The Committee Secretary,
Senate Standing Committees on Foreign Affairs, Defence and Trade
PO Box 6100
Parliament House
Canberra ACT 2600

By email: fadt.sen@aph.gov.au

15 October 2020

Dear Committee Secretary,

RE: Defence Legislation Amendment (Enhancement of Defence Force Response to Emergencies) Bill 2020

We welcome the opportunity to provide this submission to the Senate Standing Committees on Foreign Affairs, Defence and Trade regarding the Defence Legislation Amendment (Enhancement of Defence Force Response to Emergencies) Bill 2020 ('The Bill'). Our submissions reflect our views as researchers, and are not the institutional views of the Australian National University. We are happy to provide further comment clarifying or expanding on these submissions.

Yours sincerely,

Mr Andrew Ray and Ms Charlotte Michalowski

Summary of Recommendations:

1. A proportionality framework should be used in assessing proposed measures contained in the Bill as this framework can best balance the competing objectives.
2. That a further review is conducted concerning the constitutionality of the Call Out provisions currently contained in the Defence Act.
3. That section 123AA(4)(b) is amended to require a determination that no domestic force can respond to the disaster before a request is made to foreign forces.
4. That section 123AA(2) is amended to require the Minister to seek approval from the respective State or Territory Government, and to set out specific matters the Minister must take into account in making a determination under that section.
5. Item 2 of the Bill should reinstate the requirement that the call out of troops be made under a legislative instrument
6. The Bill is amended to require a direction made under s 123AA(2) to be made in the form of a legislative instrument.
7. The Bill is amended to remove the ability for a Minister's decision under s 123AA(2) to be delegated.
8. In the alternative to Recommendation 7, the Bill is amended to require the Minister to publish any directions made under s 123AA(6).

9. Section 123AA(4) be amended to remove reference to foreign military and police forces.
10. All reference to "other emergency" is removed from s 123AA.
11. In the alternative to Recommendation 10, "other emergency" is appropriately defined in s 123AA within the legislation and guidance is issued in the explanatory memorandum explaining under what circumstances the government envisages that troops can be deployed to combat an "other emergency".
12. The Committee should conduct a thorough assessment of statutory immunities provided to emergency services, and carefully consider whether the defence forces should have a broader immunity than firefighters.
13. Section 123AA is amended to more closely mirror immunity provisions afforded to the AFP and ASIO.
14. The good faith requirement contained in s 123AA is either substituted with a reasonableness/proportionality requirement, or such an obligation is imposed in addition to subjective good faith.

Introduction

This submission focuses primarily on the power to deploy defence forces to assist in relation to natural disasters and other emergencies. It also raises concerns regarding the immunity afforded under the Bill. Our submission does not address, in depth, the proposed changes to the superannuation of deployed personnel, other than to comment that it is appropriate for this part of the Bill to have retrospective effect. The retrospective effect compensates members of the defence forces deployed under a Reserve Call Out to combat the 2019/2020 bushfires. These provisions appear sensible, given the current taxable status of the income those members receive when deployed in that manner, and are aimed at correcting the unintended operation of existing legislation. Given that no-one is harmed by the retrospective effect of those provisions (other than a slight cost to Australian taxpayers), there are no significant concerns raised by these provisions. This could be contrasted with retrospective creation of an immunity from civil or criminal suit. In structuring these submissions, we focus our analysis on the *proportionality* of the use and deployment of defence force members, including reserve members.

1. Balancing Defence Deployment and Powers with the threat/emergency

As previously highlighted to the Joint Committee on Intelligence and Security,[1] it is key when assessing powers granted to security agencies and police forces to consider whether the powers are proportionate to the harm they seek to prevent. This extends to powers and immunities

The authors would like to acknowledge the support of Associate Professor Heather Roberts (ANU College of Law) in drafting this submission. All errors are of course our own.

[1] See, eg, ANU Law Reform and Social Justice Research Hub, Submission No 17 to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review into the effectiveness of the Telecommunications Legislation Amendment (International Production Orders) Bill 2020* (30 April 2020) ('Telecommunications Submission').

granted to military forces, and the decision-makers that decide to deploy them.

