Law Council
OF AUSTRALIA

Independent Review of Part IIIAAA of the *Defence Act 1903* (Cth)

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Acknowledgements

We gratefully acknowledge the contribution of the Law Council's National Criminal Law Committee, National Security Working Group and National Human Rights Committee in the preparation of this submission.

Executive summary

1. The Law Council acknowledges changes in Australia's national terror threat level to 'PROBABLE' and the risk that, in exceptional circumstances, events such as a serious terror attack may result in State capabilities being overwhelmed, or an urgent need for specialist capabilities that only the Australian Defence Force (**ADF**) can provide.

2. We are mindful that there may be specialist skills that the ADF can deploy in these exceptional circumstances (e.g., sniper or explosive ordnance diffusing capabilities, specialist reconnaissance aircraft and specialist aerial imagery) to enhance State or Territory police force abilities where the protection of life may be required. Part IIIAAA of the *Defence Act 1903* (Cth) should be narrowly tailored to respond to such emergency circumstances with appropriate safeguards.

3. In this regard, our concern with the current framing of Part IIIAAA is that it is broadly framed and leaves open the risk that Part IIIAAA may be used to authorise ADF deployment to respond to a range of domestic threats in circumstances other than national emergencies.

4. Our constitution reflects liberal democratic principles such that, in non-war times, the ADF should only be called out into the States and Territories in exceptional circumstances. There is an important distinction between the prospect of utilising a defence force within a country with robust borders and strong State and Territory police forces, such as Australia, compared to countries where borders may be more amorphous and police forces ill-equipped to deal with domestic threats.

5. To improve the proportionality of Part IIIAAA of the Defence Act, we make the following recommendations:

   - **Recommendation 1**: 'Domestic violence' and 'Commonwealth interests' should be defined non-exhaustively in primary legislation having regard to the matters set out in the Addendum to the Explanatory Memorandum to the *Defence Amendment (Call Out of the Australian Defence Force) Act 2018* (Cth).
   - **Recommendation 2**: Part IIIAAA should be amended to reinstate the requirement, for domestic call out orders, that the ADF should only be called out as a last resort where the civilian authority 'is not, or is unlikely to be, able to protect itself against the domestic violence'. The ADF should make publicly available a military doctrine document recognising the importance of the exceptional circumstances principle.
   - **Recommendation 3**: Part IIIAAA should not be expanded to address cyber threats or authorise 'pre-deployment' information gathering in preparation for a call out.
   - **Recommendation 4**:
     - Guidelines should be developed about the types of specified circumstances that might be seen to be appropriate and proper use of the 'specified circumstances' provisions.
     - Primary legislation should specify that there should be retrospective review of contingent call out orders, within a certain time period, made on the basis of 'specified circumstances' to determine whether the calling out of the ADF was in fact justified.

- **Recommendation 5**:
  - The intention to preserve the privilege against self-incrimination should be incorporated in primary legislation. We accept that the privilege against self-incrimination may be abrogated in emergency situations.
  - Consideration should be given to incorporating a defence to the offence in section 51R of the Defence Act to the effect that a person is excused from complying with a direction about answering a question, producing a document or thing on the ground of the privilege against self-incrimination.
  - Primary legislation should specify compulsory questioning safeguards regarding the presence of a lawyer during questioning and use and derivative use immunities. In this regard, consideration should be given to the safeguards in Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth).
- **Recommendation 6**: The threshold of 'a threat to a person's health or safety' should be rephrased to impose a higher threshold commensurate with the potentially serious implications for the use of the powers.
- **Recommendation 7**: Division 6 should more clearly state that any use of reasonable and necessary force must be materially connected with the protection of life and preventing serious bodily harm or to arrest a person found committing an offence.
- **Recommendation 8**: The link to the protection of life and serious bodily harm should be made explicit in subparagraph 51N(3)(iii).
- **Recommendation 9**: Section 51S(1) of the Defence Act should be amended to state that it only applies to situations where there may be minor or technical non-compliance with obligations (as is stated in the explanatory materials).
- **Recommendation 10**: Part IIIAAA, or the authorising legislation for the Joint Statutory Committee on Defence, should be amended to require post-incident Parliamentary review of any call out under Part IIIAAA within a specified time.
- **Recommendation 11**:
  - Part IIIAAA and section 110C of the Defence Act should be amended to require post-incident review by the Inspector General of the ADF.
  - Part IIIAAA should be amended to include an obligation on the authorising Ministers, relevant government Departments and ADF to provide relevant documents and cooperate with post-call out investigative processes.

