
School of Law
University of New England
Armidale NSW 2350

**Associate Professor Greg Carne**

Mr Shaun Turner
Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

17 August 2018

Dear Mr Turner,

**Submission to Senate Legal and Constitutional Affairs Committee: *Defence Amendment (Call Out of the Australian Defence Force) Bill 2018* (Cth)**

Thank you for our telephone discussion of the morning of 16 August 2018 (with the Committee web page then displaying the Inquiry Status: Accepting submissions) confirming that it would be acceptable to make a submission to this inquiry, provided it was received by the start of the week Monday 20 August 2018.

On the basis of that advice, I now provide this submission to the Senate Legal and Constitutional Committee inquiry.

## General observations

The *Defence Amendment (Call Out of the Australian Defence Force) Bill 2018* proposes significant liberalising changes to the capacity and application of the ADF to be called upon, either at the request of the States, or on the initiative of the Commonwealth, to intervene in civilian law enforcement situations and apply force up to and including lethal force.

It does so with some vague wording and expressions, examples of subject matter expansion and overreach, and insufficient checks and balances that are not consistent with Australia's traditions, history and reputation as a leading liberal democracy.

Whilst it is important to acknowledge the ongoing issue of terrorism and to adapt to changes in terrorist methods, the Bill fails to optimally address the objective of calibrating responses to terrorism in ways that are necessary, proportionate and reasonable, affirming both the method and delivery of civil and political rights, whilst offering a powerful rejoinder to totalitarian ideologies associated with terrorism.

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

Consistent with traditional common law values and assumptions, it is salutary to quote Sir Owen Dixon (Dixon J as he then was) in the *Communist Party* case:[1]

> Forms of government may need protection from dangers likely to arise from within the institutions to be protected. In point of constitutional theory the power to legislate for the protection of an existing form of government ought not to be based on a conception, if otherwise adequate, adequate only to assist those holding power to resist or suppress obstruction or opposition or attempts to displace them or the form of government they defend.

The following points flow from a legal analysis of the Bill, providing **suggested *selected* amendments** that would provide a more balanced, accountable framework in the Bill, lead to its improvement, and ensure greater consistency with rule of law values of the type implicit in judgment of Dixon J, above.

Time constraints do not permit a more comprehensive analysis of amendments necessary for the Bill. Many of these other amendments are covered in other submissions to this inquiry, such as those of the Law Council of Australia (Submission 11) and the Australian Lawyers Alliance (Submission 10).

## Part IIIAAA – Calling out the Defence Force to protect Commonwealth interests, States and self-governing Territories

### Division 1 – Introduction

**. Cl 31: Definition**

***person who may be detained*** in relation to a call out order means a person:

(a) who is likely to pose a threat to the person's life, health or safety, or to public health or public safety

The above definition is most relevant to the exercise of powers of detention under cl 46 (7) (f) and cl 51 P, and **imposes a very low threshold** enabling the ADF under a Commonwealth interests order or a State protection order to take a person into custody.

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

. Similarly, the use of the words 'health or safety' and 'public health' 'public safety' **would be improved by a clear definition in the Clause 31 definition section.** Presently, the words are open to wide ranging subjective interpretations by ADF personnel involved in the detention process under the call out orders.

[1] (1951) 83 CLR 1, 187-188 (*Australian Communist Party v Commonwealth*)

**Division 2 – Calling out the Defence Force**

. The Division provides for orders made by the Governor General to call out the ADF to protect Commonwealth interests (including contingent call out arrangements) against domestic violence (Cl 33 (1) and Cl 34 (1)) and for the Governor General to call out the ADF on application of a State or self governing Territory to the Commonwealth Government to protect against domestic violence (including contingent call out arrangements) (Cl 35 (1) and Cl 36 (1).