In this context proportionality is important for two reasons. First, it ensures that the public does not lose confidence in Australia's armed forces or their actions. This is critical to ensuring that the public both accepts the deployment of armed forces, and obeys directions of defence personnel where given. Second, it ensures that powers granted to Australia's armed forces, and those that deploy them, are appropriate and do not unduly impinge on individual liberty or lead to unnecessary use of force. This is of particular concern for this Bill given the wide immunity that it grants to members of the defence forces, foreign defence forces and foreign police forces.

Given this we recommend that the Committee utilise a proportionality framework in assessing the powers and immunities granted to armed forces under the Bill. In undertaking this assessment it is critical to ask whether a proposed power/immunity is necessary and whether a less extensive power/immunity could accomplish the same objective. In assessing whether this threshold is met, the burden to establish the necessity of the provision must fall on the agency/branch calling for its creation. We accept that in some security and defence contexts it may not be possible for all information regarding a proposed law to be made public. This law is not such a law. The Bill is focused on deployment of reserve forces to combat natural disasters and the creation of a statutory immunity for defence force members. There are no national security concerns. As such, any information justifying the proposed laws ought to be included on the public record or in the explanatory memorandum.

Recommendation 1: A proportionality framework should be used in assessing proposed measures contained in the Bill as this framework can best balance the competing objectives.

We note that the proposed amendments to the *Defence Act 1902* (Cth) follow a series of amendments to that *Act* increasing the circumstances in which members of the defence forces can be deployed in Australia.[2] These changes have generally been justified on the basis of national security, or terrorist threats.[3] We mirror previous comments made regarding the broad scope of those deployment powers,[4] and highlight that there remain significant constitutional

[2] See, eg, Defence Amendment (Call Out of the Australian Defence Force) Bill 2018 (Cth); *Defence Legislation Amendment (Aid to Civilian Authorities) Act 2000* (Cth); *Defence Legislation Amendment Act 2006* (Cth).
[3] Andrew Greene, 'Shakeup of Defence "Call-Out" Powers Will Make It Easier for Police to Request Military Backup During Terror Attacks', *ABC News* (online, 28 June 2018) <https://www.abc.net.au/news/2018-06-28/military-call-out-powers-up-for-debate-legislation-in-parliament/9916636>.
[4] Michael Head, 'Another Expansion of Military Call Out Powers in Australia: Some Critical Legal, Constitutional and Political Questions' (2019) 5 *UNSW Law Journal Forum* 1; Michael Head, *Calling Out*

ambiguities around whether the powers currently contained in the *Defence Act* are supported by the *Constitution*.[5] In particular, some of the circumstances in which the armed forces can be deployed may go beyond the heads of power given to the Commonwealth under s 51 and s 119 of the *Constitution*.[6]

In this context, it is important that Parliament does not raise further uncertainty regarding the constitutional validity of the current Call Out Powers. The Bill, as currently drafted, extends the circumstances in which a call out order may be made through the proposed s 123AA(2). This section appears to draw its authority from the Nationhood power through the words 'the nature or scale of the natural disaster or other emergency makes it necessary, *for the benefit of the nation*'.[7] There are specific concerns regarding the breadth of the term "emergency" which will be addressed further below. In addition to those concerns however, the Bill builds on previous amendments to the *Act* to expand the circumstances where armed forces can be deployed on domestic soil.[8]

In this case, the provision as written may raise constitutional issues concerning *who* can decide whether a particular act is or is not authorised under the Nationhood power. In particular, the High Court has expressed concern about allowing the Commonwealth (and especially a single Minister) to decide that an act is within its power.[9] Further, it is not clear what limits (if any) are placed on a Minister's direction, with s 123AA silent on what factors the Minister must take into account. In this case it is particularly concerning that the Minister does not need to seek approval from State or Territory Governments before authorising the use of defence forces (including foreign forces).[10] While, in practice, it is possible that this requirement is implicit (given that the Minister must be satisfied that it is necessary for the Commonwealth to intervene), there is no reason that this requirement (if it exists) is not clearly stated. Further, the lack of consultation (or required approval) is not mentioned in the Explanatory Memoranda. It is therefore possible that this is an unintended artifact of the Bill. This could lead to, in a particularly egregious case, the

the Troops: The Australian Military and Civil Unrest: The Legal and Constitutional Issues (Federation Press, 2009).