Background to Part IIIAAA of the *Defence Act 1903* (Cth)

Background to review

6. On 6 June 2024, Ms Sophie Callan SC was appointed by the Deputy Prime Minister and Minister for Defence, the Hon Richard Marles MP, to undertake an independent review of Part IIIAAA. We gratefully acknowledge Ms Callan's consultative approach to stakeholder consultation with civil society, and have had the benefit of considering the Issues Paper[1] to guide submissions. We would welcome the opportunity to provide more detailed feedback in relation to any of the issues canvassed in this submission.

The regime

7. Part IIIAAA of the Defence Act enables the ADF to be called out, under a call out order, to assist civilian authorities such as the police in response to 'domestic violence' in the States and Territories, as well as to protect Commonwealth interests.

8. A call out order is made by the Governor-General if the Prime Minister, the Defence Minister and the Attorney-General are satisfied of various matters. There are two types of call out orders: Commonwealth interests orders and State protection orders. Both orders may be made on a general, expedited or contingent basis (that is, only if specified circumstances arise).

    - Under a Commonwealth interests order, the ADF is called out to protect Commonwealth interests in Australia or an offshore area; as the order might apply in a State or Territory, the affected State or Territory must generally[2] be consulted before the order is made.
    - Under a State protection order, a State or Territory can apply for an order to call out the ADF to protect the State or Territory from "domestic violence". Once a call out order is made, as far as is reasonably practicable, the Chief of the Defence Force must assist and cooperate with the police force of a State or Territory that is affected by the call out. ADF members may be conferred with a range of powers under a call out order, as set out in Division 3 (powers that generally can be exercised only if authorised by an authorising Minister), Division 4 (powers that can be exercised in an area that has been declared by the authorising Ministers) and Division 5 (powers for protecting infrastructure that has been declared by the authorising Ministers).

    There is scope for expedited call out orders, specified area declarations and infrastructure declarations to be made by the authorising Ministers or other Ministers in sudden and extraordinary emergencies.[3]

9. We refer to our submission to the Senate Legal and Constitutional Affairs Legislation Committee in 2018 regarding the *Defence Amendment (Call Out of the Australian Defence Force) Act 2018* (Cth).[4] That Act was intended to streamline the legal procedures for call out of the ADF to protect States', self-governing Territories', and Commonwealth interests, onshore and offshore, against certain incidences of

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[1] Sophie Callan SC, Independent Review of Part IIIAAA of the *Defence Act 1903* (Cth) (Issues Paper, 9 October 2024). ('***Issues Paper***')
[2] Defence Act, section 38.
[3] Ibid, Division 7.
[4] Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Legislation Committee, Defence Amendment (Call Out of the Australian Defence Force) Bill 2018 (Submission, 3 August 2018). ('***Law Council's 2018 Submission***')

violence, including terrorism. While we acknowledge the views expressed in the report of State Coroner of New South Wales Inquest into the deaths arising from the Lindt Café Siege,[5] elements of that streamlining were achieved by diminishing appropriate thresholds and safeguards. In this submission, we ask that the necessity and proportionality of some of those changes be reevaluated.

Constitutional context

10. Part IIIAAA of the Defence Act is substantially underpinned by section 119 of the Commonwealth Constitution. As commentators have observed, additional support for Part IIIAAA may be found in:[6]

- section 51(vi) of the Constitution, which provides the Commonwealth Parliament with the power to make laws with respect to 'the naval and military defence of the Commonwealth and of the several States';
- Section 68 of the Constitution, which provides that the command in chief of the naval and military forces of the Constitution is vested in the Governor-General as the Queen's representative;
- Section 61 of the Constitution, which provides the Commonwealth's executive power and has been interpreted to include an inherent nationhood power,[7] and incidental power in section 51(xxxix); and
- royal prerogative powers at common law.