[ From the above clauses] in determining whether the authorising Ministers are satisfied as mentioned in paragraph…in relation to domestic violence that is occurring or is likely to occur [would occur, or would be likely to occur] in one or more States or self governing Territories if specified circumstances were to arise, the authorising Ministers:

(a) must consider:
  (i) the nature of the domestic violence; and
  **(ii) whether the utilisation of the Defence Force would be likely to enhance the ability of each of those States and Territories to protect the Commonwealth to protect the Commonwealth interests against domestic violence [likely to enhance the ability of the State or Territory to protect the State or Territory against the domestic violence]**
(b) may consider any other matter that the authorising Ministers consider is relevant

The bolded clause (a) (ii) really adds nothing in the way of salient factors for rigorous Ministerial consideration – because *enhancement* of State or Territory capacity will inevitably occur through the provision of any additional capabilities or resources, **so the existing criterion is affirmatively self-answering.** It adds nothing in the form of a rigorous analysis as to whether – given a traditional common law separation between military and civilian powers – the ADF should in fact be deployed in the identified circumstances of domestic violence.

The real and proper question should be **whether the utilisation of the Defence Force – given the nature of the domestic violence so identified (or hypothesised – anticipated) is appropriate, necessary, reasonable and proportionate – and in what form of configuration and in what deployment the utilisation of such capacity meets those criteria.**

**The Bill's clause (a) (ii) should in each instance be amended to reflect these more salient criteria.**

**. The Division provides for measures of *assistance and co-operation* with the police forces of affected States and Territories – to clearly ensure such assistance and co-operation, the language needs to be refined.**

Its present ambivalence arguably permits Commonwealth action using the ADF in a manner potentially at odds with the requirements or assessments of State or Territory authorities. There also needs to be greater clarity and emphasis in the legislation on Commonwealth ministerial control of the deployment of the ADF.

Cl 40 (1) In utilising the Defence Force under a call out order …the Chief of the Defence Force must, *as far as is reasonably practicable*, ensure that:

(a) the Defence Force:
  (i) is utilised to assist any State or Territory specified in the order
  (ii) cooperates with the police force of those States and Territories

(b) the Defence Force is not utilised for any particular task in any of those States and Territories …unless a member of the police force of that State or Territory requests that the Defence Force be so utilised

(2) A request under paragraph (1)(b) must, if reasonably practicable, be in writing

(3) Subsection (1) does not require or permit the Chief of the Defence Force to transfer to any extent command of the Defence Force

.The words 'as far as is reasonably practicable', without more, allow too much discretion and insufficient accountability. The extent of this discretion and latitude is underlined by the line authority command and control arrangements in Cl 40 (3): 'Subsection (1) does not require or permit the Chief of the Defence Force to transfer to any extent command of the Defence Force to a State or Territory, or to a police force or member of the police force of that State or Territory'.

One further accountability mechanism would be a mandatory, contemporaneous reporting process of the Chief of the Defence Force to a Parliamentary Review Committee (Such as the Joint Parliamentary Committee on Foreign Affairs, Defence and Trade) or independent reviewer (such as a broadly based review panel, discussed at page 8 of this submission, under the heading Division 8 – Miscellaneous) where it is claimed by that office holder that it is not possible to act as far as reasonably practicable to achieve the objectives of (a) (i) and (ii) and (b), above.

. Cl 40 (1) (b) fails to specify the level or rank of the member of the police force of that State or Territory requesting that the Defence Force be so utilised. This is confirmed by the partial definition of the phrase in Cl 31 'member of the police force of a Territory for which the Australian Federal Police provides police services, means a member or special member of the Australian Federal Police providing police services for the Territory'.

The existing drafting of the provision potentially allows relatively junior members of the police force of that State or Territory to request that the Defence Force be utilised for any particular task.

Further, Cl 40 (2) confirms that the request need not necessarily be in writing: (2) 'A request under paragraph (1) (b) must, if reasonably practicable, be in writing'.

Both of these items should be tightened to ensure greater accountability – listing the appropriate rank level of members of the police force of that State or Territory; and specifying that in exceptional circumstances only, that requests may be made that are not in writing. Such amendments would reinforce the precedence of civilian authority over the deployment of the Defence Force.

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

Cl 39 (2) The Chief of the Defence Force must utilise the Defence Force (subject to subsection (3) and section 40) in such manner as is reasonable and necessary, for the purpose specified in the order under subsection 33 (30, 34 (3), 35 (3) or 36 (3).