[5] See, eg, Michael Head, 'Another Expansion of Military Call Out Powers in Australia: Some Critical Legal, Constitutional and Political Questions' (2019) 5 *UNSW Law Journal Forum* 1.

[6] The use of defence involvement in non-defence matters was outlined in a 1997-1998 Parliamentary Research Paper, but it appears that Parliament has not conducted a detailed analysis since: Elizabeth Ward, 'Call Out the Troops: an examination of the legal basis for Australian Defence Force involvement in 'non-defence' matters' (Research Paper No 8, Law and Bills Digest Group, 1997-1998).

[7] Proposed s 123AA(2) (emphasis added).

[8] At least that appears to have been the interpretation of the Standing Committee for the Scrutiny of Bills. The Explanatory Memorandum does not clearly indicate whether s 123AA(2) creates a new power through which the Minister can authorise the assistance of Australian and foreign forces. For the purposes of the submission we have assumed that the Standing Committee's interpretation is correct. If however, the provision as written only outlines where *immunity* will apply then much of this analysis will not apply.

[9] *Australian Communist Part c Commonwealth* (1951) 83 CLR 1. The issue was further discussed in *Thomas v Mowbray* (2007) 233 CLR 307, however as the relevant decision-maker was a Court the issue did not need to be decided.

[10] This concern was raised by the Standing Committee for the Scrutiny of Bills.

Minister authorising the deployment of foreign armed forces against the request of a State Government with no limit on the period of deployment, or the actions the foreign forces could take. Those forces would then enjoy a total immunity from criminal or civil suit for actions taken under that authorisation. To prevent such an event, an additional requirement should be inserted into the Bill requiring a Minister to determine that no domestic force can appropriately respond before a request is made to a foreign force. Further, the Bill should require the Minister to seek approval from the respective State or Territory in which the armed forces will be deployed prior to their deployment.

If a deployment was made contrary to the *Constitution* this would have flow on ramifications regarding the efficacy of any immunity from prosecution or civil suit granted by the Bill. Given that any constitutional issues present in the *Act* would therefore be significantly exacerbated by the creation of the proposed immunity, the Committee should seek further views through a public inquiry regarding the constitutional basis for the current Call Out Provisions and indeed the proposed s 123AA(2).

Recommendation 2: That a further review is conducted concerning the constitutionality of the Call Out provisions currently contained in the *Defence Act*.

Recommendation 3: That section 123AA(4)(b) is amended to require a determination that no domestic force can respond to the disaster before a request is made to foreign forces.

Recommendation 4: That section 123AA(2) is amended to require the Minister to seek approval from the respective State or Territory Government, and to set out specific matters the Minister must take into account in making a determination under that section.

2. Concerns regarding amended oversight of call-out orders

We mirror the concerns regarding the proposed amendment to s 28(1) raised by the Standing Committee for the Scrutiny of BIlls.[11] Given that the deployment of armed forces should be as a matter of last resort, decisions calling them out should be subject to stringent parliamentary oversight. We emphasise that efficiency alone should not trump due process. Proposed amendments that limit or remove parliamentary scrutiny therefore require measured justification as to why the proposed amendments are reasonable and necessary. This view is supported by remarks made by the Honourable Robert Hope who noted in his report that 'appropriate

[11] Scrutiny Digest 13 of 2020, Standing Committee for the Scrutiny of Bills (7 October 2020) 10.

parliamentary safeguards seem the most satisfactory safeguards that can be erected to prevent any misuse of members of the Defence Force in civilian security operations.'[12] We reiterate that expanding the power and remit of Commonwealth agents (especially armed forces) requires explicit justification.

