violence' could be explicitly defined; in relation to the situation described in [1.28], where an aircraft or vessel is destroyed, resulting in the loss of life of large numbers of innocent people, whether the measure is proportionate).

### **Response**

#### Proportionate

In the context of a call out order, the measures in the Bill that may limit the right to life are not arbitrary, are sufficiently circumscribed and adopt the least restrictive approach.

The use of force powers are only enlivened in extraordinary situations where there is, or is likely to be, domestic violence and the Governor-General has made a call out order. The same principles apply to the use of lethal force and the use of force more generally. The provisions permitting the use of force, including lethal force, are anchored by proposed section 51N which requires that the use of force be 'reasonable and necessary' to protect others from the domestic violence specified in the order. This provides the flexibility needed for the measure to be commensurate to the threat while providing procedural safeguards to ensure there is sufficient accountability at each level.

In addition to the safeguards stated above in proposed section 51N, force can only be used in relation to an action that has been approved by an authorising Minister. The actions include preventing, or putting an end to, acts of violence or threats to any person's life, health or safety, or to public health or public safety (proposed paragraph 46(5)(b)), and protecting any persons from acts of violence, threats to any person's life, health or safety, or to public health or public safety (proposed paragraph 46(5)(c)). The effect of these paragraphs is to confine the circumstances in which force may be used. These provisions operate both individually, and in conjunction with each other, to ensure that the eventual exercise of any power under a call out order is not arbitrary and is not disproportionate to the threat.

Furthermore, the use of force powers and the limitations that apply to individual ADF members must be understood against the limitations and safeguards that operate at a Ministerial and ADF command level. At the Ministerial level, for example, authorising Ministers may only decide to advise the Governor General to issue a call out order where they are satisfied of a range of matters, including that domestic violence is actually occurring or likely to occur, and after considering the nature of that violence and whether ADF assistance would enhance a state or territory's law enforcement response (under proposed subsections 33(2), 34(2), 35(2) and 36(2)). Authorising Ministers must also determine which

specific types of powers are appropriate to make available to the ADF to respond to the violence (under proposed subparagraphs 33(1)(c), 34(1)(c), 35(1)(c) and 36(1)(c)).

At the ADF command level, proposed subsection 39(2) requires the Chief of the Defence Force (CDF) to only utilise the ADF under a call out order in such manner as is reasonable and necessary for the purposes specified in the order.

#### Definition of 'domestic violence'

Part IIIAAA provides the legislative framework authorising the ADF to be called out to use force to resolve 'domestic violence' occurring in Australia. Part IIIAAA uses the term 'domestic violence' as this is the term used in section 119 of the Constitution, which deals with state requests for assistance in responding to domestic violence.

The term is not defined in the Constitution. It refers to conduct that is marked by significant force and would include a terrorist attack, hostage situation, and widespread or significant violence. In other words, for a call out order to be made, there needs to be violence of such a magnitude that it endangers, or risks endangering, the lives of others. By contrast, peaceful industrial action, political protests or civil disobedience would not fall within the definition of 'domestic violence' that would enliven the use of the call out powers.

#### Declared infrastructure

Under proposed subsection 51H(1), the authorising Ministers may declare that a particular infrastructure, or a part of particular infrastructure, is declared infrastructure.

The authorising Ministers may only do so if they believe on reasonable grounds that there is a threat of damage or disruption to the operation of the infrastructure (or, if a contingent call out order is in force, there would be such a threat), and the damage or disruption would directly or indirectly endanger the life of, or cause serious injury to, any person (subsection 51H(2)). The types of infrastructure intended to be declared as declared infrastructure include, for example, power stations, dams and water treatment plants. Damage or disruption to the operation of such infrastructure could directly or indirectly cause widespread loss of life. There must always be a nexus between the damage or disruption to the infrastructure and the risk of death or serious injury to a person.

This is an important limit on the making of such a declaration, providing a clear link between a declaration and threats to the life or safety of others. The authorising Ministers must revoke the declaration if they cease to believe these matters, or the state or territory that requested the declaration requests its revocation (subsection 51H(3)). Therefore, a declaration may only remain in effect while the authorising Ministers are satisfied that this important nexus exists.

Significantly, while a declaration may be made whether or not a call out order is in force, it has no effect until a call out order is in force. Call out can only be authorised where domestic violence is occurring or is likely to occur within Australia, or there is a threat in the offshore area, and the authorising Ministers are satisfied that the ADF should be called out (proposed sections 33 to 36). Accordingly, an infrastructure declaration has no practical effect unless there is an incident of domestic violence.

In addition, the call out order must state that the powers in Division 5 to protect declared infrastructure apply for them to be used. The powers are focused primarily on preventing and ending damage or disruption to the operation of declared infrastructure, and on preventing, ending and protecting people from acts of violence and threats.

An ADF member being utilised under a call out order, which includes protection of declared infrastructure, may or may not need to use force against a person in exercising powers to protect the infrastructure. An ADF member may be able to take a range of other steps to protect the infrastructure. Proposed subsection 51N(1) makes clear that an ADF member is only able to use force if it is reasonable and necessary in the circumstances. Proposed

subparagraph 51N(3)(a)(ii) contains special requirements for an ADF member using force that is likely to cause the death of, or grievous bodily harm to, a person to protect declared infrastructure. Under paragraph 51(N)(3)(a)(ii), the ADF member must believe on reasonable grounds that the use of potentially lethal force is necessary to protect the declared infrastructure against the domestic violence or threat specified in the call out order. Therefore, there is a connection between the power to use force under proposed section 51N and protection of life, because infrastructure may only be the subject of a declaration under proposed section 51H if damage or disruption would endanger life (proposed subsection 51H(2)).

Taken together, the matters that must be satisfied before an ADF member is required to act to protect declared infrastructure, and the limitations on the use of force to what is reasonable and necessary in the circumstances, provide a proportionate limitation. There are no less rights restrictive alternatives that would address the extraordinary circumstances in which the ADF members would be exercising such powers in protecting declared infrastructure.

#### Destruction of aircraft or vessel

Proposed paragraphs 46(5)(d) and (e) provide that an ADF member may take measures (including the use of force) against an aircraft or vessel, up to and including destroying the aircraft or vessel, and that an ADF member may give an order relating to the taking of such measures. These powers broadly replicate powers available under the existing legislation (sections 51SE and 51ST) and are subject to proposed subsection 46(6).

Whether a measure is reasonable or necessary is central to the authorisation and exercise of the powers in proposed paragraphs 46(5)(d) and (e). This involves a proportionality assessment.

In recognition of the potentially significant loss of life that the use of force in such circumstances may occasion, there are several matters that must occur before an ADF member is in a position to consider the exercise of this power, and even then, there are multiple safeguards on the exercise of the power.

First, the Governor-General must have made a call out order in response to domestic violence that is occurring, or likely to occur. The discussion above notes the types of significant violent circumstances that would need to exist to engage call out. The authorising Ministers must also have decided that Division 3 powers, which include proposed paragraphs 46(5)(d) and (e), should be available for use by the ADF.

