**Foreign Affairs, Defence and Trade References Committee**
Department of the Senate
Parliament House

Dear Committee,

**Inquiry into the potential use by the Australian Defence Force of unmanned air, maritime and land platforms**

Thank you for the opportunity to make a submission to this inquiry. I stress at the outset that while I am an officer in the Royal Australian Air Force, this submission is made in my personal capacity and does not necessarily represent the views of the Australian Department of Defence or the Australian Defence Force.

By way of background, I have been a full-time military lawyer since 1993; I have bachelor degrees in science and law from Monash University, and a master's degree in law and a doctorate from the University of Melbourne. I have lectured and presented on the legal issues associated with unmanned platforms (particularly air and maritime) in Australia and overseas, and have written a number of articles and book chapters concerning unmanned platforms and legal review of developing technology (available at http://ssrn.com/author=1878018).

From an international law perspective, certain key points can be made:

1. It is necessary to distinguish between the use of unmanned platforms (and any other use of the military) in an armed conflict and outside of an armed conflict. This is because the applicable legal rules are significantly different inside and outside of an armed conflict.

a. The use of force, particularly lethal force, outside of an armed conflict is mainly limited to preventing death or serious bodily injury

b. In an armed conflict, as it is lawful to attack the opposing force (the enemy), there is no legal requirement to limit the use of force to self-defence situations.

2. Putting to one side regulatory rules, there is little distinction in international law between the rules that apply to manned and unmanned platforms, and no distinction when it comes to the application of force from those platforms.

a. Consequently, there are no additional legal limitations or restrictions on when armed unmanned platforms can be used versus armed manned platforms.

b. It is very important, therefore, that any tendency to impose policy-based limitations or restrictions on the use of armed unmanned platforms needs to take into account the points raised in the following paragraphs.

3. Significantly, as a party to the *Protocol Additional to the Geneva Conventions of 12 August 1949,* and *relating to the Protection of Victims of International Armed Conflicts*,[1] Australia is bound to conduct reviews of new weapons, means and methods of warfare to ensure compliance with international law.[2] This requirement for legal review applies unchanged to unmanned systems. A study by the International Committee of the Red Cross identified that Australia is one of the few States that has a process for implementing this obligation.

[1] Opened for signature 12 December 1977, 1125 UNTS 3, entered into force 7 December 1978 (API).
[2] Art 36 of API provides: In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party

a. Great care should be taken before identifying limitations or restrictions on the employment and use of unmanned systems. This is because any such limitation or restriction would prima facie apply equally to manned systems as there is no legally significant difference between the two (again, putting to one side regulatory rules).

4. As some people seem particularly concerned about the application of force from unmanned platforms, it is worth reiterating that the resort to the use of force and the regulation of particular instances of use of force is comprehensively addressed in international law. Any particular concerns with the interpretation and application of that law which might arise with, for example, use of force against non-state actors in third countries or targeting of individuals based on either status or conduct, apply equally to other military uses of force. And while the relevant law can often be quite simply stated, it can also be nuanced in its application.

a. For example, I very respectfully disagree with Professor Saul when he writes "Only military personnel may operate unmanned platforms engaged in hostilities".[3] Not only does the law relating to unmanned platforms vary to at least some degree between the air, maritime and land environments, I believe the issue Professor Saul is referring to is that in an armed conflict, only members of the armed forces will enjoy the combatant's privilege under international law. However, that is not the same as saying international prohibits the operation of unmanned platforms engaged in hostilities by other than military personnel — all the more so in a non-international armed conflict.

b. Equally, I very respectfully disagree with Professor Alston, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, when he writes "it is incumbent on pilots, whether remote or not, to ensure that a commander's assessment of the legality of a proposed strike is borne out by visual confirmation that the target is in fact lawful".[4] The relevant law simply does not require pilots to <u>visually</u> confirm targets. Rather, what the law does require is that:

> a) those who plan or decide upon an attack shall:
>
> > (i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;
>
> …
>
> (b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;[5]

c. For completeness, I note that while I would respectfully disagree with most of the points Dr Enemark makes on pages 1 and 7 of his submission if they were being

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[3] Submission by Prof Saul of 10 December 2014, page 2, para (h).
4 Ibid, annexes, *Pages 27-29 of 'Study on Targeted Killings', Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, UN DocA/HRC/14/24/Add.6 (28 May 2010)*, page 2.
[5] API, art 57(2).

advanced as legal propositions, I understand him to be advancing them as ethical positions and not legal positions.

5. While the underlying law may not change, it is important to consider how unmanned systems might facilitate greater compliance with the law.

a. For example, the greater intelligence, surveillance and reconnaissance persistence that can be provided by current unmanned systems can facilitate better target discrimination and lead to less incidental injury to civilians and damage to civilian property.

b. Equally, the inherently remote nature of unmanned systems facilitates greater force protection for the operators of those systems. Not only is this of direct benefit to the operators, but it can also be of benefit to civilians as the operators may be less likely (when compared to operators who are personally at risk) 'to resort to greater force to address threats'.[6]

c. While the selection of the appropriate military platform and tactic needs to be assessed in context, to the extent that the use of an unmanned platform in a particular case does not increase the risk to the civilian population, this use of such a platform may be not only a militarily wise strategy but may well be something that is legally required of commanders and the government.[7] Accordingly, there would be significant legal risk in imposing arbitrary restrictions on the use of unmanned platforms.

I would be pleased to expand on any of the above points or address other issues if that would assist the Committee.

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[6] Anderson et al, 'Adapting the Law of Armed Conflict to Autonomous Weapon Systems', (2014) 90 *International Law Studies* 386, 393.

[7] See *Smith v Ministry of Defence*, *Ellis v Ministry of Defence, Allbutt v Ministry of Defence*, [2013] UKSC 41 (http://www.bailii.org/uk/cases/UKSC/2013/41.html), where the UK Supreme Court held that the government can potentially be liable for failure to provide technology and equipment that reduces combat risk to soldiers. In addition to this possible common law obligation, the full ambit of the relatively new Workplace Health and Safety obligations in Australia are yet to be discovered.