

## ANOTHER EXPANSION OF MILITARY CALL OUT POWERS IN AUSTRALIA: SOME CRITICAL LEGAL, CONSTITUTIONAL AND POLITICAL QUESTIONS

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### I INTRODUCTION: CAUSES FOR CONCERN

Since the turn of the century, extensive statutory provisions have been introduced, for the first time, specifically empowering Australian government ministers, or if ‘pre-authorised’, the Chief of the Defence Force (‘CDF’), to call out the Australian Defence Force (‘ADF’) to deal with either possible ‘domestic violence’ – including a perceived threat to ‘Commonwealth interests’ – or a likely danger to ‘declared infrastructure’.<sup>1</sup>

None of these terms are defined in the legislation, nor are other key phrases, effectively handing vague and potentially far-reaching powers to governments and military commanders. Once deployed, military personnel can exercise extraordinary powers over civilians, overturning basic legal and democratic rights.

In late 2018, for the third time since 2000,<sup>2</sup> and again with little public debate or scrutiny, Australia’s Parliament gave several government ministers and/or the CDF new or extended powers to mobilise the armed forces, potentially to put down civil unrest.<sup>3</sup>

As in 2000 and 2006, the Labor Party joined a Liberal-National Coalition Government in passing the legislation, with only minor amendments. The already broad call out powers inserted into the *Defence Act 1903* (Cth) (‘*Defence Act*’) in 2000, and significantly expanded in 2006, were widened again by the *Defence Amendment (Call Out of the Australian Defence Force) Act 2018* (Cth) (‘*Amendment Act*’).

Like the measures of 2000 and 2006, the 2018 legislation was depicted in Parliament and the media largely as a means of protecting the population against

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1 *Defence Act 1903* (Cth) Part IIIAAA (‘*Defence Act*’).

2 See *Defence Legislation Amendment (Aid to Civilian Authorities) Act 2000* (Cth); *Defence Legislation Amendment Act 2006* (Cth).

3 For details of these debates and the earlier amendments to Part IAAA of the *Defence Act*, see Michael Head, *Calling Out the Troops: The Australian Military and Civil Unrest: The Legal and Constitutional Issues* (Federation Press, 2009) 13–21, 100–21.

terrorist attacks.<sup>4</sup> The measures were said to be a response to a 2014 hostage-taking incident at a Sydney café, officially described as a ‘terrorist act’, and the recommendations of a subsequent Coroner’s Report.<sup>5</sup> Yet the legislation allows the Prime Minister or other ‘authorising’ ministers to call out the military, or pre-authorise deployment, on a much broader basis than combating terrorist-related activities.

Moreover, Part IIIAAA of the *Defence Act*, which contains the call out provisions, states that these powers are in addition to any other legal powers to deploy the armed forces domestically. Little defined powers are said to exist, derived either from the ancient prerogatives of the British Monarchy, the common law rights of citizens, a ‘nationhood’ Executive power arguably implicit in the 1901 *Australian Constitution*, the powers of the Governor-General under the *Constitution*, or even martial law.<sup>6</sup> Previous language to this effect, first introduced in 2000, is retained in section 51ZD of the *Defence Act*,<sup>7</sup> which states: [t]his Part does not affect any utilisation of the Defence Force that would be permitted or required, or any powers that the Defence Force would have, if this Part were disregarded.

The latest expansion of military call out powers came on top of numerous suites of ‘counter-terrorism’ and other legislation to increase the powers of the police and intelligence agencies since 2002.<sup>8</sup> So, in addition to boosting the legal powers and capacities of the civilian security agencies to unprecedented peacetime levels, successive governments have insisted on the necessity to be able to order the domestic deployment of the military forces.

The amended *Defence Act* further erodes a centuries-old principle – reinforced by the abolition of the absolute Monarchy in Britain – of barring those in power from unleashing the military against the people.<sup>9</sup> The indefinite ‘war on terrorism’, first proclaimed by the United States (‘US’) government and its allies in 2001, has again provided the pretext for measures previously regarded as a threat to fundamental civil liberties.<sup>10</sup>

While the latest legislation, like the 2000 and 2006 amendments, was justified in Parliament and the media as a means of combating terrorism,<sup>11</sup> statements by government representatives pointed to the fact that the wording of the provisions permits the use of the armed forces for other purposes.

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4 See, eg, Andrew Greene, ‘Shakeup of Defence “Call-Out” Powers Will Make It Easier for Police to Request Military Backup During Terror Attacks’, *ABC News* (online at 28 June 2018) <<https://www.abc.net.au/news/2018-06-28/military-call-out-powers-up-for-debate-legislation-in-parliament/9916636>>.