Cl 39 (3) In doing so, the Chief of the Defence Force:

(a) must (subject to paragraph (b)) comply with any direction that the Minister gives from time to time as to the way in which the Defence Force is to be utilised; and
(b) must not stop or restrict any protest, dissent, assembly or industrial action, except if there is a reasonable likelihood of:

(i) the death of, or serious injury to, persons;
(ii) serious damage to property

The clause is therefore expressed as a default, reserved position to the grant of extensive powers to the ADF under four sets of call out orders – protection of Commonwealth interests (Cl 33); contingent protection of Commonwealth interests (Cl 34); request by State or Territory to protect against domestic violence (Cl 35) and contingent protection order request by State or Territory to protect against domestic violence (Cl 36).

A clearer drafting model would individually legislatively excise from each of the capacities to make call out orders in the first place under the respective clauses Cl 33, Cl 34, Cl 35 and Cl 36 – the above interests sought to be protected.

**The Bill should therefore be amended to remove the possibility of making call out orders under these four clauses that would have the likelihood, effect or consequence of deterring, stopping or restricting peaceable protest, dissent, assembly or industrial action. That amendment should preface each enabling procedure for the making of the four types of call out orders.**

**Division 6 – Provisions common to Divisions 3 to 5**

Cl 46 (7) and (9) provide for special powers to be utilised under call out orders by members of the Defence Force under the command of the Chief of the Defence Force, in connection with authorised actions taken under Cl 46 (5).

These special powers are enabled where under Cl 46 (1) (a) an authorising Minister has authorised in writing taking the action **or** under Cl 46 (1) (b) 'the member believes on reasonable grounds that there is insufficient time to obtain the authorisation because a sudden and extraordinary emergency exist.'

There are various concerns about the special powers attaching to authorised actions taken under Cl 46 (5). **The common thread of concern is that the powers available to members of the Defence Force may exceed the powers available to police in similar circumstances.**

The clauses should be amended to provide clearer protections for those so detained. Some necessary amendments (without being exhaustive) are as follows:

. **Detention of persons:**

The issue of raising the threshold by amending the definition of a ***person who may be detained*** (Cl 31) has been discussed at the start of this submission – under the heading Division One – Introduction. The suggested amendments referred to there are endorsed for present purposes.

Cl 46 (7) allows the member of the Defence Force, in connection with the taking any action mentioned in subsection (5) to (f) '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 a member of a police force at the earliest practicable time' – this should be amended to add (after 'earliest practicable time') being no greater than two hours from the commencement of the detention.

. **Answering of questions:**

Cl 46 (7) allows a member of the Defence Force, in connection with the taking any action mentioned in subsection (5) to (h) 'direct a person to answer a question put to the member or to produce to the member a particular document that is readily accessible to the person' – should be amended to

provide a right to reasonably refuse to answer such question or produce such document on the grounds of self-incrimination.

**. Persons to be informed of certain matters if detained:**

Cl 51 P (1) provides that persons should be informed of certain matters if detained.

Cl 51 P (2) (a) provides *an exemption* to the provision of such information to a detained person if 'the person should, in the circumstances know the substance of the offence, threat or risk'.

The broad sweeping form of the language of this exemption is open to abuse (as it asserts a presumption, constructive knowledge or imputation that the person so detained by the Defence Force has knowledge of the threat they pose to a person's life, health, or safety, or public health or public safety, or has committed an Commonwealth, State or Territory offence relating to domestic violence or a threat specified in a call out order). **Cl 51 P (2) (a) should be deleted.**

**Division 7 – Expedited orders and declarations**

**. Sudden and extraordinary emergency**

Cl 51 U (1) allows the making of a call out order, an infrastructure declaration or a specified area declaration if the maker of makers are satisfied that

(a) because a sudden and extraordinary emergency exists, it is not practicable for an order or declaration to be made under the section under which the order or declaration would otherwise be made and
(b) for a call out order or an infrastructure declaration- the circumstances referred to in subsection 33(1), 34(1), 35 (1), 36(1) or 51 H(2) (as the case requires) exist.