Second, an authorising Minister must have specifically authorised action against an aircraft or vessel, except where there is insufficient time to obtain the authorisation because a sudden and extraordinary emergency exists (dealt with separately below) (subsection 46(1)).

The question of whether it is reasonable and necessary to use lethal force, or for the Minister to authorise the taking of measures involving the use of lethal force under proposed subsection 46(3), would need to take into account the potential consequences of not taking action and whether the aircraft or vessel posed a threat to the life or safety of others. The significance of this decision-making process is reflected in the fact that the legislative framework requires this consideration at the Ministerial level.

Proposed paragraphs 46(5)(d) and (e) also allow measures to be taken against aircraft or vessels that may not involve the loss of life. For example, the ADF may use force against unmanned or unoccupied aircraft and vessels. The ADF may also take measures against an aircraft or vessel that do not involve the use of force against people or the destruction of that aircraft or vessel.

Third, an ADF member can only take measures in relation to an aircraft or vessel if a number of conditions have been met (subsection 46(6)). These conditions ensure that an ADF member does not take action against an aircraft or vessel on the basis of a manifestly



unlawful order, or where circumstances have changed in a way that is material to taking an action or giving an order. The conditions regarding change in circumstances are particularly important in the context of air and maritime threats, where the situation may change quickly. They ensure that an ADF member does not take action on the basis of an order from someone who is not at the scene, who cannot accurately assess whether a threat still exists, or whether it is still reasonable and necessary to take the action ordered. This will also be reflected in operational documents such as Rules of Engagement.

The limitation on taking a measure against an aircraft or vessel under proposed subsection 46(6) also needs to be viewed within the broader use of force obligations on ADF members. Proposed subsection 51N(1) provides that a member of the ADF may only use such force against persons or things as is reasonable and necessary in the circumstances and, if using force against persons, must do so in accordance with the restrictions specified in subsection 51N(3). In relation to the exercise of powers under paragraphs 46(5)(d) or (e), the member, in using force against a person, must not do anything that is likely to cause the death of, or grievous bodily harm to, the person unless it is reasonable and necessary to give effect to the call out order under which, or under the authority of which, the member is acting (subparagraph 51N(3)(a)(iii)). As noted above, the requirement to consider whether it is reasonable and necessary to use such force in taking a measure against an aircraft or vessel would involve a proportionality assessment. In this regard, destroying an aircraft or vessel in a way that would involve the death of, or serious injury to, persons may only be reasonable and necessary if that aircraft or vessel posed a significant threat to other people (for example, by causing mass casualties).

This same assessment would be required in an emergency situation. Proposed paragraphs 46(5)(d) and (e) authorise an ADF member to take measures against an aircraft or vessel where they believe on reasonable grounds that there is insufficient time to obtain an authorisation because a sudden and extraordinary emergency exists. This recognises that there may be circumstances that evolve quickly and in an unforeseen way, particularly air and maritime threats. However, this power is also subject to a number of safeguards. The exercise of this power in emergency circumstances can only occur where there is already a call out order in place and it provides for the use of Division 3 powers. The ADF member must have a belief on reasonable grounds that there is insufficient time to obtain Ministerial authorisation. Crucially, the ADF member remains subject to the obligation under subsection 51N(1) to only use such force against persons or things as is reasonable and necessary in the circumstances.

This framework ensures that the use of force in relation to an aircraft or vessel is proportionate to any potential loss of life it may entail. It provides sufficient flexibility to deal with evolving threats but does not go further than is necessary to achieve the legitimate objective. It only authorises use of force where it is reasonable and necessary in the circumstances, meaning that the use of force will be graduated and only used as a last resort. Use of force which would result in loss of life would only be exercised in the most exceptional circumstances, such as when there is a serious threat of mass casualties if action is not taken against the aircraft or vessel.

#### Use of force against fleeing suspect

The framework in the previous section also applies in relation to the use of force against a person who is attempting to escape being detained. Proposed paragraph 51N(3)(b) authorises the use of force against a person who is attempting to escape being detained by fleeing where that person has, if practicable, been called on to surrender and the ADF member believes on reasonable grounds that the person cannot be apprehended in any other manner.

Additionally, a member of the ADF must not use force against the fleeing person unless the member believes on reasonable grounds that the use of force is necessary to protect life

including the member's life (subparagraph 51N(3)(a)(i)), protect declared infrastructure (subparagraph 51N(3)(a)(ii)) which could only occur if there is an infrastructure declaration in place, or it is reasonable and necessary to give effect to an order in relation to aircraft or vessels (subparagraph 51N(3)(a)(iii)).

Further, any use of force remains subject to the obligation that such force against persons is only what is reasonable and necessary in the circumstances (subsection 51N(1)).

As discussed above, use of force needs to be viewed in the broader context. These circumstances would only arise in the context of a call out order, which requires the existence or likelihood of domestic violence. The use of force is always subject to what is reasonable and necessary in the circumstances. This entails a proportionality analysis, which requires the ADF member to consider other tactics or approaches to apprehend the fleeing person before resorting to this extreme measure. This ensures that the taking of the measure is proportionate and necessary to the threat the person poses, and requires a graduated approach in response to the threat.

### **Detention of individuals – Compatibility of the measure with the right to liberty**

#### **Committee Comment**

The committee requests advice as to whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective.

#### **Response**

The amendments authorising ADF members to detain persons for the purpose of placing the person in the custody of a member of a police force are necessary to achieve the legitimate objective of responding to, and protecting the Australian populace from, acts of significant violence, including terrorism.

For the powers to be used under proposed subsection 46(7), they must be in connection with an action authorised by an authorising Minister (proposed paragraph 46(1)(a)). Alternatively, the powers to detain certain persons may be used without authorisation, but only where the ADF member believes on reasonable grounds that there is insufficient time to obtain authorisation because a sudden and extraordinary emergency exists (proposed paragraph 46(1)(b)).

Under proposed paragraph 46(7)(d), an ADF member may search persons, locations or things for things that may be seized, or persons who may be detained, in relation to the call out order. Proposed paragraph 46(7)(f) provides that an ADF member may detain any person found in the search that the member believes on reasonable grounds is a person who may be detained in relation to the call out order for the purpose of placing the person in the custody of state or territory law enforcement at the earliest practicable time.

Proposed section 31 of the Bill defines a 'person who may be detained', in relation to a call out order, as a person:

- who is likely to pose a threat to any person's life, health or safety, or to public health or public safety (paragraph (a)), or
- who has committed an offence, against a law of the Commonwealth, a State or a Territory, that is related to the domestic violence or threat specified in the call out, and whom it is necessary, as a matter of urgency, to detain (paragraph (b)). The note at this paragraph makes clear the ADF member must believe on reasonable grounds that the conditions in this paragraph have been met.