5 State Coroner of New South Wales, *Inquest into the Deaths Arising from the Lindt Café Siege: Findings and Recommendations* (Report, May 2017).

6 See Head, *Calling Out the Troops* (n 3) 122–35; Cameron Moore, *Crown and Sword: Executive Power and the Use of Force by the Australian Defence Force* (ANU Press, 2017) 165–203.

7 The author notes that, at the time of publication, the *Amendment Act* was not yet incorporated into the *Defence Act*. The references are to the *Defence Act*, as amended.

8 For a summary up to 2014, see Andrew Lynch, Nicola McGarrity and George Williams (eds) *Inside Australia’s Anti-Terrorism Laws and Trials* (NewSouth, 2015).

9 Head, *Calling Out the Troops* (n 3) 10–11.

10 For a critique, see Michael Head, *Crimes Against the State: From Treason to Terrorism* (Ashgate, 2011) 181–7.

11 Greene (n 4); see also Head, *Calling Out the Troops* (n 3) 28–31.

When the Defence Amendment (Call Out of the Australian Defence Force) Bill 2018 ('the Bill') was first tabled in June 2018, Attorney-General Christian Porter told journalists the military could be used to restore order in case of 'widespread rioting'.<sup>12</sup> That statement was not subsequently explained. Nor was it retracted.

Former Special Air Service ('SAS') officer Andrew Hastie, Chairman of the Parliamentary Joint Intelligence and Security Committee, told the House of Representatives in November 2018 he was 'very pleased' that the Bill would 'unlock' the capabilities of the country's two Special Forces units – the SAS Regiment in Perth and the 2<sup>nd</sup> Commando Regiment in Sydney. He stated:

They benchmark against Five Eyes special operations and law enforcement units, so they have world's best practice at their fingertips. They also have significant combat experience acquired through ADF operations in Afghanistan over the past decade or so ... They are surgical in the application of lethal force. Culturally – this is a key point between our police and military – they're ruthlessly mission focused, particularly when it comes to resolving these sorts of situations.<sup>13</sup>

While Hastie couched his remarks in terms of countering terrorism-related incidents, his references to Afghanistan, the US-led 'Five Eyes' operations and 'surgical' use of lethal force are notable. Australia's Special Forces have been under investigation, accused of war crimes against civilians during the ongoing war in Afghanistan.<sup>14</sup> The Five Eyes network – the US, United Kingdom ('UK'), Canada, Australia and New Zealand – conducts global mass surveillance, particularly targeting people deemed a threat to any of the five governments involved.<sup>15</sup>

As detailed below, the amended *Defence Act* expands the military's powers, including to kill people, beyond situations where commanders claim it is necessary to protect a life. Lethal force can be used to protect 'declared infrastructure' or end 'threats to ... public health or public safety'.<sup>16</sup> In addition, military personnel have been further protected from legal liability by adding a new defence of acting in 'good faith'.<sup>17</sup>

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12 Paul Karp, 'Military Could Be On Call for Sieges and Riots, Attorney General Says', *The Guardian* (online at 28 June 2018) <<https://www.theguardian.com/australia-news/2018/jun/28/military-could-be-on-call-for-sieges-and-riots-attorney-general-says>>.

13 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 October 2018, 10436–9 (Andrew Hastie).

14 Nick McKenzie and Chris Masters, 'Police Investigate Ben Roberts-Smith over Alleged War Crimes', *The Sydney Morning Herald* (online at 29 November 2018) <<https://www.smh.com.au/national/police-investigate-ben-roberts-smith-over-alleged-war-crimes-20181126-p50iib.html>>.

15 Scarlet Kim et al, 'Newly Disclosed Documents on the Five Eyes Alliance and What They Tell Us about Intelligence-Sharing Agreements', *Lawfare* (online at 23 April 2018) <<https://www.lawfareblog.com/newly-disclosed-documents-five-eyes-alliance-and-what-they-tell-us-about-intelligence-sharing>>; Mike Head, 'Leaked Documents Expose Plans for Internal Surveillance by Australia's Electronic Spy Agency', *World Socialist Web Site* (online at 2 May 2018) <<https://www.wsws.org/en/articles/2018/05/02/asde-m02.html>>.

16 See, eg, *Defence Act* ss 46(5)(b), (c).

17 *Defence Act* s 51F.

Under the new provisions, government ministers can issue call out orders if they consider that potential ‘domestic violence’ could pose a ‘threat’ to ‘Commonwealth interests’, even if the relevant state or territory government does not request the call out, or even disagrees or objects.<sup>18</sup> Military personnel will have great powers, including to use lethal force, detain civilians, issue directives, search people and premises, question people and seize documents.<sup>19</sup> These features of the legislation raise constitutional and legal issues, as well as those of civil rights. It will be suggested in this article that these provisions could facilitate the use of military force to suppress social unrest.

