



AUSTRALIAN
LAWYERS
FOR
HUMAN RIGHTS

PO Box A147
Sydney South
NSW 1235
info@alhr.org.au
www.alhr.org.au

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

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

Dear Committee Secretary,

Submission on the Defence Amendment (Call out of the Australian Defence Force) Bill 2018

Australian Lawyers for Human Rights (**ALHR**) thanks the Senate Legal and Constitutional Affairs Committee (**Committee**) for the opportunity to make this submission on the Defence Amendment (Call out of the Australian Defence Force) Bill 2018 (**Bill**).

ALHR was established in 1993 and is a national network of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

1. Summary

This Bill will amend Part IIIAAA of the *Defence Act 1903* (**Act**). ALHR acknowledges that the Bill follows the inquest into the Lindt Café Siege, which found that existing arrangements for ADF call out in relation to terrorist incidents are inadequate.

The amendments contained in the Bill remove the threshold requirement that the States and Territories “are not, or are unlikely to be, able to protect themselves or

Commonwealth interests against the domestic violence” before calling out the Australian Defence Force (ADF). Relevantly, the amendments also:

- allow the ADF to be called out to multiple States and Territories simultaneously;
- allow the ADF to operate cross-jurisdictionally, even where one or more jurisdictions were not specified in the call out order, if it is for the purpose of protecting the interests specified in the order;
- allow the ADF to deploy in certain pre-approved situations without being called out by the State or Territory authorities; and
- expand the powers of the ADF to search and seize, detain persons and to control movement during an incident.

The deployment of the ADF on to the streets of Australia and the powers that the ADF is authorised to use under the Bill are serious issues. The last time Australians saw a significant military presence on domestic streets was post the 1978 Hilton Bombing. Given that the Bill has the potential to significantly change the way situations of public emergency are dealt with in Australia, it should be heavily scrutinised.

While ALHR recognises that the Bill’s drafting includes a number of safeguards, ALHR does not believe that the Bill should be enacted in its current form. We provide the comments below in the hope that they are of assistance to the Committee.

2. ALHR’s Human Rights Concerns

Pursuant to the principle of legality, Australian legislation and judicial decisions should adhere to international human rights law and standards, unless legislation contains clear and unambiguous language otherwise. Furthermore, the Australian parliament should properly abide by its binding obligations to the international community in accordance with the seven core international human rights treaties and conventions that it has signed and ratified, according to the principle of good faith.

ALHR endorses the views of the Parliamentary Joint Committee on Human Rights (PJCHR) expressed in Guidance Note 1 of December 2014¹ as to the nature of Australia’s human, civil and political rights obligations, and agree that the inclusion of human rights ‘safeguards’ in Commonwealth legislation is directly relevant to Australia’s compliance with those obligations.

Generally, behaviour should not be protected by Australian law where that behaviour itself infringes other human rights. There is no hierarchy of human rights – they are all interrelated, interdependent and indivisible. Where protection is desired for particular behaviour it will be relevant to what extent that behaviour reflects respect for the rights of others.

It is only through holding all behaviours up to the standard of international human rights that one can help improve and reform harmful and discriminatory practices.

¹ Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Guidance Note 1: Drafting Statements of Compatibility*, December 2014, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources> accessed 16 January 2015, see also previous *Practice Note 1* which was replaced by the Guidance Note, available at <<https://www.humanrights.gov.au/parliamentary-joint-committee-human-rights>>.

Legislation should represent an **appropriate and proportionate response** to the harms being dealt with by the legislation, and adherence to international human rights law and standards is an important indicator of proportionality.²

3. Contingent call out in ‘specified circumstances’

ALHR notes that the Bill provides for contingent call out of the ADF in ‘specified circumstances’.³ However, the term ‘specified circumstances’ is not defined in the Bill. Further, no indication is given within the Explanatory Memorandum as to the definition of ‘specified circumstances’ or events/circumstances which would be considered ‘specified circumstances’.

ALHR is concerned also that there is no review mechanism within the Bill for retrospective analysis of a declaration of ‘specified circumstance’. We believe a review process is necessary to ensure the call out of the ADF was justified in the circumstances. We are further concerned that if ‘specified circumstances’ are included in regulations promulgated from time to time, there will be insufficient parliamentary consideration and review of those circumstances.

4. Clause 51S

Clause 51S bears repeating in full:

If, before, while or after exercising a power under any of Divisions 3 to 5 or this Division, a member of the Defence Force fails to comply with any obligation imposed under this Part that relates to the exercise of the power, the member is not, and is taken not to have been, entitled to exercise the power unless the member exercised the power in good faith.

The Explanatory Memorandum states that clause 51S is necessary to avoid the criminal prosecution of ADF members who “breach a minor technical obligation, such as failing to wear their name badge”.

However, in practice this is a wide exception to obligations on ADF members under the Bill. For example, clause 51S could mean that an ADF member can use force that is likely to cause the death of, or grievous bodily harm to, a person without complying with the restrictions on the use of force if they act in ‘good faith’.

The term ‘good faith’ is abstract and has not been completely established within Australian law. The inclusion of this nebulous term in the Bill only serves to create confusion in the legal obligations of individual ADF members when they are exercising powers under the Bill.

5. Clause 46

Clause 46 of the Bill provides ‘additional powers’ to ADF members during a call out. This includes the power to “direct a person to answer a question put by the member, or

² See generally Law Council of Australia, “*Anti-Terrorism Reform Project*” October 2013, <<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Oct%202013%20Update%20-%20Anti-Terrorism%20Reform%20Project.pdf>> .

³ Clause 34 and 36 of the Defence Amendment (Call out of the Australian Defence Force) Bill 2018.

to produce to the member a particular document that is readily accessible to the person, (including by requiring the person to provide identification to the member)”.