In the extreme context of a domestic violence incident, these powers will be necessary to detain persons who are inciting or carrying out acts of domestic violence so that the lives of

others can be protected. This is clearly a protective purpose. While law enforcement will have primary responsibility for managing an incident, there will be situations where the ADF may be operating away from law enforcement. This could occur, for example, where there are highly mobile attackers spread over a wide geographical area. These powers will enable the ADF to protect the life, health or safety of others, or public health or safety by detaining a person who poses a threat to others, and handing them over to the police as soon as practicable, to be dealt with in accordance with the due process of law.

The current powers are insufficient to enable ADF members to detain persons who pose a risk to the operation or integrity of declared infrastructure. Proposed subparagraph 51L(3)(e)(ii) will allow an ADF member to detain a person whom the member believes on reasonable grounds is likely to pose a risk to the operation or integrity of declared infrastructure. This furthers the objective of protecting others by enabling the ADF to detain persons who may damage or disrupt declared infrastructure and, as a consequence, endanger the lives of others.

Furthermore, the Bill narrows the ability for ADF members to detain persons on the grounds of committing a Commonwealth, state or territory offence. The definition now requires that the offence be related to the threat or violence specified in the order. Narrowing this ability ensures that the ADF only detains persons for purposes directly connected to the commission or attempted commission of actions related to the domestic violence to which the call out order relates.

#### **Committee Comment**

The committee requests advice as to whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including what safeguards apply once a person is handed over to police; prior to a handover to police whether there are sufficient safeguards; and whether the measure is the least rights restrictive approach).

#### **Response**

The Bill provides the ADF with the power to detain a person who may be detained in each of Divisions 3, 4 and 5. While the committee's analysis focussed on the incidental power to detain persons in Division 3 of Part IIIAAA, the following comments about the safeguards and procedures involved in the ADF detaining a person who may be detained apply equally to the powers in Divisions 4 and 5.

Under proposed paragraph 46(7)(f), an ADF member may detain any person found in the search that the member believes on reasonable grounds is a person who may be detained in relation to the call out order for the purpose of placing the person in the custody of state or territory law enforcement at the earliest practicable time. Similar powers exist in proposed sections 51D and 51L. The deprivation of liberty in this situation is a necessary precursor to detention in a regular policing context.

An ADF member being utilised under a call out order may only detain a person for the purpose of placing the person in the custody of a member of a police force at the earliest practicable time. There are no powers in the Bill providing for extended detention without charge. Once the person is placed in the custody of state or territory police, it will be up to the police to arrest, question, charge or release the person, in accordance with the criminal law and the standard policing procedures of that state or territory.

In recognition of the fact that these provisions limit the right to liberty, the Bill provides a number of safeguards to ensure that the use of these powers is proportionate and is not arbitrary. First, the ADF may only detain a person where a member has reasonable grounds to believe that the person is a person who may be detained (see proposed subsection 46(7), sections 51D and 51L). Further, proposed section 51P requires a member of the ADF to

inform detained persons of the reasons for their detention at the time they are detained. In particular, this means that the ADF member must inform the person (as applicable):

- of the offence the person is reasonably believed to have committed (proposed paragraph 51(1)(a))
- that the person is believed to be likely to pose a threat to any person's life, health or safety, or to public health or safety, and the reasons for that belief (proposed subparagraphs 51P(1)(b)(i) and (ii)), or
- that the person is believed to be likely to pose a risk to the operation or integrity of declared infrastructure, and the reasons for that belief (proposed subparagraphs 51P(1)(c)(i) and (ii)).

This ensures that the person being detained is made aware of the grounds for their detention in accordance with procedural fairness and in a timely manner.

These powers to detain certain persons are only enlivened where domestic violence of the kind specified in a call out order occurs, or is likely to occur. In these circumstances, the rapid apprehension of persons who may be inciting or perpetrating domestic violence is critical to mitigate the risk for harm, and the magnitude of that harm. The detention powers in the Bill represent the least rights restrictive approach, in that they are focussed on allowing the ADF to detain persons who either present a threat, or who are engaging in criminal action connected to the domestic violence. In this sense, they are tailored at enabling the ADF to assist state and territory police in a practical sense. Once the ADF has detained a person, their detention is only permitted to protect others and to assist state and territory law enforcement in placing suspects in custody.

The amendments also provide a more limited approach to the right to detain as compared to existing legislation, for example by raising the threshold for detention in proposed section 51D from a 'suspicion' to a 'reasonable belief'.

### **Powers to control the movement of individuals – Compatibility of the measure with the right to freedom of movement**

#### **Committee Comment**

The Committee requests advice on how the right to freedom of movement is engaged, insofar as the Bill provides for ADF powers to erect barriers, to stop individuals and vehicles and to require people to move on from particular areas.

#### **Response**

The right to freedom of movement is set out in Article 12 of the International Covenant on Civil and Political Rights (ICCPR). Articles 12(1) and 12(2) provide that the right to freedom of movement encompasses the freedom to move within the territory of a State, the freedom to choose one's residence and the freedom to leave any country, including one's own. Article 12(3) provides that these freedoms may be restricted by law, and by reasons of necessity to protect national security, public order, public health or morals or the rights and freedoms of others, as long as the restrictions are consistent with the other ICCPR rights.

Proposed subsections 46(7), 51D(2) and 51L(3) engage the right to freedom of movement. These provisions provide ADF members with powers to control the movement of people.

Proposed subsection 46(7) enables an ADF member to control the movement of persons (paragraph 46(7)(b)) and to evacuate persons to a place of safety (paragraph 46(7)(c)). These powers may be exercised where a call out order specifies that Division 3 applies.

Proposed subsection 51D(2) provides powers that may be exercised to control the movement of persons in connection with a specified area declaration made under Division 4. A member of the ADF being utilised under a call out order may:

- erect barriers or other structures at the border of, or in any part of, the specified area (paragraph 51D(2)(a))
- stop any person in the specified area (paragraph 51D(2)(b))
- direct any person not to enter the specified area, to leave or not to leave the specified area, or to move or not to move from or to another place in the specified area (paragraph 51D(2)(c))
- direct a person in charge of any means of transport to not bring the transport into the specified area, to take or not to take the transport out of the specified area, to take the transport from a place in the specified area to another place in the specified area, or not to take the transport from a place in the specified area to any other place or to a specified place in the specified area (paragraph 51D(2)(d))
- direct a person in charge of a means of transport not to move the means of transport within the specified area (including by bringing it into or taking it out of that area) unless the person agrees to a member searching the person and the means of transport and any thing in or on the means of transport (paragraph 51D(2)(f)), or
- direct any person not to move within the specified area (including by coming into or going out of that area) unless the person agrees to a member searching the person (paragraph 51D(2)(g)).

Proposed subsection 51L(3) provides powers that may be exercised to control the movement of persons in connection with the protection of declared infrastructure under Division 5. For the purposes of protecting declared infrastructure, a member of the ADF being utilised under a call out order may control the movement of persons or of means of transport (paragraph 51L(3)(a)) and evacuate persons to a place of safety (paragraph 51L(3)(b)).