## II WIDE POWERS

It is incontrovertible that the legislation is not confined to dealing with terrorism. In fact, the word terrorism does not appear in amended Part IIIAAA of the *Defence Act*. Rather, the government can order the military to many types of perceived potential threats, including to ‘public safety’<sup>20</sup> – another undefined term.

Moreover, in ‘specified circumstances’ the ministers can authorise a ‘contingent call out’, handing the call out powers to the CDF.<sup>21</sup> Supported by the Labor Party opposition, the Government refused to amend the Bill to define ‘specified circumstances’. Instead, in response to two Parliamentary Committee Reports,<sup>22</sup> it changed the Bill’s Explanatory Memorandum to declare: ‘[w]hat constitutes specified circumstances will depend on the situation in question’.<sup>23</sup> Such a response undercuts any claim that Parliamentary scrutiny narrowed the scope of the legislation.

The Government also rejected calls made in Parliament and Committee Inquiry submissions to define ‘domestic violence’. The Explanatory Memorandum was revised to state: ‘[p]eaceful protests, industrial action or civil disobedience would not fall within the definition of “domestic violence”’.<sup>24</sup> However, section 39(3)(b) of the amended *Defence Act* states that this caveat does not apply if there is a ‘reasonable likelihood of: (ii) serious damage to property’. The *Defence Act* provides no definition of ‘serious damage’. The likelihood of allegedly ‘serious’ danger to property could be cited to set troops against strikers, demonstrators or participants in civil disobedience, without any objective measure of seriousness.

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18 *Defence Act* s 38.

19 See, eg, *Defence Act* s 46(7).

20 See, eg, *Defence Act* ss 46(5)(b), (c).

21 *Defence Act* s 34.

22 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Defence Amendment (Call Out of the Australian Defence Force) Bill 2018 [Provisions]* (Report, September 2018); Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report* (Report 12, November 2018).

23 Addendum to the Explanatory Memorandum, *Defence Amendment (Call Out of the Australian Defence Force) Bill 2018 (Cth) 3 [205A]* (‘Addendum to the Explanatory Memorandum’).

24 *Ibid* 2 [165A].

‘Domestic violence’ is an undefined term embedded in section 119 of the *Constitution*. Derived from the *United States Constitution*, it refers to serious civil unrest that endangers the existing order, but its extent remains unclear.<sup>25</sup>

Previously, because the *Constitution* left police powers in the hands of the Australian states, the ADF could be called out only if a state or territory was ‘not, or is unlikely to be, able to protect’ itself or Commonwealth interests ‘against the domestic violence’.<sup>26</sup>

That language retained a semblance of consistency with section 119 of the *Constitution*, which states: ‘[t]he Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the States, against domestic violence’. Nevertheless, constitutional doubt exists whether such a military mobilisation could proceed if a state government objected.<sup>27</sup>

This constitutional limit has been further eviscerated by the 2018 amendments. The Prime Minister or two ‘authorising ministers’ – now including the Home Affairs Minister – have the power to mobilise the ADF if they decide it ‘would be likely to enhance’ the state or territory’s ability to protect itself or Commonwealth interests.<sup>28</sup> This revised threshold means it is no longer necessary for the government to assert that a state or territory is, or could be, unable to provide the required protection.

Furthermore, in the cases of ‘Commonwealth interests’ and ‘declared infrastructure’ a call out can override state and territory governments and police forces. Section 37(7) of the *Defence Act* states that an authorising minister must notify the government of an affected state or territory ‘as soon as reasonably practicable’ after authorising a ‘Commonwealth interests’ order, but failure to do so ‘does not affect the validity’ of the order.

Moreover, section 38(2) provides that a ‘Commonwealth interests order’ can be made whether or not the relevant state or territory requests the order. In that event, an authorising minister must consult that government before authorising the order, but that consultation cannot prevent or override the order. In addition, section 38(3) states that no such consultation is required for a call out order if ‘the authorising ministers are satisfied that, for reasons of urgency, it is impracticable to comply with’ section 37(2).

Nor is an authorising minister required to consult in relation to an expedited call out order under section 51U.<sup>29</sup> The same powers apply to urgent or expedited orders to protect ‘declared infrastructure’.<sup>30</sup>

These provisions provide great leeway to pre-empt or defy state and territory objections. In effect, the state and territory governments have no say in the matter. The Explanatory Memorandum asserted: [i]t is the Commonwealth’s prerogative

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25 Head, *Calling Out the Troops* (n 3) 18–19.