We recognise the concerns raised by members of Parliament that the current process is complex, and may, under certain extreme circumstances, hinder attempts to provide timely assistance.[13] However, there are pathways to improving efficiency that do not require removal of legitimate scrutiny by our elected representatives. There are also provisions in the *Defence Act 1903* (Cth) that already provide for expedited orders and declarations in extraordinary emergencies.[14] It is unclear why those powers are not sufficient to deal with time-sensitive emergencies. The proposed provision acts as a blanket exclusion to parliamentary oversight, with little justification having been provided by the Minister to the Parliament, beyond advocating the pursuit of efficiency.[15]

Recommendation 5: Item 2 of the Bill should reinstate the requirement that the call out of troops be made under a legislative instrument

3. Concerns regarding civil and criminal immunity in relation to certain assistance

The Bill would insert a new section 123AA into the *Defence Act*. This section, as currently drafted, creates an immunity from civil and criminal suit for members of the defence forces,[16] members of the Department of Defence,[17] and, where authorised, other Commonwealth employees or members of foreign armed forces, or foreign police forces.[18] In all cases, 'a protected person … is not subject to any liability (whether civil or criminal) in respect of anything the protected person does or omits to do, in good faith in the performance or purported performance of the protected person's duties' provided that certain conditions are met.[19]

3.1 Concerns with direction made under s 123AA(2) and delegated powers under s

[12] R. M. Hope, 'Protective Security Review' (Parliamentary Paper No 397, 1979) 174–5 [10.102].
[13] Wallace, Andrew Second Reading Speech, 6 October 2020, p 13.
[14] *Defence Act 1903* (Cth) div 7.
[15] Alex Hawke, Second Reading Speech, 3 September 2020, p 6510.
[16] Proposed s 123AA(3)(a).
[17] Proposed s 123AA(3)(b).
[18] Proposed s 123AA(3)(c).
[19] Proposed s 123AA(1).

123AA(2) and 123AA(4)-(5)

As will be discussed in further detail below, there are significant concerns regarding the breadth of the immunity provision. Given the immunity applies to situations where 'assistance is provided at the direction of the Minister' under s 123AA(2), there are further concerns regarding accountability and transparency by efforts in the legislation to limit the reviewability of the decision by the Minister to issue a Direction. In particular, the lack of parliamentary oversight of the immunity again both lacks a clear reason, and may significantly reduce public scrutiny. It is unclear why the direction could not be made in the form of a legislative instrument,[20] allowing parliamentary oversight of the process through disallowance and publication of reasons from the Minister. This would enable Parliament to step in to directly override the immunity on a case-by-case basis and create a public record of each authorisation.

In our view, a blanket immunity (such as that contained in the proposed s 123AA) should be used sparingly and any authorisation should be clearly in the public record. Additionally, the ability for the Minister to delegate the power under s 123AA(2) to the Secretary of the Department is not justified. While we accept that it is common practice for Secretaries to have authority to make decisions on behalf of Ministers, in this particular case we think that the immunity is broad enough to justify requiring the Minister to make the decision personally. This would ensure that the Minister remains directly accountable for any resulting acts or omissions that cause harm to Australian citizens. In the alternative, the Bill should be amended to require the Minister to publish any directions made under s 123AA(6).[21]

Recommendation 6: The Bill is amended to require a direction made under s 123AA(2) to be made in the form of a legislative instrument.

Recommendation 7: The Bill is amended to remove the ability for a Minister's decision under s 123AA(2) to be delegated.

Recommendation 8: In the alternative to Recommendation 7, the Bill is amended to require the Minister to publish any directions made under s 123AA(6).

3.2 Foreign Armed Forces/Police Forces Immunity

[20] This is expressly excluded by the operation of s 123AA(7).
[21] We note that this may already be required through the operation of ss 8-10 of the *Freedom of Information Act 1982* (Cth) (as the immunity may detrimentally impact an individual) however, the application of the *FOI Act* in this type of case has not, to our knowledge, been tested.