The provisions restricting movement operate in accordance with procedures established by law. They are required to protect national security and public order and, in particular, ensure the safety of persons and the preservation of infrastructure that affects the lives and safety of persons in the vicinity of domestic violence in the extreme context of call out.

#### **Committee Comment**

The Committee requests further information on whether the measure pursues a legitimate objective for the purposes of international human rights law (including how current laws are insufficient to address this objective).

#### **Response**

The proposed provisions authorising ADF members to control the movement of persons pursue the legitimate objective of responding to, and protecting the Australian populace from, acts of significant violence, including terrorism.

ADF members have the power to control and restrict the movement of persons under existing Part IIIAAA provisions (see sections 51I, 51IB, 51R, 51SE, 51SM). The Bill will simplify, harmonise and address minor gaps in the ADF's existing powers to control the movement of people. It makes no substantive changes to these powers from those in existing Part IIIAAA.

As set out above, Australia's threat environment has evolved significantly in recent years. In addition to attacks and threats related to the use of explosive devices, recent events overseas highlight the growing risk of highly mobile attackers moving quickly between locations and premises across large areas. The powers to restrict movement in proposed Divisions 3 to 5 of

the Bill are aimed at ensuring existing powers in Part IIIAAA are appropriate and adapted to respond to these kinds of events, while maintaining appropriate safeguards.

The powers are necessary for protective purposes. They enable the ADF to establish secure perimeters around known areas of domestic violence, move people away from that violence and out of harm's way. They also allow the ADF to control the persons who enter and exit the area, ensuring members are able to protect the public from dangerous persons and things associated with the domestic violence.

#### **Committee Comment**

The Committee requests further information on how the measure is effective to achieve (that is, rationally connected to) that objective.

#### **Response**

When viewed in the context of a call out order, the exercise of these powers is reasonable in the contemporary threat environment. Where domestic violence is occurring, or is likely to occur, it is reasonable to restrict the movement of persons to ensure the safety of the Australian public and to ensure that individuals who pose a threat can be located and apprehended as appropriate.

As noted above, this environment is characterised by the threat of highly mobile attackers that move quickly between locations and premises across large areas, and the exact location of a threat may not be known or may change rapidly as a domestic violence situation develops.

In these circumstances, it is the ADF's role to assist state and territory police in responding to the domestic violence. As the ADF and state and territory police may not always be operating in close proximity, it is necessary for ADF members to have the power to control the movement of persons, including those who may pose a threat to the safety of others. This ensures that the ADF is able to assist in situations involving significant violence to protect the safety of the public and ensure that individuals who pose a threat can be located. This could involve setting up a barrier, cordoning off an area or directing people to move to another location. These powers are reasonable and proportionate in ensuring public order and safety particularly where there is an ongoing threat or significant damage in a crowded place or the need to preserve evidence.

Accordingly, any limitation on the right to freedom of movement is rationally connected to achieving the legitimate objective of responding to, and protecting the Australian populace from, acts of significant violence, including terrorism. The powers can be exercised for protective purposes, to keep people away from threats and other actors carrying out acts of violence, or to control the movement of dangerous people.

#### **Committee Comment**

The Committee requests further information on whether the limitation is a reasonable and proportionate measure to achieve the stated objective.

#### **Response**

The provisions which could restrict movement are reasonable and proportionate to achieve the objective discussed above.

The power to restrict the movement of persons under proposed subsections 46(7), 51D(2) and 51L(3) may only be exercised in the extreme context of a call out order, where the Governor-General has authorised the ADF to respond to domestic violence that is actually occurring or likely to occur (proposed sections 33 to 36). Such incidents could include catastrophic terrorist incidents involving widespread or significant violence. The powers to restrict the

movement of persons may only be exercised if the authorising Ministers specify that the Divisions in which these powers are located apply to the call out order.

These powers are necessary and proportionate in the context of call out. They have a protective function. For example, a perimeter could be set up around an incident to ensure that people are appropriately protected from violence occurring in the area. The powers can also be used in searching for suspects, allowing ADF members to manage movements in or out of a particular area while the location of a suspect is ascertained. It is important to note, however, that state or territory police forces would be the first responders in the circumstances contemplated by the Bill and they are well trained and equipped to respond to such situations.

Recognising that the exercise of these powers might restrict or interfere with a person's freedom of movement, there are a number of safeguards on the authorisation and exercise of these powers to ensure that they are used for a proper purpose, are proportionate to the threat, and are exercised in accordance with procedures established by law, without unduly limiting the operational flexibility the ADF needs to deal with a wide variety of potential situations of domestic violence.

A member of the ADF who is being utilised under a call out order may only exercise the power to restrict movement under proposed subsection 46(7) if an authorising Minister has authorised the taking of an action, or the member believes on reasonable grounds that there is insufficient time to obtain the authorisation because a sudden and extraordinary emergency exists (subsection 46(1)).

Relevantly, under proposed subsection 46(5) a member of the ADF may take an action to:

- capture or recapture a location or thing
- prevent, or put an end to, acts of violence or threats to life, health or safety, or to public health or public safety, or
- protect people from acts of violence or threats to life, health or safety, or to public health or public safety.

The ADF member may only restrict movement under proposed paragraphs 46(7)(b) or (c) in connection with these actions. This reinforces that the ADF member will usually exercise the power to restrict movement in connection with public safety and protection.

Further, an ADF member must not control the movement of persons for longer than is reasonable and necessary in the circumstances (subsection 46(8)). This limitation on the length of time that an ADF member is permitted to restrict the movement of persons invokes an assessment of proportionality and appropriately places a limit on the period during which the restriction on the freedom of movement might apply.

The power to restrict movement in proposed subsection 51D(2) relates to specified areas. In addition to requiring a call out order to be in effect, these powers cannot be exercised unless the authorising Ministers have declared an area to be a specified area (subsection 51(1)).

A specified area is a limited geographical area. If a specified area declaration is made, the authorising Ministers must arrange for the preparation of a statement that includes, among other matters, a description of the specified area and its boundaries (subsection 51(6)). The statement must generally be broadcast so as to be capable of being received within the specified area and must be forwarded to each House of Parliament within 24 hours of the declaration being made (subsection 51(7)). While there are exceptions where this will not be appropriate (subsection 51(8)) (for example, it may interfere with law enforcement efforts to apprehend a perpetrator), broadcast of the area notifies the public of the specified area in which ADF members might exercise their powers to restrict the movement of persons.

Subsection 51D(1) provides that the proposed powers in subsection 51D(2) apply if an ADF member who is being utilised under a call out order believes on reasonable grounds that there is in a specified area:

- a person who is likely to pose a threat to a person's life, health or safety, or public health or public safety
- a person who has in their possession a thing that is likely to pose a threat to a person's life, health or safety, or public health or public safety, or cause serious damage to property
- a person connected with the domestic violence or threat specified in the order
- a thing that is likely to pose a threat to a person's life, health or safety, or public health or public safety, or cause serious damage to property, or
- a thing connected with the domestic violence or threat specified in the order.