26 *Defence Act 1903* (Cth) ss 51A–51C, later amended by the *Defence Amendment (Call Out of the Australian Defence Force) Act 2018* (Cth).

27 Head, *Calling Out the Troops* (n 3) 61–74, 148–61.

28 *Defence Act* ss 33(2), 34(2), 35(2), 36(2).

29 See *Defence Act* s 51V(6).

30 *Defence Act* ss 51H(7), (8).

to make orders for the protection of its own interests, and it does not need a request from a state or territory to make or vary such an order.<sup>31</sup>

Expanded powers have been created for ministers to order a ‘contingent call out’ that pre-authorises the CDF to deploy troops.<sup>32</sup> It now extends to cover Commonwealth and state and territory interests.<sup>33</sup>

Although no call out orders have been issued since 2000, ‘contingency callouts’ have been ordered for numbers of political and sporting events. In a Senate Committee submission, the Attorney-General’s Department stated: [s]uch orders have been regularly made as part of security measures to protect major Commonwealth events (for example, the G20, Commonwealth Games, and the ASEAN summit) from circumstances involving air threats.<sup>34</sup>

Arguably, these operations have functioned as dress rehearsals for military mobilisations, designed also to accustom the population to ADF operations, such as air force fly overs and troop deployments, in major cities.<sup>35</sup>

### III BEYOND TERRORISM

In 2000 and 2006, the call out legislation was presented to Parliament as essential to deal with potential threats to major sporting events – the 2000 Sydney Olympics and the 2006 Melbourne Commonwealth Games respectively – even though no specific terrorist dangers were cited, no plots were ever reported, and no attacks occurred.<sup>36</sup> In 2018 the main explanation provided by both the Government and the Labor Party was that military resources should be available to respond to a terrorist attack like that which allegedly occurred in a December 2014 Sydney Lindt Café siege.<sup>37</sup>

Then Prime Minister Malcolm Turnbull first foreshadowed the 2018 Bill in mid-2017, citing a Coroner’s Report on the hostage-taking event, conducted by lone gunman Man Haron Monis.<sup>38</sup> The Government and the media labelled the siege a terrorist emergency and claimed it demonstrated the need for the Special Forces regiments to intervene with lethal force. Great doubts, however, exist about Monis’ actions and motivations. He was a mentally disturbed individual who had been in close contact with police and intelligence agencies for many years.<sup>39</sup> Great doubts also surround the entire political and geo-strategic agenda of the US-led ‘war on terror’, which has not only laid waste to societies throughout the Middle

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31 Explanatory Memorandum, Defence Amendment (Call Out of the Australian Defence Force) Bill 2018 (Cth) 49 [263] (‘Explanatory Memorandum’).

32 *Defence Act* s 34.

33 *Defence Act* ss 34, 36.

34 Senate Legal and Constitutional Affairs Legislation Committee (n 22) 5 [1.15].

35 Head, *Calling Out the Troops* (n 3) 77–94.

36 *Ibid* 82–5.

37 ‘Military to Gain New Terror Powers’, *InDaily* (online at 17 July 2017) <<https://indaily.com.au/news/2017/07/17/military-gain-new-terror-powers/>>.

38 Mark Kenny, ‘Lindt Siege Findings: Malcolm Turnbull Flags Changes to Make Defence Force Intervention Easier’, *The Sydney Morning Herald* (online at 25 May 2017) <<https://www.smh.com.au/politics/federal/lindt-siege-findings-malcolm-turnbull-flags-changes-to-make-defence-force-intervention-easier-20170524-gwc705.html>>.

39 State Coroner of New South Wales (n 5) 53–72, 93–101.

East and produced the worst refugee crisis since World War II, but also provided a breeding ground for terrorism.<sup>40</sup>

More broadly, the expansion of military call out powers in Australia is part of an international trend. Since the turn of the century, greater powers to deploy the armed forces domestically, and for purposes beyond terrorism, have been adopted in comparable countries with an English-derived legal system, including the US, UK and Canada, and other key countries like Germany, Italy and Japan.<sup>41</sup> Moreover, large contingents of troops have been mobilised in some countries, such as the US, UK, France, Belgium and Italy, on various pretexts, from averting terrorist attacks (UK, France, Belgium) to dealing with street crime (Italy) and preventing an ‘invasion’ of refugees (the US).<sup>42</sup>

The international character of these phenomena itself points to underlying economic and political factors, which this article suggests are related to growing social inequality, rising domestic class tensions and worsening global economic and military conflicts.

