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**SUBMISSION TO THE SENATE FOREIGN AFFAIRS, DEFENCE AND TRADE
LEGISLATION COMMITTEE: INQUIRY INTO THE DEFENCE LEGISLATION
AMENDMENT (ENHANCEMENT OF DEFENCE FORCE RESPONSE TO
EMERGENCIES) BILL 2020**

I refer to your letter/email dated 9 October 2020 in which you provided an invitation to make a written submission to the above Inquiry into the *Defence Legislation Amendment (Enhancement of Defence Force Response to Emergencies) Bill 2020* ('the Bill'). The Centre for Military and Security Law, ANU College of Law, greatly appreciates the opportunity to provide this submission.

Events that have occurred in late 2019, and so far in 2020, have highlighted the need for the Federal Government to have the capacity to use the Australian Defence Force (ADF) to deal with a range of situations which once may have been considered not suitable or appropriate for the ADF to be involved with.

This submission will provide comment on aspects of Schedule 1 and Schedule 2 of the Bill.

In relation to Schedule 1, the amendments proposed in the Bill, and as explained in the Explanatory Memorandum, are reasonably non-contentious as they primarily deal with the basis upon which a member of the reserve force can be required to serve and the manner in which any call-out order is made.

However, the Bill does not address the underpinning legal basis for using the ADF in the manner that has occurred this year, and I have previously written about the need to clarify this situation.¹ Proper understanding of the constitutional basis that authorises the use of the ADF in response to emergencies is something that would benefit both the ADF and the Australian public, so that there is no doubt that any deployment of the ADF occurs pursuant to valid lawful authority. The possible options appear to be the 'defence power' s51(vi), the 'executive power' s61 or the 'protection of states power' s119. Unfortunately, the Bill does nothing to clarify the constitutional basis for using the ADF in response to emergencies, which in turn raises questions about the scope and breadth of the Commonwealth's power to

¹ See David Letts, <https://www.canberratimes.com.au/story/6570161/sending-in-the-military-first-lets-get-some-legal-issues-straightened-out/>

use the ADF in such situations. Existing statutory mechanisms to authorise members of the ADF to exercise powers under other legislation could also be used.²

One issue that has been raised during 2020 in relation to both the bushfire and COVID-19 responses has been whether (and how) consultation between the Commonwealth and State and Territory authorities should occur. In relation to using the ADF for emergency response, the *Defence Act 1903*'s existing provisions are silent on this issue and the proposed amendments do not address the topic.³ Further, the proposed amendments are not the appropriate legislative mechanism to deal with issues related to consultation between the Commonwealth and the States/Territories regarding the wider use of the ADF, as their purpose is simply to enhance ADF numbers from a 'total force' perspective – ie by authorising the compulsory service of members of the reserve force. To be clear, the amendments impact upon the purpose and use of members of the ADF's reserve force but they do not impact how the members of the ADF's permanent force are to be used during any 'response to emergency'. The *Defence Act 1903* does not provide any legislative basis for the overall use of the ADF (ie permanent force and reserve force) during emergencies, and this is a situation that warrants rectification.⁴ Importantly, it is noted that the Bill does not create any new powers for the ADF in relation to responding to emergency situations.

The second issue is that the Bill does nothing to address the prospect, however remote, that members of the ADF may be required to use force or other coercive powers when responding to an emergency. It appears, fortunately, that this issue has not arisen in any significant way during either the bushfire response or the COVID-19 response but the possibility is nevertheless there. My comments from January 2020 remain extant:

“It is foreseeable that ADF personnel will be required to assist civil authorities dealing with people who are unwilling to comply with directions to leave an area, or to conduct searches of property and seize items for a variety of reasons. Without specific authority to undertake these activities, members of the ADF have no greater legal right to direct, search or seize than an ordinary citizen, so this situation should be clarified.”⁵