There must be a clear nexus between the exercise of the powers to restrict movement under proposed subsection 51D(2) in the context of a specified area, and the health and safety of people and the public.

The power to restrict movement in proposed subsection 51L(3) relates to the protection of declared infrastructure. Exercise of such powers to protect declared infrastructure is only relevant if the authorising Ministers have declared particular infrastructure, or a part of particular infrastructure (subsection 51H(1)) and the authorising Ministers remain satisfied there is:

- a threat to damage or destroy infrastructure
- damage, or disruption to, the infrastructure would kill or seriously injure people
- there is 'domestic violence' that is the subject of a call out order, and
- the call out order specifies that Division 5 powers to protect declared infrastructure apply.

In these circumstances a member of the ADF may take an action to:

- prevent or put an end to damage or disruption to the operation of the declared infrastructure
- prevent or put an end to acts of violence or threats to any person's life, health or safety or to public health or safety,
- protect any persons from acts of violence or threats to any person's life, health or safety or to public health or safety (subsection 51L(2)).

The ADF member may only exercise the powers to restrict movement in subsection 51L(3) in connection with taking one of these actions. Accordingly there is a clear link between the exercise of the powers to restrict movement in protecting declared infrastructure, and protection of people and the public.

Further, an ADF member must not control the movement of persons or of means of transport for longer than is reasonable and necessary in the circumstances (subsection 51L(4)). This limitation on the length of time that an ADF member is permitted to restrict the movement of persons invokes an assessment of proportionality and appropriately places a limit on the period during which the restriction on the freedom of movement might apply.

The powers to restrict movement are circumscribed by their purpose. They must be connected to an incident of domestic violence that is occurring or likely to occur. The powers in



subsections 51D(2) and 51L(3) are further narrowed, as they must be connected with a specified area or the protection of declared infrastructure.

The powers to restrict movement are also temporary. The Bill does not allow call out powers to be exercised for longer than is strictly necessary. Further, call out orders restricting movement may only be validly extended in limited circumstances. The powers are only enlivened in the context of a call out order, which is subject to a time limit (see subsections 33(5), 34(5), 35(5), 36(5) and 37(2)) and must be revoked when, amongst other things, an authorising Minister ceases to be satisfied that there is domestic violence, or that the ADF should be called out (proposed subsection 37(3)). Accordingly, any restrictions on persons' freedom of movement will be short, and no longer than is reasonable and necessary in the circumstances.

The powers to restrict movement in the Bill are necessary to protect the public, including to keep them away from dangerous situations and to contain the perpetrators of domestic violence to a smaller area. They include appropriate safeguards to ensure that they are the least intrusive means of achieving the legitimate objective of the Bill.

**Search powers and powers to direct a person to answer a question or produce a document in specified areas – Compatibility of the measure with the right to privacy**

**Committee Comment**

The Committee requests advice as to whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective (including how current laws are insufficient to address this objective).

**Response**

The Bill improves the current search powers by addressing two issues in the existing legislation. The Bill creates a more streamlined authorisation process to enable ADF members to search premises within the specified area. The Bill also addresses a gap in the current powers, which do not allow ADF members to search premises for persons who are likely to pose a threat.

**Authorisation process**

The current process for authorising the search of premises is administratively burdensome and may restrict the ADF's ability to swiftly and effectively protect others from acts of significant violence. Under current subsection 51L(1), the CDF may only issue an authorisation to search premises in a specified area where he or she believes on reasonable grounds that there is a dangerous thing on the premises and that it is necessary as a matter of urgency to make the dangerous thing safe. The current legislation requires the CDF to identify and authorise search powers for individual premises (paragraph 51L(2)(b)), which may prove challenging in a time compressed, dynamic environment with a mobile threat. In particular, this provision does not enable an ADF member to search for a dangerous thing that they know is in the area without identifying the precise premises in which it is located. This overly inflexible process may undermine the ADF's ability to respond, because the authorisation is based on the premises, rather than the thing (or person) that poses the threat.

The Bill will provide the ADF with a more streamlined power to search premises within a specified area, which is better adapted to the current threat environment. It is crucial that ADF members have the powers to conduct sweeps of areas in which the precise location of the threat within that area may be unknown or mobile. The new provision enables the search authorisation to authorise the entry and search of all premises within a specified area (proposed subparagraph 51A(2)(a)(i)), or specified premises within the specified area

(subparagraph 51A(2)(a)(ii)), for the purposes of finding the person or thing that poses a threat, or determining that the person or thing is not there. This will enable ADF members to identify and neutralise threats, and confirm that premises within a specified area are safe.

#### Grounds for authorising a search of the premises

Under the existing legislative scheme, the CDF can only issue an authorisation to search premises in a specified area where he or she believes on reasonable grounds that there is a dangerous thing on the premises and that it is necessary as a matter of urgency to make the dangerous thing safe. This means that the ADF could be prevented from searching premises in order to find persons who pose a threat to others' lives, health or safety where the ADF does not know whether they possess a dangerous thing at that moment. In this regard, the current powers could inhibit the ADF achieving the objective of safeguarding the Australian populace from threats of domestic violence in the context of a call out order. Proposed subsection 51A(1) expands the grounds on which the CDF may issue a search authorisation to allow the ADF to also search for a person who is likely to pose a threat (proposed paragraph 51A(1)(a)) or is connected with the domestic violence or threat specified in the order (proposed paragraph 51A(1)(c)). For example, this could include a person who may be seeking to assist others in carrying out acts of domestic violence to which the call out order refers.

The two improvements ensure that the ADF has the necessary powers to search premises for persons or things that are likely to pose a threat to others' lives, health or safety, or to seriously damage property, or are connected with the domestic violence or threat specified in the call out order. While these powers temporarily limit the right to privacy in the context of a call out order, they do so in order to achieve the legitimate objective of protecting others from an act of significant violence. This is particularly so given that the powers are specifically targeted toward seizing and neutralising domestic violence-related threats to others' lives.

#### **Committee Comment**

The Committee requests advice as to how the search powers are effective to achieve (that is, rationally connected to) that objective.

#### **Response**

The measures that engage the right to privacy are provided in:

- proposed Division 3 which provides ADF members with special powers, including powers to search locations, things and people (see paragraphs 53-67 and 110-122 of the Explanatory Memorandum)
- proposed Division 4 which provides ADF members with powers exercisable in specified areas, including powers to search premises, means of transport and people (see paragraphs 68-94 and 110-122 of the Explanatory Memorandum), and
- proposed Division 5 which provides ADF members with powers to protect declared infrastructure, including powers to search locations, things and people (see paragraphs 95-109 and 110-122 of the Explanatory Memorandum).

The Committee identifies two areas of concern in relation to the right to privacy.

First, the Committee queries how the incidental search powers are effective to achieve (that is, rationally connected to) the objective of responding to and protecting the Australian populace from acts of significant violence, including terrorism.

The incidental search powers exist under the current legislation (paragraphs 51I(1)(c) and 51IB(c)). The incidental search powers are provided in proposed Division 3, subsection 46(9) and proposed Division 5, subsection 51L(5).