Notably, this process has been accompanied also by expansions of military spending, reassertions of executive powers to launch military conflicts without Parliamentary approval, and preparations for war between the major powers.<sup>43</sup> One expression of that trend was the 2018 US National Defense Strategy, which stated: ‘[i]nter-state strategic competition, not terrorism, is now the primary concern in US national security’.<sup>44</sup> In particular, the document named China and Russia as such ‘competitors’.<sup>45</sup>

This article assesses the ‘peacetime’ application of the call out provisions. Any major war involving Australia, however, would have immense internal implications for civil rights, not least because the domestic powers of the military, as well as the police and intelligence services, would further expand, as happened in World War I and II.<sup>46</sup>

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40 William Blum, *Rogue State: A Guide to the World's Only Superpower* (Zed Books, 2002) 133–4, 145–6, 155; Andrew J Bacevich, *American Empire: The Realities and Consequences of US Diplomacy* (Harvard University Press, 2002); Deepak Tripathi, *Breeding Ground: Afghanistan and the Origins of Islamist Terrorism* (Potomac, 2011).

41 Michael Head and Scott Mann, *Domestic Deployment of the Armed Forces: Military Powers, Law and Human Rights* (Ashgate, 2009) 5–17.

42 See, eg, Elisabeth Braw, ‘For Not-Quite-Wars, Italy Has a Useful Alternative to Traditional Troops’, *Defense One* (online at 16 April 2018) <<https://www.defenseone.com/ideas/2018/04/todays-not-quite-wars-italy-has-alternative-traditional-troops/147457/>>.

43 Michael Head and Kristian Boehringer, *The Legal Power to Launch War: Who Decides?* (Routledge 2019), 4–15.

44 Jim Mattis, *Summary of the 2018 National Defense Strategy of the United States of America* (US Department of Defense, 2018) 1.

45 Ibid.

46 Head and Boehringer (n 43) 223–9.

#### IV EXPANDED CALL OUT POWERS IN MORE DETAIL

Division 2 of Part IIIAAA of the *Defence Act* now sets out four types of call out orders:

1. call out to protect Commonwealth interests;
2. contingent call out to protect Commonwealth interests;
3. call out to protect states and territories; and
4. contingent call out to protect states and territories.

Other Divisions provide for expedited call out orders, specified area declarations and infrastructure declarations.

These provisions, as in section 33(2), increase the power to deploy the ADF to respond to ‘domestic violence’ that is occurring across multiple state and territory jurisdictions. Section 34(1)(d) extends contingent call out powers to be available in relation to land and maritime threats, in addition to aviation threats.

Before the 2018 amendments, Part IIIAAA already contained sweeping powers to call out the ADF and conferred great powers on ADF personnel once deployed.<sup>47</sup> According to the 2018 Bill’s Explanatory Memorandum, the amendments would ‘streamline the legal procedures for call out of the ADF’ and ‘enhance the ability of the ADF to protect states, self-governing territories, and Commonwealth interests, onshore and offshore, against domestic violence, including terrorism’.<sup>48</sup>

As stated in an Addendum to the Explanatory Memorandum – tabled to respond to questions raised in two Parliamentary Committee Reports<sup>49</sup> – crucial terms remain undefined. Paragraph 163A, inserted into the Explanatory Memorandum, said:

The term ‘Commonwealth interests’ is not defined in the Bill. For the purposes of Part IIIAAA, ‘Commonwealth interests’ would include the protection of: Commonwealth property or facilities; Commonwealth public officials; visiting foreign dignitaries or heads of state; and, major national events, including the Commonwealth Games or G20.<sup>50</sup>

These words, in addition to being legally non-binding, are vague. What is ‘Commonwealth property’? What is a ‘major national event’?

Likewise, paragraph 165A stated: [t]he term ‘domestic violence’ is not defined in the Bill but refers to conduct that is marked by great physical force and would include a terrorist attack, hostage situation, and widespread or significant violence.<sup>51</sup>

What is ‘great physical force’? What is ‘significant violence’?

Paragraph 182A said the lower threshold regarding state or territory capacity ‘is not intended to impermissibly expand the circumstances in which the ADF

47 Head, *Calling Out the Troops* (n 3) 100–18.

48 Explanatory Memorandum (n 31) 2 [3].

49 Senate Legal and Constitutional Affairs Legislation Committee (n 22); Parliamentary Joint Committee on Human Rights (n 22).

50 Addendum to the Explanatory Memorandum (n 23) 2 [163A].

51 *Ibid* 2 [165A].



might be called out, or result in the ADF being called out in response to minor incidents that police routinely and appropriately deal with'.<sup>52</sup> However, it provided no assurance against this or wider use of the ADF. Instead, it asserted that the authorising ministers would consider the 'same factors' as under the previous threshold. If that were true, the amendment would serve no purpose.