The proposed s 123AA(4)(b) extends to foreign armed forces and police forces. Though we recognise that foreign armed forces and emergency services forces have provided support during natural disasters in the past, it appears that little justification has been provided as to why these personnel require immunity from not only civil, but criminal prosecution, in Australia.[22]

In conjunction with the currently undefined scope of 'emergency' and 'good faith', this provision would likely have the capacity to apply broadly to foreign forces in Australia The Australian government should always retain the capacity, flexibility and discretion to prosecute foreign actors who commit crimes on Australian soil. A blanket exemption without justification appears inappropriate. This is particularly the case given that the justification provided for the new immunity provision is to reflect state and territory provisions, which (even when they rarely extend to immunity from criminal liability) do not seem to generally extend to foreign forces/services.[23]

Recommendation 9: Section 123AA(4) be amended to remove reference to foreign military and police forces.

3.3 Concerns regarding unclear definitions and scope of immunity

Finally, we would like to raise concerns with the lack of clarity about the meaning of two terms in the proposed s 123AA. These have the capacity to expand significantly both the scope of the power of deployment afforded by the section and the subsequent immunity it creates for members of the defence forces. The first of these concerns the grounds on which the Minister may make a direction under s 123AA(2).

The Minister may direct for the provision of assistance in relation to a 'natural disaster or other emergency' if satisfied that 'the nature and scale of the … disaster or … emergency makes it necessary, for the benefit of the nation … [or] the assistance is necessary for the protection of Commonwealth agencies … personnel or … property'. The primary concern is under the first limb of the authorisation (with the second likely not extending deployment beyond other powers already contained in the *Act*). "Other emergency" is not defined in the Bill or the *Act* more broadly. The fact that the scope of "emergency" is unclear is critical. For example, would emergency extend to deploying armed forces to disperse a protest, where that protest had shut down critical infrastructure in a city? While we are not convinced that it would, there appears to be nothing in the Bill preventing the Minister from making such a determination. Given that past government legislation based on the Nationhood power has only narrowly been upheld by the High Court,[24] the lack of clarity in the Bill presents a risk that the amendment would be struck down. Further, the purported reasoning behind the Bill: the need to clarify when the armed forces can be deployed in situations analogous to the 2019/2020 bushfires leaves the question open as to why

[22] This was not explained in the Explanatory Memorandum.
[23] See, eg, *Rural Fire Act 1997* (NSW) s 128.
[24] See, eg, *Pape v Commissioner of Taxation* [2009] HCA 23.

"other emergency" is needed at all. As previously noted, the use of military forces, particularly foreign military forces, on domestic soil should be viewed as a last resort, not a matter that governments consider lightly. Again, we repeat the point that existing emergency deployment provisions in the Act (with high bars for use) may cover the situations contemplated by 'other emergency'.

Recommendation 10: All reference to "other emergency" is removed from s 123AA.

Recommendation 11: In the alternative to Recommendation 10, "other emergency" is appropriately defined in s 123AA within the legislation and guidance is issued in the explanatory memorandum explaining under what circumstances the government envisages that troops can be deployed to combat an "other emergency".

The second relates to the scope of the immunity contained in s 123AA. While the immunity is limited to circumstances of good faith, the breadth of the immunity is staggering. It prevents a protected person being subject 'to *any* liability (whether civil or criminal) in respect of *anything* the protected person does or omits to do, in good faith, in the performance or *purported* performance of the protected person's duties'.[25] The Explanatory Memorandum justifies the immunity on the basis that the lack of immunity 'presents some legal risk to [the] individuals [involved]' and that under current law defence force members 'are not afforded immunities from criminal or civil liability akin to those received by state and territory emergency services'. Firstly, as noted above, it is not clear that current immunities given to, at least some, state and territory emergency services are as broad as that contained in s 123AA. In particular, some do not extend to immunity from criminal prosecution.[26] This raises a significant concern, as it undercuts the justification for the immunity contained in the Explanatory Memorandum.