Proposed subsection 46(9) provides additional powers for an ADF member to do anything incidental to anything in proposed subsections 46(5) or (7), including enter any place or premises or board an aircraft or vessel. The incidental powers in subsection (9) do not themselves require specific authorisation by an authorising Minister. However, they can only be exercised where an authorising Minister has authorised one or more of the actions in proposed subsection 46(5).

Proposed subsection 51L(5) similarly enables an ADF member to do anything incidental to the powers in relation to declared infrastructure in proposed subsections 51L(2) or (3). These powers can only be exercised where an authorising Minister has declared particular infrastructure to be declared infrastructure under proposed subsection 51H(1), and where they are incidental to taking an action in subsection 51L(2) (either directly or indirectly via subsection 51L(3)).

These incidental powers are rationally connected to the objective of responding to and protecting the Australian populace from, acts of significant violence. The incidental powers clarify that an ADF member may enter any place or premises, or board an aircraft or vessel, in exercising these powers, in connection with the purpose of protecting others from domestic violence. For example, an ADF member can only exercise the incidental power to search premises in proposed subsection 46(9) in relation to the actions authorised in proposed subsection 46(5), which are connected to the purpose of the legislation to protect others' lives.

Here, the incidental powers would enable ADF members to follow or search for a person connected with domestic violence whether they are on public or private property. Proposed subsection 51L(5) operates in the same way. Without the incidental powers, proposed subsections 46(5), 46(7), 51L(5) and 51L(7) may be rendered redundant. For example, it would not be possible for ADF members to end or protect others from acts of domestic violence if the legislation allowed the ADF to only search publicly accessible locations. In this regard, the incidental powers are critical to ensuring that the ADF is able to perform the actions set out in proposed subsection 46(5), and protect the Australian community from acts of domestic violence.

Second, the Committee seeks clarification of the search powers in relation to specified areas, and how these powers further the objective of protecting the Australian populace from acts of significant violence, including terrorism.

The Bill does not enable a situation where everyone in a specified area may be subject to search, questioning and seizure powers and without the ADF member having a reasonable suspicion. Proposed subsection 51D(1) provides that an ADF member may search a person if the member *believes on reasonable grounds* that there is in a specified area:

- a person who is likely to pose a threat to any person's life, health or safety or to public health or public safety (proposed subparagraphs 51D(1)(a)(i) and (ii))
- a person who has in their possession a thing likely to pose a threat to any person's life, health or safety, or to public health or public safety, or to cause serious damage to property (proposed subparagraphs 51D(1)(b)(i) and (ii))
- a person connected with the domestic violence or threat specified in the order (proposed paragraph 51D(1)(c))
- a thing likely to pose a threat to any person's life, health or safety, to public health or public safety, or to cause serious damage to property (proposed subparagraphs 51D(1)(d)(i), (ii) and (iii)), or

- a thing connected with the domestic violence or threat specified in the order (proposed paragraph 51D(1)(e)).

Only once that condition is met, can an ADF member then exercise the powers in proposed subsection 51D(2) subject to further restrictions. For example, an ADF member is only permitted to use the search and seizure powers in a specified area with the person's consent (proposed paragraphs 51D(2)(f), (g) and (h)). In addition, proposed subsections 51D(3) and (5) provide search powers in relation to means of transport on which the ADF believes on reasonable grounds there is a dangerous person or thing (that is, as set out in proposed subsection 51D(1)), or suspects (within the meaning of proposed subsection 51D(1)).

The Bill does enable an ADF member being utilised under a call out order to stop a person in the specified area under proposed paragraph 51D(2)(b), and direct them in accordance with proposed subparagraphs 51D(2)(c)(i), (ii), (iii) and (iv). However, this limitation is rationally connected to the legitimate objective of protecting the lives of others in the context of a domestic violence incident. The contemporary threat environment is likely to involve highly mobile attackers, as well as attacks and threats related to the use of explosive devices. To enable the ADF to adequately assist state and territory law enforcement, they must be equipped with search powers, which may only be used subject to certain conditions being met. They are not powers that can be exercised freely in a specified area. The requirements of consent or reasonable belief ensure that the use of the power is connected with the overarching objective of protecting others' lives, whether directly from a threat of domestic violence or through assisting state and territory law enforcement.

#### **Committee Comment**

The Committee requests advice as to whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether it is necessary, whether it is the least rights restrictive approach and whether there are adequate and effective safeguards in place in relation to its operation).

#### **Response**

These powers are proportionate to the objective of responding to, and protecting the Australian populace from, acts of significant violence, including terrorism. As detailed in the Explanatory Memorandum, the powers that may be used pursuant to Divisions 3, 4 and 5, including the incidental powers, are reasonable and proportionate.

It is a fundamental principle of call out that the civilian law enforcement powers remain paramount, and that the ADF is used only to support state and territory law enforcement agencies as primary responders. The Bill expressly recognises that state and territory law enforcement and the ADF play different roles under a call out order. The Bill does not grant ADF members law enforcement powers *in addition to* Part IIIAAA powers. Rather the Part IIIAAA powers are carefully calibrated to enable ADF members to assist state and territory law enforcement; they do not enable ADF members to perform a law enforcement role. In particular, the Bill does not provide the ADF with power to generally seize things that may constitute evidence of an offence. As detailed above, the Bill will enable the ADF to seize things:

- that are likely to pose a threat to any person's life, health or safety, or to public health or public safety, or that are likely to cause serious damage to property, or
- that are connected with the domestic violence or threat specified in the call out order, and that are necessary, as a matter of urgency, to seize.

Under proposed section 51Q, the Bill requires that whenever an ADF member seizes a thing, and believes on reasonable grounds that the thing has been used or otherwise involved in the

commission of an offence, they must give the thing to a member of a police force at the earliest practicable time (proposed subparagraph 51Q(3)(c)(ii)).

In this regard, the limitation on the right to privacy is reasonable and proportionate, because the limitations on that right are no more than is necessary to enable the ADF to assist state and territory law enforcement in responding to a domestic violence incident.

In addition, the Bill preserves Parliament's oversight role in relation to call out under Part IIIAAA. Under proposed paragraphs 51ZA(1)(b) and (c), the Minister must present to Parliament a copy of any specified area declarations that relate to a call out order that has been made, and any report on the utilisation of the ADF that occurred under that order, including the number of premises searched in specified areas. This ensures that Parliament can adequately scrutinise the operation of the powers exercised under Division 4, including the extent to which the right to privacy is engaged in the context of a particular call out order.

### **Compatibility of the measure with the right to freedom of expression, association and assembly**

#### **Committee Comment**

The Committee requests advice on how the amendments engage the right to freedom of assembly, expression and association.

#### **Response**

The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) protect the rights to freedom of expression, and freedom of association and assembly.

Under Article 19 of the ICCPR, the right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers. The exercise of this right may be subject to certain restrictions but only as provided by law and as are necessary for the respect of the rights or reputations of others, or for the protection of national security, public order, or public health or morals.