Paragraph 182A insisted that the new threshold in sections 33 to 36 recognised that 'calling out the ADF to respond to an incident is a significant and exceptional act, and ensures that it is not to be done in relation to incidents that are within the ordinary capability of police'.<sup>53</sup> Yet, the legislation does not specify that. Rather, section 35(2) of the *Defence Act* states that the ADF can be deployed if that 'would be likely to enhance the ability of the state or territory to protect the state or territory against the domestic violence'.

Similarly, the *Defence Act* does not define the 'specified circumstances' in the Act to issue a contingent call out order. Paragraph 205A stated: '[t]here are a range of specified circumstances that could give rise to a contingent call out order'.<sup>54</sup> This language is meaningless. Paragraph 205C said 'typically' the circumstances would be similar to the 2014 G20 Leaders' Summit in Brisbane, the 2018 Gold Coast Commonwealth Games and the 2018 ASEAN-Australia Summit, where contingent call out orders were issued for aviation threats.<sup>55</sup> However, the legislation contains no such limits.

A new definition of 'declared infrastructure' has been inserted to replace the previous definition of 'designated critical infrastructure'. This amendment creates an almost open-ended power to deploy the armed forces, because 'declared infrastructure' is defined to mean any infrastructure, or a part of infrastructure, that is declared by authorising ministers under section 51H. That section permits a declaration where 'there is a threat or damage to disruption to the operation of the infrastructure or the part of the infrastructure' where the damage or disruption would 'directly or indirectly endanger the life of, or cause serious injury to, any person'.<sup>56</sup>

In addition to pre-authorized contingent call outs, the legislation, via section 51U, provides for 'expedited orders and declarations' in a 'sudden and extraordinary emergency' (also undefined). The Prime Minister or two authorising ministers can verbally issue such orders and declarations. Such orders 'need not be in writing'. A mere phone call from the Prime Minister to the CDF would suffice.

This 'extraordinary' power was previously created by the 2006 amendments, but the 2018 Bill extended it to cover 'declared infrastructure' and 'specified area' declarations, and to include the Home Affairs Minister and acting authorised ministers in the list of those holding the power.

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52 Ibid 2 [182A].

53 Ibid 3 [182A].

54 Ibid 3 [205A].

55 Ibid 4 [205A].

56 *Defence Act* s 51H(2).

Section 51U(4)(a) makes clear that the making of expedited orders or declarations does not require the authorising ministers to be satisfied of the ‘particular matters’ in sections 33(1), 34(1), 35(1), 36(1) or 51H(2). That is, the ministers do not have to consider that there is a likely threat of ‘domestic violence’ or danger to ‘Commonwealth interests’ or ‘declared infrastructure’. In effect, the alleged existence of a ‘sudden and extraordinary emergency’ can override these thresholds.

### A Greater ADF Powers Once Called Out

The 2018 Bill expanded the already considerable powers available to the ADF once deployed, consolidating them into four divisions of Part IIIAAA of the *Defence Act*: ‘reasonable and necessary’ powers ordered by the CDF (Division 2); ‘special powers’ generally authorised by an authorising minister (Division 3); powers exercised in ‘specified areas’ (Division 4); and powers to protect ‘declared infrastructure’ (Division 5).

Division 2 powers are subject to directions given by the Defence Minister to the CDF, and ‘must not stop or restrict any protest, dissent, assembly or industrial action’ except if there is a ‘reasonable likelihood’ of death, injury or ‘serious damage to property’.<sup>57</sup> There is also a requirement ‘as far as reasonably practicable’ to utilise ADF personnel in cooperation with state and territory police forces and for tasks requested by a police officer.<sup>58</sup>

Division 3, which is designed for the most heavily-armed Special Forces deployments, contains the most extensive powers. Part IIIAAA previously provided powers to prevent, put an end to, and protect persons from, acts of violence. Sections 46(5)(b) and 46(5)(c) expand these ‘special powers’ to also authorise the ADF to take action to prevent, put an end to, or protect persons from, threats to a person’s life or safety, or to public health or public safety.

The terms ‘safety’, ‘public health’ and ‘public safety’ are vague and open to wide interpretation. According to the Explanatory Memorandum:

These additional limbs are intended to allow the ADF to put an end to threats which have not yet materialised into acts of violence. They are also intended to make clear that the ADF can act in relation to generalised threats which may not be directed toward any specific person but towards the community in general.<sup>59</sup>

Sections 46(5)(d) and (e) extend these powers to shooting down planes and sinking vessels – which could endanger hundreds of lives – so long as an order to do so is not ‘manifestly unlawful’.