11. The constitutional context to section 119 is reflective of our liberal democratic tradition that defence forces are only deployed domestically in very rare circumstances (maintaining the distinction between military and civil power).[8] Relatedly, it is important that the call out scheme not be expanded in ways that exceed the constitutional remit.

12. We respectfully agree with Dixon J's dicta in *R v Sharkey* (1949) 79 CLR 121 that section 119 reflects an important distinction between domestic violence within a State and Commonwealth interests. Dixon J said '… what is important is the fact that, except on the application of the Executive Government of the State, it is not within the province of the Commonwealth to protect the State against domestic violence …', and went on to cite the following passage from John Quick and Robert Garran's *The Annotated Constitution of the Australian Commonwealth*:[9]

> *The maintenance of order in a State is primarily the concern of the State, for which the police powers of the State are ordinarily adequate. But even if the State is unable to cope with domestic violence, the Federal Government has no right to intervene, for the protection of the State or its citizens, unless called upon by the State Executive. If, however, domestic violence within a State is of such a character as to interfere with the operations of the Federal Government, or with the rights and privileges of federal citizenship, the Federal Government may clearly, without a summons from the State, interfere to restore order.*

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[5] See also, then Prime Minister Turnbull's media release regarding outcomes from the Review of Defence Support to National Counter-Terrorism 2017: The Hon Malcolm Turnbull and Senate Marise Payne, 'Defence support to domestic Counter-Terrorism arrangements,' (Media Release, 17 July 2017).
[6] Michael Head, 'The Military Call-Out Legislation – Some Legal and Constitutional Questions' (2001) 29 *Federal Law Review* 273.
[7] Pape v Commissioner of Taxation (2009) 238 CLR 1, 126 (French CJ).
[8] *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 562 (Brennan and Toohey JJ).
[9] *R v Sharkey* (1949) 79 CLR 121, 151 quoting: Quick and Garran, *Constitution of the Australian Commonwealth*, 964.

> *Thus if a riot in a State interfered with the carriage of the federal mails, or with inter-state commerce, or with the right of an elector to record his vote at federal elections, the Federal Government could use all the force at its disposal, not to protect the State, but to protect itself. Were it otherwise, the Federal Government would be dependent on the Governments of the States for the effective exercise of its powers.*

Democratic context

13. The constitutional context referred to above is reflective of the political principle that the use of an armed defence force for purposes other than external defence presents acute risks for civil liberties. As noted by Justice Robert Hope in his 1979 Protective Security Review:

> *Use of the military other than for external defence, is a critical and controversial issue in the political life of a country and the civil liberties of its citizens. [Citing Edmund Burke:] 'An armed disciplined body is in its essence dangerous to Liberty: undisciplined, it is ruinous to Society'. Given that there must be a permanent Defence Force, it is critical that it be employed only for proper purposes and that it be subject to proper control.*[10]

14. We generally agree with Justice Hope that the risk to established democratic norms and the rule of law will vary in intensity depending on the manner in which the ADF is called out.[11] For example, '[u]se of a small detachment of armed soldiers against terrorists in a siege situation' presents less risk compared to the deployment of a substantial number of armed ADF members in public places in confrontation with members of the general public.[12]

15. As we have previously explained, in non-war times, the ADF should only be called out to the States and Territories in exceptional circumstances.[13] All of the States and Territories have highly functioning operative police forces that are familiar with their local territories and have well developed legislative frameworks that regulate their powers. Further, the ADF has specialist capabilities developed for deployment extra-territorially and in times of war or national emergency, which are equally well-defined in those circumstances.

Rule of law and broadly expressed executive powers

16. In this submission, we have also referred repeatedly to the rule of law principle that the Executive should be subject to the law and any action undertaken by the Executive should be authorised by law.[14] It should not be left to the Executive to determine for itself what powers it has and when and how they may be used. That principle requires:[15]

    - The use of Executive powers should be subject to meaningful parliamentary and judicial oversight, particularly: powers to use force; to detain; to enter

[10] Justice Robert Hope, Parliament of Australia, Protective Security Review (Parliamentary Paper No 397, 15 May 1979), 142 [10.10].
[11] Ibid.
[12] Ibid, [10.11] 142 -143.
[13] 2018 Submission, 5 [4].
[14] Law Council of Australia, Policy Statement—Rule of Law Principles (Policy Statement, March 2011), Principle 6.
[15] Law Council of Australia, Policy Statement—Rule of Law Principles (Policy Statement, March 2011), Principle 6 (b) and (c).

private premises; to seize property; to copy or seize information; to intercept or access telecommunications or stored communications; to compel the attendance or cooperation of a person; or to deport a person. Mechanisms should be in place to safeguard against the misuse or overuse of executive powers.