The *Defence Act 1903* currently contains provisions that deal with the use of reasonable and necessary force by the ADF in relation to the situations that Part IIIAAA of that *Act* covers. Similarly, relevant State and Territory legislation explicitly addresses the use of force during a 'state of emergency'⁶ in that State or Territory. The lack of a similar legislative basis for the potential use of force by the ADF in response to emergencies is a serious deficiency that

² For example, in response to a pandemic the ADF could be declared a 'national response agency' under s452 of the *Biosecurity Act 2015* (Cth) which would then enliven the powers and authority under Chapter 8, Part 1, Division 3 of that *Act*; there is the possibility of further authorisation for the ADF to use powers available under Chapter 10 of the *Biosecurity Act 2015* (Cth)

³ Letts, *op cit*, where I referred to the example of the (then) NSW Rural Fire Service Commissioner stating in early January 2020 that he was unaware of the deployment of 3000 army personnel to provide firefighting assistance

⁴ This situation can be contrasted with the consultation requirements that are included in *Defence Act 1903* Part IIIAAA Calling out the Defence Force to protect Commonwealth interests, States and self-governing Territories

⁵ Letts, *op cit*

⁶ For example, *State Emergency and Rescue Management Act 1989* (NSW) s37E

should be corrected for the protection of both the ADF and the Australian community in situations where the ADF is responding to emergencies.

In relation to Schedule 2 of the Bill, the claim in the Explanatory Memorandum that immunity from ‘any liability, whether civil or criminal is analogous with the immunity available to emergency services in some States and Territories’ warrants further examination. Some recent research on this topic by a CMSL Emergency Management expert notes that exclusion from criminal liability is ‘unusual’⁷ as ‘most’ State and Territory legislation only provides exemption from civil liability.⁸ However, a brief review of some of the relevant legislation from other jurisdictions has identified that a variety of different forms of release from liability are used,⁹ and some of these do expressly provide for release from criminal liability.¹⁰

The intention to release a ‘protected person’ from criminal liability for actions that are performed in good faith when responding to an emergency (clause 123AA of the Bill) is understood and supported. As the Bill clearly contemplates this occurring, a small amendment to the words used in the Explanatory Memorandum may be warranted in order to remove any doubt that might exist regarding the intention of the legislation to provide an exemption from both civil and criminal liability as outlined in Schedule 2.

In conclusion, while the overall purpose of the Bill is supported, it leaves a number of unanswered questions regarding the use of the ADF in response to emergencies. The focus on amending the *Defence Act 1903* in relation to ‘Call out’ of the reserve force in response to emergencies, without any attempt to clarify the legal basis upon which the ADF can be used in such situations, does not reflect the way in which the ADF has been used in response to emergencies in recent years. The absence of any reference to the nature and extent of powers that can be exercised by the ADF (ie permanent and reserve force) in these situations, including the potential use of force and other coercive powers, is also concerning.

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⁷ See Michael Eburn, <https://emergencylaw.wordpress.com/2019/10/26/immunity-from-criminal-prosecution-for-traffic-offence-by-sa-police-and-emergency-workers/>

⁸ See Michael Eburn <https://emergencylaw.wordpress.com/2016/10/14/rfs-fatal-collision-and-s-128-of-the-rural-fires-act/>

⁹ For example, *Fire and Rescue NSW Act 1989* s78; *State Emergency and Rescue Management Act 1989* (NSW) s59; *Emergencies Act 2004* (ACT) s198; *Emergency Management Act 2013* (VIC) s75

¹⁰ At least three jurisdictions in Australia have such legislation: the *Police Act 1988* (SA) s65 stipulates that: ‘A member of SA Police does not incur any civil or criminal liability for an honest act or omission in the exercise or discharge, or the purported exercise or discharge, of a power, function or duty conferred or imposed by or under this Act or any other Act or law’; the *Emergency Management Act 2006* (TAS) s58 and the *Emergency Management Act 2013* (NT) s113 also provide an exemption from civil and criminal liability