In addition, section 46(7) empowers ADF members to free hostages, control movements of people or means of transport, evacuate people, search persons, locations or things, seize items, detain people, require detained people to provide identification, patrol and cordon off areas, question people and compel production of documents. Subsection 46(9) allows an ADF member to do anything incidental to these powers.

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57 See *Defence Act* s 39(3).

58 See *Defence Act* s 40.

59 Addendum to the Explanatory Memorandum (n 23) 56 [307].

Section 50 also removes the previous requirement for ADF personnel to wear uniforms and identification when exercising the Division 3 powers, although the requirement remains when invoking most other powers. The Explanatory Memorandum stated:

This is because the tasks that the ADF will be required to perform under Division 3 are higher end military actions and may involve the Special Forces. These tasks may require the ADF to operate in a covert manner where uniforms would be detrimental. ADF Special Forces soldiers have protected identity status because they are associated with sensitive capabilities.<sup>60</sup>

This raises the likelihood of Special Forces troops taking ‘higher end military actions’ against civilians without being recognised as ADF personnel, or else not being identified and therefore not held accountable for killings or other violent acts. SAS soldiers could, for example, burst into a person’s home, provoking an alarmed response from someone inside who did not realise they were ADF personnel, and then shoot the person in alleged self-defence.<sup>61</sup>

Also expanded are the Division 4 powers for ‘specified areas’. First, the Division abolished the previous distinction between General Security Areas and Designated Areas, allowing the full suite of powers to be exercised within a specified area.<sup>62</sup>

Second, these powers are significantly broadened. Section 51A now allows ADF personnel also to search for a person who is likely to pose a threat to a person’s life, health or safety or public health or public safety, as well as things and people ‘connected’ (another undefined term) with the domestic violence or threat specified in the call out order. According to the Explanatory Memorandum:

The ability to search for persons connected with the domestic violence allows the ADF to search for people who do not pose a threat themselves, and who have not yet committed an offence, but who may be seeking to assist others in carrying out acts of violence.<sup>63</sup>

Section 51A(2)(a) now permits a generic written authorisation to search all premises in the specified area. This opens up the prospect of troops conducting sweeps through entire suburbs. The Explanatory Memorandum stated: [t]hese purposive powers will permit the ADF to undertake a coordinated, thorough, and systematic search of a specified area, or part of a specified area, to either find the threat, or to clear the area of a threat.<sup>64</sup>

Subsections 51A(2)(c) and (d) further allow an ADF member to search a person who is at or near premises, because the ADF member believes on

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60 Ibid [332].

61 As happened in 1989 when New South Wales Special Weapons and Operations Section (‘SWOS’) police officers shot and killed David Gundy, who had reacted angrily when armed men burst into his house in a mistaken early morning raid: see Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of David John Gundy* (1991) 4.

62 *Defence Act* s 47.

63 Explanatory Memorandum (n 31) 64 [354].

64 Ibid 64 [358].

reasonable grounds that the person has any thing that may be seized or is a ‘person who may be detained’ in relation to the call out order.

This detention power is also expanded. The phrase ‘person who may be detained’ is defined in section 31 as a person ‘who is likely to pose a threat to any person’s life, health or safety, or to public health or safety’, or who has committed an offence related to the domestic violence or threat specified in the call out order, and whom it is necessary, as a matter of urgency, to detain’. This power thus covers considerable ground, well beyond the alleged commission of an offence (the previous limit), to a suspected future threat.

Also removed is a previous requirement that a search authorisation state the name, rank and service number of the member in charge of the search. The Explanatory Memorandum simply asserted that this requirement was ‘impractical’.<sup>65</sup> The occupier of a premises or their representative, if present at the time of a search, is entitled to observe the search being carried out. This ‘entitlement’ ceases, however, if the occupier or their representative ‘impedes’ the search. It may be rendered meaningless anyway as a protection against abuses – such as material being planted – because two or more parts of the premises can be searched at the same time,<sup>66</sup> making it difficult for the occupier to monitor the simultaneous searches.

Previously, the *Defence Act* did not permit the ADF to search for people who could pose a threat. Section 51D now provides ADF members with those powers if they reasonably believe a person is ‘likely to’ pose a threat to, inter alia, ‘public safety’. Soldiers can also establish barriers or cordons, check identities, direct people, search, question and detain people and compel the production of documents. Previous powers to search vehicles and people are extended to those leaving a ‘specified area’, as well as those entering it. Some of these powers also were previously available only in the offshore area.