ALHR notes that these powers purport to be unfettered by principles of common law, particularly the right against self-incrimination and the right to silence.

6. Concentration of power

The proposed amendments introduce the Minister for Home Affairs as a named alternative minister for the purposes of expedited call out. This is another instance of discretionary power being shifted toward the Minister for Home Affairs.

ALHR notes that the creation of Minister Dutton’s new ‘super portfolio’, the Department of Home Affairs, has recently led to an unprecedented concentration of ministerial powers, by combining four existing Ministries and adding functions from yet more Ministries. ALHR is concerned that the proposed amendments constitute yet further ‘power creep’ and demonstrate another example of the lack of internal restraints and balances resulting from inception of the ‘mega ministry’ headed by Peter Dutton. The effect of the Ministry taking charge of so many different departments is — in the absence of a Federal Human Rights Act — to diminish the balances necessary for maintaining the rule of law and the civil and human rights of all Australians.

7. The police – military divide

Members of the ADF are trained to kill, equipped with the highly effective weapons, and arguably instilled with an allied/enemy mindset. In wartime, soldiers operate in an extremely chaotic and confused environment where every civilian is a potential enemy, every window a possible sniper's nest. Policing, on the other hand, is a job that involves entirely different community expectations and standards. In an Australian urban setting, police confront a more comprehensible and structured situation – usually no more than a few suspects and with bystanders who are generally assumed to be friendly or neutral.

Literature has established that there is a clear split between military and policing ethos in many cultures including, it is submitted, that of Australia. Military success is based on efficiency and effectiveness as compared to the degree of force applied. Efficiency is demonstrated in the balance reached between means applied and results obtained. The consequential aim is to project the maximum possible force while employing the minimum means necessary.⁴

Police forces have a distinctly different approach to the relationship of force and results. The concept of efficiency is replaced by the concept of relativity – that is, force has to be applied in proportion to the level of the perceived threat. This means that police are more likely than the military to limit the use of force to the unavoidable minimum because they are socially constrained to do so, even if this requires greater means to be deployed in terms of non-lethal equipment and personnel.⁵

⁴ Kim Lioe, *Armed in Law Enforcement Operations? – The German and European Perspective*, (Springer, Berlin 2011), 148.

⁵ Arthur Costa, Mateus Medeiros “Police Demilitarisation: Cops, Soldiers and Democracy” in *Conflict, Security & Development*, issue 2, volume 2 (2002), 28.

The use of force under the Bill relates directly to the right to life in Article 6 of the *International Covenant on Civil and Political Rights (ICCPR)*. Proposed subsection 51N(3) engages the right to life by authorising members of the ADF to use lethal force when exercising powers under the Bill.

ALHR is concerned that the difference in approaches to domestic emergency incidents between the police and the ADF increases the likelihood, when the ADF are employed in preference to local police, of human rights breaches, particularly of the right to life.

ALHR is of the view that transfer of responsibility for public safety from the police to the ADF should occur only in circumstances in which State and Territory police “are not, or are unlikely to be, able to protect themselves or Commonwealth interests against the domestic violence”.

8. Conclusion

The Explanatory Memorandum for the Bill identifies the following rights under the ICCPR as potentially impacted, arguing however that the impact is proportionate, necessary and reasonable in the circumstances. These are:

- the right to life in Article 6 of the ICCPR;
- the right to freedom from arbitrary detention and arrest, and the right to liberty and security of the person in Article 9 of the ICCPR; and
- the right to freedom from arbitrary or unlawful interference with one’s privacy or home in Article 17 of the ICCPR.

For the reasons given above, in our view the impact of the Bill is not proportionate, necessary or reasonable in the circumstances.

Any legislation which impinges upon human rights must be narrowly framed, proportionate to the relevant harm it addresses, and provide an appropriate contextual response which minimises the overall impact upon all human rights. ALHR is concerned that the Bill does not strike the right balance.

ALHR thanks the Committee for the opportunity to make this submission and hopes the comments above and our recommendations below are of use to the Committee in its consideration of the Bill.

9. Recommendations

Recommendation 1

The Government should give an indication, preferably within the text of the legislation, of the events/circumstances which would be considered ‘specified circumstances’ for the purposes of clauses 34 and 36 of the Bill.

Recommendation 2

The Bill should include a parliamentary review mechanism for retrospective analysis of a declaration of ‘specified circumstance’ to ensure the call out of the ADF was justified in the circumstances.

Recommendation 3

Clause 51S should be limited to minor breaches of obligations by ADF members, such as failure to wear a name badge, and not extended to allow serious breaches e.g. of the restrictions on the use of force, on the basis that the ADF member was acting in ‘good faith’.

Recommendation 4

The power to direct a person to answer a question put by an ADF member should be made subject to the right to silence and the right to self-incrimination, or at minimum excluded from being used as evidence in proving an offence against the person.

Recommendation 5

In recognition that the Minister already has significant discretionary power under Australian law, the Minister for Home Affairs should not be included as an Authorised Minister for the purposes of the Bill.

Recommendation 6

Recognising the differences between military and police operations discussed in paragraph (7) above, the ADF should not be deployed in preference to police. Instead their call out should be limited to specific teams of ADF members with specific capabilities when State and Territory police do not have those specific capabilities and therefore “are not, or are unlikely to be, able to protect themselves or Commonwealth interests against the domestic violence” e.g. responding the use of chemical weapons.

If you would like to discuss any aspect of this submission, please contact Kerry Weste, President, Australian Lawyers for Human Rights, by email at president@alhr.org.au.

Yours faithfully,



Kerry Weste
President
Australian Lawyers for Human Rights