A Cl 51 U (1) expedited order or declaration takes effect 'for all purposes as if it were (a) a call out order made by the Governor General; or (b) an infrastructure declaration or specified area declaration made by the authorising Ministers (as the case requires) except as provided by subsections (4) and (5) and for the purposes of section 51 U.

The most obvious required amendment **is the need for a clear definition to be included in Cl 31 definitions of what is a 'sudden and extraordinary emergency' is for the purposes of Clause 51 U (this same issue *also arises* in relation to the assessment by a member of the Defence Force under Cl 46 (1)(b) where 'the member believes on reasonable grounds that there is insufficient time to obtain the authorisation because a sudden and extraordinary emergency exists'.** This is because the 'sudden and extraordinary emergency' criteria enable the bypassing of checks and balances installed (such as they are) in the standard methods of making call out orders, infrastructure declarations and specified area declarations.

In the absence of such a definition, the determination of what constitutes a 'sudden and extraordinary emergency' will simply default to the subjective opinion of those listed office holders under Cl 51 U (2) being the Prime Minister; jointly two of the authorising ministers, being the Prime Minister, The Defence Minister and the Attorney General, or an authorising minister with one of the Deputy Prime Minister, the Foreign Affairs Minister, the Treasurer or the Minister for Home Affairs (the last category only if the available authorising Minister and the alternative Minister are satisfied that the other authorising Ministers are unable to be contacted…). This presently means that Executive office holders have an insufficiently checked and accountable power to create a call out situation, or an infrastructure or specified area declaration.

**. Prime Minister**

Cl 51 U (2) enables the Prime Minister, acting alone, to make an expedited order or declaration.

This provision should be removed, ensuring that the Prime Minister (as one of three authorising Ministers in Cl 31) can only make an expedited order or declaration with another authorising Minister, or with another alternative Minister, under Cl 51 (2) (b) or (c ). The Prime Minister should act in consultation, and with approval of at least one other Minister, a modest check requirement rendered feasible by multiple forms of instantaneous modern communications.

**. Consultation with State or Territory is not required for an Expedited Order or Declaration.**

Cl 51 V (6) clearly states 'To avoid doubt, subsections 38(2) and 51 H (7) do not apply to an expedited order or declaration that would have effect as if it were a Commonwealth interests order or infrastructure declaration'

Cl 38 (2) and 51 H (7) (in ordinary circumstances) respectively require the Commonwealth authorising Minister to consult with the relevant State or Territory Government about a call out order or variation before the Governor General makes or varies the order, where the State or Territory has not requested the order or variation; and for the authorising Minister also to consult where the State or Territory has not requested the infrastructure declaration, before the Ministers make it.

Cl 51 V (6) provides for exemption measures from consultation with the States and Territories that are too broad and unaccountable.

Cl 51 V (6) **should be amended to formally and statutorily require in Cl 38(2) and 51 H (7) situations where an expedited order or declaration has been made, that the relevant State or Territory government be immediately notified about the making of that Commonwealth expedited order or declaration, and be provided immediately with a copy of that Commonwealth order or declaration.**

The omission of this requirement from the current arrangements – and from *the similar exemption to consult with the relevant state or territory in Cl 38 (3) and Cl 51 H (8)* 'if the authorising Ministers are satisfied that, for reasons of urgency, it is impracticable to comply with that subsection' – creates a real, predictable risk of conflicting, dangerous and confused Commonwealth and State responses to critical incidents, including in the deployment and use of personnel, resources and powers.

**A further desirable amendment would be the inclusion of a requirement** (covering the above circumstances) for the authorising Ministers having to state in writing to an independent authority (such as INSLM) or Parliamentary committee (such as the Joint Parliamentary Committee on Foreign Affairs, Defence and Trade) the reasons of urgency making it impracticable to comply with the subsection regarding consultation with the State or Territory – as a legislated part of the expedited order or declaration authorisation process, which would then be subject to review by that independent authority or Parliamentary committee.

**Division 8 – Miscellaneous**

**. Review of call out orders – the mechanism for review is too limited to certain types of call out orders**

The Bill only provides for limited forms of review in Cl 51 ZA: Ministerial presentation to each House of Parliament of copies of (a) any call out order that has ceased to be in force; and (b) any specified area declarations that relate to the order; and (c) a report on any utilisation of the Defence Force that occurred under the order.