Article 21 of the ICCPR recognises the right of *peaceful* assembly. No restrictions on the exercise of this right are permitted other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others.

Article 8(1)(a) of the ICESCR includes the right of everyone to form and join trade unions. Similar to article 21 of the ICCPR, this right may be restricted only as prescribed by law and to the extent necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others. The Bill makes no provision with respect to the right to form or join trade unions.

There are extremely limited circumstances in which the Bill might engage the right to freedom of expression, association and assembly. The powers in the Bill are premised on the occurrence or threat of domestic violence, or a threat in the offshore area (proposed subsections 33(1), 34(1), 35(1) and 36(1)). The rare type of situation in which this could arise, and interact with those human rights, is if there were a protest, industrial action or act of civil disobedience *and* there were a significant violent incident. In that situation, the Bill gives the ADF the power to protect those persons involved in the peaceful protest or dispute. Moreover, as previously noted, the ADF's role in a call out is to assist state or territory police, as the primary responders to domestic violence. State and territory law enforcement agencies are generally well-equipped to protect protestors and control crowds in such situations.

Where the ADF is called out, the Bill imposes a range of limitations and safeguards on the authorisation and use of ADF powers to ensure that the exercise of any power under a call out order is necessary, reasonable and proportionate in the circumstances. These limitations and safeguards operate at various levels, including at the Ministerial level, at the ADF command level, and also at the level of individual ADF members.

The authorising Ministers must be satisfied that the ADF *should* be called out, having regard to the nature of the domestic violence and whether the ADF would enhance the state or territory law enforcement response (subsections 33(1) and (2), 34(1) and (2), 35(1) and (2) and 36(1) and (2)).

In particular, the Bill imposes limitations on the way in which the CDF may utilise the ADF. If the Governor-General makes a call out order, or in relation to a contingent call out order the circumstances specified in the order arise, subsection 39(1) requires the CDF to utilise the ADF in such manner as is reasonable and necessary for the purposes specified in the call out order under subsection 33(3), 34(3), 35(3) or 36(3).

The CDF's power is subject to further limitations, including subsection 39(3) which requires that in doing so the CDF must not stop or restrict any protest, dissent, assembly or industrial action, except if there is a reasonable likelihood of the death of, or serious injury, to persons, or serious damage to property.

Accordingly, call out of the ADF cannot occur outside of this limited context in which there is an incident of domestic violence occurring or likely to occur, and the ADF can only be utilised for the specific purpose set out in the call out order. Therefore, the powers in the Bill have no operation in relation to peaceful industrial action, political protests or civil disobedience as these would not constitute incidents of 'domestic violence'.

#### **Committee Comment**

The Committee requests advice on whether the measure pursues a legitimate objective for the purposes of international human rights law (including how current laws are insufficient to address this objective)

#### **Response**

The powers within the Bill, including in proposed section 39, are necessary to achieve the legitimate objective of responding to, and protecting the Australian populace from, acts of significant violence, including terrorism.

As set out previously, Australia's threat environment has evolved significantly in recent years. In addition to attacks and threat related to the use of explosive devices, events overseas highlight the growing risk of highly mobile attackers moving quickly between locations and premises across large areas. To the extent that the measures in the Bill may engage the rights to freedom of assembly, expression and association, it has made changes to Part IIIAAA to adapt and respond to this changed threat environment and ensure that the ADF is able to be called out to assist state and territory police to protect the public when appropriate.

To the extent that the Bill engages the rights to freedom of expression, association and assembly, these are only engaged in the extreme circumstances that would be associated with the call out of the ADF. Call out orders can only be made where domestic violence is occurring or likely to occur (subsections 33(1), 34(1), 35(1) and 36(1)). Call out is subject to limitations and safeguards which operate at various levels, including at the Ministerial level, at the ADF command level, and also at the level of individual ADF members.

Subsection 39(1) requires the CDF to utilise the ADF in such manner as is reasonable and necessary for the purposes specified in the call out order under subsection 33(3), 34(3), 35(3) or 36(3).

The term 'domestic violence' is not defined in legislation but refers to conduct that is marked by significant force and would include a terrorist attack, hostage situation, and widespread or significant violence. Part IIIAAA uses the term 'domestic violence' as this is the term used in section 119 of the Constitution, which deals with state requests for assistance in responding to domestic violence. Accordingly, there can be no call out of the ADF in relation to peaceful industrial action, political protests or civil disobedience as these would not fall within the definition of 'domestic violence'.

There may be circumstances where a terrorist attacks a peaceful protest, or conducts an attack in the vicinity of a peaceful protest. ADF members may be exercising powers in the Bill, such as establishing a cordon or directing people away from a location of violence, which could incidentally impact on people engaged in peaceful protest. However, this would only be in a manner which is reasonable and necessary to protect the lives and safety of people from actors, such as terrorists, who are carrying out or are likely to carry out acts of violence. It is important to note that state and territory police would be the primary first responders to such incidents.

Further, in all relevant regards, the Bill does not limit the rights of freedom of expression, assembly and association any more than the provisions in Part IIIAAA of the current Act. Proposed subsection 39(2) requires that, where the ADF is being utilised for the purposes specified in a call out order, the CDF must not stop or restrict any protest, dissent, assembly or industrial action, except if there is a reasonable likelihood of the death of, or serious injury, to persons, or serious damage to property. This obligation reflects an existing obligation in section 51G of the *Defence Act 1903*.

#### **Committee Comment**

The Committee requests advice on how the measure is effective to achieve (that is, rationally connected to) that objective.

#### **Response**

When viewed in the context of a call out order, the exercise of call out powers in the Bill is reasonable in the contemporary threat environment. This threat environment, discussed above, is characterised by highly mobile attackers that move quickly across large areas. At the same time, attacks using simple weapons and improvised explosives continue to pose a significant threat.

The powers associated with call out are only exercised in the extreme circumstances in which a call out order is enlivened. Call out orders can only be made where domestic violence is occurring or likely to occur or there is a threat in the offshore area (subsections 33(1), 34(1), 35(1) and 36(1)).

Where domestic violence is occurring, or is likely to occur, it is reasonable and appropriate that the ADF may be called out to assist state and territory law enforcement to resolve the incident of domestic violence. Authorising Ministers will be required to take into account the nature of the violence and whether the ADF would be likely to enhance the state and territory response in determining whether the ADF should be called out.

There is no right to violent protest, action, or assembly under the ICCPR or ICESCR (or domestic law). The exercise of call out powers pursuant to paragraph 39(3)(b) provides reasonable limitations to the rights to freedom of expression, assembly and association, in the context of domestic violence. As noted above, the term 'domestic violence' refers to conduct that is marked by significant force and would include a terrorist attack, hostage situation, and widespread or significant violence. Therefore, peaceful industrial action, political protests or civil disobedience, not giving rise to such circumstances, would not fall within the definition of 'domestic violence' irrespective of the issue motivating the protest or strike.