- Where the Executive has acted unlawfully, anyone affected should have access to effective remedy and redress. The Law Council's longstanding position is that, where the law recognises a human right, the recognition of the right should be accompanied by provision for an accessible and effective remedy.[16] This reflects the international human right to an effective remedy.[17]

17. In relation to civil and criminal immunities afforded to ADF members pursuant to section 51S of the Defence Act, we refer to the rule of law principle that no one should be regarded as above the law and all people should be held to account for a breach of law, regardless of rank or station.[18] Further discussion on the scope of this immunity is contained below at paragraph 79 of this submission. However, broader consideration should be given to whether this approach unduly infringes on an individual's ability to access an effective remedy where a person is adversely affected by an operation under Part IIIAAA and the use of related powers by ADF members.

Risk of politicisation

18. While we acknowledge that there have been no call outs under this scheme, there remains an inherent risk that the perception of a politicised use of Part IIIAAA could significantly undermine the trust and social licence underpinning democratic norms and civil–military relations. In our view, this reinforces the need for careful safeguards to ensure that the scheme is tailored to addressing circumstances of national emergencies (e.g., significant terrorist attacks).

19. In this regard, we note that some commentators have noted previous examples where perceptions of politicisation about ADF actions have damaged the standing of the ADF in the community and civil-military relations.[19]

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[16] Law Council of Australia, Policy Statement on Rule of Law Principles (Policy Statement, 2011), Principles 6(c) and 8; Law Council of Australia, Law Council of Australia, Human Rights and the Legal Profession: Key principles and commitments (Policy Statement, May 2017), 3 [10].

[17] See for example, *Universal Declaration of Human Rights*, GA Res 217A(III), UN GAOR, UN Doc A/810 (10 December 1948) art 8; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 2(3).

[18] Ibid, Principle 2.

[19] In relation to the 'Skype incident' in 2011, and the 'children overboard affair' in 2001 on civil-military relations: Brian Agnew, Centre for Defence and Strategic Studies, Australian Defence College, Building Trust: Civil-Military Relations in Australia (December 2012). See criticising the deployment of more than 600 ADF members were deployed to support the Northern Territory Emergency Response, under Operation OUTREACH in 2007 Rosalie Kunoth-Monks quoted in: AMNESTY INTERNATIONAL, Indigenous People's Rights in Australia Today Section 3: The NT intervention and human rights (Report, 2021), 3:

> *We feel, here, that the intervention offers us absolutely nothing, except to compound the feeling of being second-class citizens. The only thing we have gained out of the intervention is the police. We had had dialogue in the past about having a police station here. But that is all, and also, we are still reeling from the way the Federal government wheeled out, or dealt out, the intervention, in a military fashion, when Major Chalmers sent out the army, in uniform, and they did the health check, which is a duplication of our clinic here, and we still feel that you are breaking some human rights points, in the way you have addressed our needs.*

See also, in relation to the Northern Territory Emergency Response, commentators observed: '[b]y deploying uniformed members of the Australian Defence Forces into the communities to establish logistics, the Intervention was designed to send a clear message of disruption and control'. Diana Perche, The Conversation, Ten years on, it's time we learned the lessons from the failed Northern Territory Intervention (Online, 26 June 2017).

20. Apart from the rule of law benefits of objective specification in primary legislation carefully defining executive powers, we note that specification may have the benefit of reducing the risk of politicisation when call out orders are made, or applications for call out orders are refused.