Similarly, the clause relating to the declaration of a specified area (Cl 51) has a summary statement of the content of the call out order to which the declaration relates (Cl 51 (6)) – 'must be forwarded, within 24 hours after the declaration is made, to the Presiding Officer of each House of the Parliament for tabling in that House' (Cl 51 (7) ( c) '

Further, 'Each House of the Parliament must sit within 6 days after its Presiding Officer receives the statement that is forwarded in accordance with paragraph (7) ( c)'

The Bill accordingly only provides for review of call out orders that have expired or have been activated, **linked as it is to the presentation to Commonwealth Parliament of the said call out notice, and/or report on the utilisation of the Defence Force that occurred under the order. It provides for *no form of regular review of two very significant forms of call out orders* – Cl 34 Contingent call out orders of the Defence Force to protect Commonwealth interests and Cl 36 Contingent call out orders for call out of the Defence Force to protect States and Territories.**

In each instance, the content of the order states that the order (i) comes into force when it is made and (ii) ceases to be in force at the end of a specified period [at the end of the period specified in the order] unless it is revoked earlier: Cl 34 (5) (d) and Cl 36 (5) (d).

As these contingent call out orders are not released into the public domain, the **Bill should be amended for:**

**. Regular and periodic review of contingent call out orders by INSLM or an appropriate Parliamentary Committee, such as the Parliamentary Joint Committee on Foreign Affairs, Defence and Trade - in the manner that the PJCIS reviews the listing of proscribed terrorist organisations on a periodic basis; and**

**. Prescribing an upper limit sunset clause of three years on contingent call out orders, before they would be renewed (and renewal only upon the above INSLM, Parliamentary Joint Committee on Foreign Affairs, Defence and Trade or PJCIS etc type review)**

**. Review of Part III AAA – the review mechanism lacks specificity, demonstrable independence from the Minister and balance**

The Bill provides in Cl 51ZB as follows:

(1) The Minister, may at any time, cause an independent review of this Part to be conducted by one or more persons who, in the Minister's opinion, possess appropriate qualifications to carry out the review.
(2) The Minister must ensure that, at least every five years, an independent review of this Part is commenced by one or more persons who, in the Minister's opinion, possess appropriate qualifications to carry out the review

The above clause does not guarantee a genuinely independent review of the Part – either as an ad hoc review or a five year review.

The Bill should be re-drafted to ensure such demonstrable capacity and independence from the Minister.

**An appropriate model for such independent review was evidenced by the very balanced committees (representing all relevant interests and expertise) that comprised the Sheller Committee review of terrorism legislation[2] and the Whealy Committee (COAG Committee) Review of Terrorism Laws.[3]**

The Bill should be re-drafted to ensure such an appropriate and balanced review membership (by specifying in the enacted legislation categories of former or current office holders), be chaired by a retired judge of a superior court of a State, Territory or the Commonwealth and thus constitute genuinely independent review.

I would be pleased to provide the Senate Legal and Constitutional Affairs Committee with any further explanation or clarification of this submission upon request.

Yours faithfully

Associate Professor Greg Carne

School of Law
University of New England
Armidale NSW 2350

[2] Commonwealth of Australia, Report of the Security Legislation Review Committee (June 2006), 1 (Members of the Committee) Hon Simon Sheller QC Chair, a retired NSW Supreme Court judge. Members included a Law Council of Australia representative, the Inspector General of Intelligence and Security, The Privacy Commissioner, The Attorney-General's nominee, the Human Rights Commissioner, the Commonwealth Ombudsman.

[3] Australian Government, Council of Australian Governments Review of Counter Terrorism Legislation (2013), viii (Members of the Committee) Hon Anthony Whealy QC Chair, a retired NSW Supreme Court judge. Members included the South Australian Ombudsman, an Assistant Commissioner of Queensland Police, The Deputy Director of the Commonwealth DPP, a Victorian Law Reform Commissioner and an Assistant Commissioner of the AFP.