It is important, however, to note that a fundamental principle underpinning call out of the ADF is that it should only occur to assist civilian authorities. State or territory police forces would be the first responders to incidents of domestic violence and they are well trained and equipped to respond to such situations.

### Committee Comment

The Committee requests advice on whether the limitation is a reasonable and proportionate measure to achieve the stated objective, including:

- the extent to which 'domestic violence' could capture political protests or industrial action
- whether 'domestic violence' could be defined in the Bill and appropriately circumscribed, and
- whether there are adequate and effective safeguards in place.

### Response

The rights to freedom of expression, association and assembly would only be engaged in relation to this matter if there is a call out order in place.

A call out order can only be made onshore where there is domestic violence occurring or likely to occur, or where there is a threat to Commonwealth interests in the offshore area (subsections 33(1), 34(1), 35(1) and 36(1)). Part IIIAAA uses the term 'domestic violence' as this is the term used in section 119 of the Constitution, which deals with state requests for assistance in responding to domestic violence. It is not defined in the Bill because it could encompass a range of circumstances, which will be difficult to prescribe or predict in their entirety. It refers to conduct that is marked by significant force and would include a terrorist attack, hostage situation, and widespread or significant violence. It would not include peaceful political protests, industrial disputes or civil disobedience. The Bill does not impact on the rights of people to engage in peaceful protests.

A further pre-condition of a call out order is that the authorising Ministers must be satisfied that the ADF should be called out, having regard to the nature of the domestic violence and whether the ADF would be likely to enhance the state or territory response (subsections 33(1) and (2), 34(1) and (2), 35(1) and (2) and 36(1) and (2)).

If the Governor-General makes a call out order, or the circumstances specified in a contingent call out order arise, subsection 39(1) requires the CDF to utilise the ADF in such manner as is reasonable and necessary for the purposes specified in the call out order under subsections 33(3), 34(3), 35(3) or 36(3) (subsection 39(2)). There must be a nexus between the ADF response and the domestic violence specified in the order. This limitation ensures that the ADF is not utilised for any purposes other than the purpose specified in the call out order and in a manner that is reasonable, proportionate and necessary for achieving that purpose.

This is subject to further safeguards in proposed subsection 39(3). Proposed paragraph 39(3)(a) requires the CDF to comply with any direction that the Minister gives regarding the way that the ADF is to be utilised. Proposed paragraph 39(3)(b) requires that in utilising the ADF, the CDF must not 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, assembly and association. There is no right under the ICCPR or ICESCR to engage in violent action.

Proposed subparagraphs 39(3)(b)(i) and (ii) contain exceptions to this general prohibition where there is a reasonable likelihood of either the death of, or serious injury to, persons, or serious damage to property. The exercise of call out powers pursuant to paragraph 39(3)(b) provides reasonable and proportionate limitations to the rights to freedom of expression, assembly and association, in the context of domestic violence. As noted above, the term 'domestic violence' refers to conduct that is marked by significant force and would include a



terrorist attack, hostage situation, and widespread or significant violence. Therefore, peaceful industrial action, political protests or civil disobedience, not giving rise to such circumstances, would not fall within the definition of 'domestic violence'. Call out powers could only be exercised in this context where the Governor-General has made a call out order on the basis that there is, or is likely to be, domestic violence, and the CDF reaches the view that there is a reasonable likelihood that someone could be killed or seriously injured, or there could be serious damage to property.

Where other actors are engaging in domestic violence that may cause injury to people or serious damage to property, the ADF could be called out to respond to that violence. The ADF's powers in such circumstances are protective. Part IIIAAA does provide the ADF with powers to evacuate innocent persons or peaceful protesters to places of safety, and crowd control powers to control the movement of persons and means of transport (subsection 46(7), sections 51D and 51L). These powers could be used in relation to peaceful protesters to protect them from other actors carrying out acts of violence.

It is also important to note that state or territory police forces would be the first responders in such circumstances and they are well trained and equipped to respond to such situations. It is a fundamental principle underpinning call out of the ADF that it should only occur to assist civilian authorities.

Accordingly, to the limited extent that the Bill engages the rights to freedom of expression, association and assembly, it is provided by law and is necessary, reasonable and proportionate to protect lives and safety and ensure public order in the extreme circumstances in which the call out provisions are engaged.

### **Defence of superior orders – Compatibility with the right to an effective remedy**

#### **Committee Comment**

The committee requests advice as to the compatibility of the measure in proposed section 51Z with the right to an effective remedy.

#### **Response**

Nothing in the Bill prevents a person whose rights have been unreasonably or arbitrarily interfered with during a call out order from taking action (including judicial review of a decision) against the Commonwealth and seeking appropriate reparations, such as compensation.

In this light, the right to an effective remedy may be engaged by the operation of proposed subsection 51Z(2). This provision provides an ADF member a defence in criminal proceedings against them, in circumstances where they have engaged in conduct that constitutes criminal behaviour during a call out order but the narrow criteria for the defence in subsection 51Z(2) are met.

Under proposed subsection 51Z(1), the fact that an ADF member engaged in a criminal act during a call out under the orders of a superior will not automatically relieve the member of criminal responsibility. Subsection 51Z(2) provides a narrowly circumscribed defence for an ADF member, but only if the ADF member can demonstrate all of the following elements:

- the criminal act was done by the member under an order of a superior (proposed paragraph 51Z(2)(a))
- the member was under a legal obligation to obey the order (proposed paragraph 51Z(2)(b))
- the order was not manifestly unlawful (proposed paragraph 51Z(2)(c))

- the member had no reason to believe that circumstances had changed in a material respect since the order was given (proposed paragraph 51Z(2)(d))
- the member had no reason to believe that the order was based on a mistake as to a material fact (proposed paragraph 51Z(2)(e)), and
- the action taken was reasonable and necessary to give effect to the order (proposed paragraph 51Z(2)(f)).

The defence of superior orders is necessary to achieve the legitimate objective of enabling ADF members to effectively respond to incidents of domestic violence and to protect the Australian public. The defence is only available in the context of a call out order to respond to an incident of domestic violence.

When viewed in the context of a call out order, the defence is rationally connected to the above objective. ADF members can only respond to domestic violence and protect the lives of others in the current threat environment if they have a level of operational certainty. It is a reasonable measure, given the nature of contemporary acts of violence, which require timely action to rapidly respond to moving or unknown threats.

This defence is also proportionate to its aims. It is a tightly defined defence, which is onerous to prove and therefore does not enable a person to automatically escape criminal liability purely on the basis of superior orders. It only operates in the extreme circumstances of a call out order, where the Governor-General has authorised the ADF to respond to domestic violence that is actually occurring or likely to occur.

The defence does not affect the criminal liability of a superior for giving the relevant order. Further, even if the ADF member in question is fully within the defence, it is not intended to otherwise affect the liability of the Commonwealth.

While the defence of superior orders engages the right to an effective remedy, it is compatible with that right. To the extent that proposed section 51Z limits the right, it does so in a way that is necessary, reasonable and proportionate.