Further, that justification does not appropriately consider that defence forces should be deployed as a last resort, and that defence force personnel have different training and different skills available to them than emergency services. Given their military training, defence forces are more akin to police officers and security agency operatives than emergency services. On this basis it is worth considering the nature of the immunity currently afforded to AFP officers and ASIO operatives when assessing the appropriate scope of the immunity. For example, AFP officers taking part in a controlled operation are afforded *some* protections from civil action and criminal responsibility. This protection is however limited as outlined below:

1. It does not operate where conduct causes death or serious injury to any person.
2. It does not operate where the conduct involves the commission of a sexual offence against

[25] Section 123AA(1).
[26] *Rural Fire Services Act 1997* (NSW) s 128. See further *Inspector Mayo-Ramsay (WorkCover Authority of NSW) v The Crown in the Right of the State of New South Wales (NSW Fire Brigades)* [2006] NSWIRComm 356, [50] where Justice Boland clearly outlined that 'action, liability, claim or demand' are associated with civil not criminal proceedings. See further *Country Fire Authority Act 1958* (Vic) s 18A: 'An officer … is not subject to any action, liability, claim or demand for any matter or thing'.

any person.

3. It does not extend to civilians unless they act in accordance with the instructions of a law enforcement officer.
4. It does not amount to a total immunity in civil suit, instead the Commonwealth *indemnifies* the relevant officer/civilian and must compensate any person who suffers loss of or serious damage to property or personal injury.[27]

Similar, but less extensive limitations are present in the immunity afforded to ASIO officers under s 35K of the *Australian Security Intelligence Organisation Act 1979* (Cth).[28] Notably, the immunity afforded under the *ASIO Act* does not require the Commonwealth to compensate for loss suffered. The Law Council of Australia has previously submitted that it believes the immunity afforded under the *ASIO Act* to be disproportionate as it does not contain similar limitations to that contained in the *Crimes Act 1914*.[29]

Finally, there are significant concerns regarding the use of the limitation of 'good faith' contained in the immunity provision. Good faith has been widely used in immunity provisions, however academic commentators have highlighted that the exact scope of the term is unclear, with few cases having applied the test in relation to immunities.[30] At its widest the immunity may protect anyone who subjectively believes they are acting in good faith. Alternatively, in some cases courts have considered competing policy considerations to weigh up whether an action should fall within a good faith exception.[31] It is unclear which standard would be applied were the application of immunity contained in s 123AA challenged. This leads to the situation where it is unclear when an individual could rely on the immunity, a position that is at odds with the stated justification of the amendment. It is perhaps for this reason, that the immunity conferred to AFP and ASIO officers discussed previously *does not mention good faith*. Instead establishing defined "reasonable" limits within the legislation. We suggest that a similar approach is taken in the Bill. For example, the immunity could extend to situations where the relevant personnel have acted reasonably in accordance with legal obligations, or acted in a manner proportionate to the threat/emergency they are seeking to combat. Additionally, as the immunity applies to foreign military personnel, we believe that a reasonableness standard is more appropriate than a standard importing subjective elements. This can be illustrated by our example of civilians who are injured by military personnel while they are protesting. A subjective 'good faith' standard may be influenced by societal norms in foreign nations that have historically placed different value on

[27] *Crimes Act 1914* (Cth) ss 15HA, 15HB, 15HF.
[28] ('*ASIO Act*').
[29] Law Council of Australia, Submission No 75 to Australian Law Reform Commission, *Review into Traditional Rights and Freedoms* (March 2015) 44-5.
[30] Mark Henry, 'Statutory immunities: when is good faith honest ineptitude' 2000 (Spring) *Australian Journal of Emergency Management* 10.
[31] Ibid.

individual rights, and the freedom to protest, than Australia.[32]

Recommendation 12: The Committee should conduct a thorough assessment of statutory immunities provided to emergency services, and carefully consider whether the defence forces should have a broader immunity than firefighters.

Recommendation 13: Section 123AA is amended to more closely mirror immunity provisions afforded to the AFP and ASIO.

Recommendation 14: The good faith requirement contained in s 123AA is either substituted with a reasonableness/proportionality requirement, or such an obligation is imposed in addition to subjective good faith.

[32] For example, many nations do not have an express or implied "free speech" right (in Australia supported by the implied freedom of political communication) where they do not it is unclear whether good faith would incorporate their own local practices.