Similar power expansions apply in Division 5, covering ‘declared infrastructure’. In particular, powers to prevent, or put an end to, acts of violence are extended by section 51L to prevent or put an end to threats to a person’s life, health or safety, or to public health or public safety.

## B Weakened Accountability

Section 51N of the *Defence Act* expands the power to use lethal force. An ADF member must believe on reasonable grounds that using such force was necessary to protect the life of, or to prevent serious injury to, a person (including the member). Now, deadly force can be used also where it is reasonably believed necessary to ‘protect the declared infrastructure’<sup>67</sup> and where it is ‘reasonable and necessary’<sup>68</sup> to give effect to an order to shoot down a plane or sink a vessel.

Section 51S adds a far-reaching new defence of ‘good faith’. This protects ADF personnel from both criminal and civil liability, even if they acted under an

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65 Ibid 65 [363].

66 *Defence Act* s 51C(2), (3).

67 *Defence Act* s 51N(3)(ii).

68 *Defence Act* s 51N(1)(a).

invalid order, provided that ‘the powers were exercised or purportedly exercised in good faith’.<sup>69</sup> The Explanatory Memorandum stated: [t]his proposed provision is necessary to ensure that individual ADF members have operational certainty that they will not be held responsible for procedural or other defects in the making of a call out order, declaration or authorisation.<sup>70</sup>

Potentially, however, the defence could do much more than that. It could shield all military personnel, including commanders, from criminal or civil prosecution for unlawful acts, as long as they can argue ‘good faith’ – a defence that would be difficult to refute.<sup>71</sup>

Again, the Government refused to amend the Bill to limit the scope of this defence. Instead, paragraph 446A was inserted into the Explanatory Memorandum to assert that it was ‘not intended to remove legal liability in instances where an ADF member has exceeded their legal authority in circumstances that cannot be characterised as minor or technical’.<sup>72</sup> That assurance has no legal effect.

The lack of accountability was further underpinned by the Government and the Labor Party rejecting a Greens amendment. It would have made call out orders disallowable instruments, thus able to be struck down by either House of Parliament, and required that Parliament sit within six days of any call out order being made. A similar Greens amendment was defeated when the Defence Legislation Amendment (Aid to Civilian Authorities) Bill (2006) was passed.<sup>73</sup>

### C Underlying Legal, Constitutional and Political Questions

The 2018 Bill has amplified many of the legal, constitutional and political issues posed by the 2000 and 2006 legislation. This initial article cannot examine them in detail. None have been tested yet, because no call out has occurred (except for contingency call outs) since 2000. Many questions remain from the last large-scale domestic mobilisation of soldiers, near Sydney in 1978, after the still unexplained Hilton Hotel bombing. It was not clear by what legal authority the call out occurred.<sup>74</sup>

Suffice to say that a Pandora’s Box of legal questions still exists, such as the scope and effect of the ‘good faith’ defence, the meaning of terms like ‘public safety’ and the ‘reasonableness’ of lethal force, as well as the innate difficulties of securing judicial review of military operations conducted in the name of national security.<sup>75</sup>

Likewise, it seems that a plethora of constitutional doubts has been deepened, particularly by the greater capacity of the Federal Government and the ADF to deploy troops without any state or territory request and to disregard state and territory objections. Not only do the provisions arguably exceed the boundaries of

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69 *Defence Act* s 51S(2)(b).

70 Explanatory Memorandum (n 31) 79 [447].

71 Head, *Calling Out the Troops* (n 3) 177–84, 187–99.

72 Addendum to the Explanatory Memorandum (n 23) 7 [446A].

73 Commonwealth, *Parliamentary Debates*, Senate, 26 November 2018, 8613 (Nicholas McKim).

74 Head, *Calling Out the Troops* (n 3) 49–55.

75 *Ibid* 166–70, 177–82.

section 119 of the *Constitution*, they may also lack a sufficient connection to the defence power or other federal heads of power.<sup>76</sup>

Politically, the key question is: why have these powers been created on the pretext of combatting terrorism when the provisions are far wider? The only conclusion that can be drawn is that preparations are being made to mobilise the armed forces domestically for purposes other than counter-terrorism, such as to deal with ‘rioting’ or other forms of civil unrest.

A decade ago, in discussing the 2000 and 2006 legislation, this author drew attention to the underlying likelihood of these powers being employed to deal with convulsive social and political unrest under conditions of worsening social inequality, economic breakdown and rising global geo-strategic tensions.<sup>77</sup> Those concerns have been amplified by the latest amendments.

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76 Ibid 63–74, 148–61.

77 Ibid 2–4, 204–21.