Comparison with like-minded international jurisdictions

21. We suggest that the review have regard to the arrangements in the United Kingdom under the *Civil Contingencies Act 2004* (UK) and the *Emergency Powers Act 1964* (UK), especially in light of recent call outs responding to terror attacks.[20] In the UK, the call out plan to support police following the Manchester terror attack in May 2017, Operation Temperer, involved 1400 defence personnel. Notably, these personnel were used to protect and secure key locations, while armed police officers conducted law enforcement activities more likely to involve the use of force.[21]

Necessity

22. We acknowledge the evidence in the Issues Paper that 'while a call out order under Part IIIAAA has been practised for and exercised (and contingent call out orders have been made) the deployment of the ADF under a call out to protect Commonwealth interests or to assist a State or Territory in response to domestic violence has never occurred.[22]

23. In principle, we acknowledge that there may be specialist skills that the ADF can deploy in exceptional circumstances (e.g., sniper or bomb defusing capabilities) to enhance State or Territory police force abilities where the protection of life may be required. We also note that it is better to have a well-designed scheme, subject to the rule of law, and relevant safeguards embedding proportionality considerations and, to the extent possible, sound constitutional foundations compared to arrangements improvised in response to an emergency.

Part IIIAAA should be tailored to addressing exceptional circumstances

Definition of 'domestic violence' and 'Commonwealth interests'

Definition of 'domestic violence'

24. The Issues Paper notes the 'the breadth of the definition of "domestic violence"—which is only defined by reference to section 119 of the Constitution' and 'it has not been suggested the "domestic violence" ought be the subject of more precise definition. But submissions may wish to address this'.[23]

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[20] Louisa Brooke-Holland, Deploying the armed forces in the UK House of Commons Library (Research Briefing, 2022).

[21] Then Prime Minister described Operation Temperer in the following terms: United Kingdom, Prime Minister Statement, 'PM statement following second COBR meeting on Manchester attack' (Speech, 23 May 2017).

> *This means that armed police officers responsible for duties such as guarding key sites will be replaced by members of the armed forces, which will allow the police to significantly increase the number of armed officers on patrol in key locations. You might also see military personnel deployed at certain events, such as concerts and sports matches, helping the police to keep the public safe. In all circumstances, members of the armed forces who are deployed in this way will be under the command of police officers.*

[22] Issues Paper, 13 [5].

[23] Issues Paper, 21 [79].

25. In our assessment, the absence of definitions of key concepts in primary legislation is problematic and has the potential to undermine rule of law principles. These definitional concepts inform thresholds for the authorisation of call out orders and applicable coercive powers including the use of force.

26. The term "domestic violence" in section 119 is taken from section 4 of Article IV of the United States Constitution, where it has been understood to refer to local uprisings, insurrections or internal unrest within a State.[24]

27. As the Issues Paper notes, consideration of the history of call outs of the ADF in Australia illustrates the range of circumstances in which a request might be made by a State or Territory for a call out order. In particular:

- Prior to Federation, during the 19th century, Head notes that 'martial law was declared several times to deal with riots and rebellions, but the last clear exception to the military–civil division of power occurred in 1891 when the Queensland Government used troops to help the police suppress a sheep shearers' strike'.[25]
- The Issues Paper notes that 'State Governments requested military intervention from the Commonwealth on six occasions between 1916 and 1928' and that a number of these requests 'involved disturbances caused by labour strikes'. However, all were refused.[26]
- The Issues Paper notes further a request under section 119 has only been invoked once, by the Queensland government in 1912, during the 1912 Brisbane general strike.

28. In light of these historical examples, we share the concern expressed by the Senate Standing Committee for the Scrutiny of Bills (**Scrutiny of Bills Committee**) when reviewing the Defence Amendment (Call Out of the Australian Defence Force) Bill 2018 (Cth) (the **2018 Amendment**) about leaving key definitional terms, such as 'domestic violence' and 'Commonwealth interests' undefined in primary legislation.[27] Highlighting inconsistent treatment of 'domestic violence' in explanatory materials, the Scrutiny of Bills Committee requested that the Attorney-General provide further clarification regarding the scope of 'domestic violence'. For example, the Scrutiny of Bills Committee compellingly pointed out that there might be an important difference between defining domestic violence in terms of conduct marked by 'great physical force, including a terrorist attack or other mass casualty incident' or 'significant force, including a terrorist attack, hostage situation, and widespread or significant violence' noting that both expressions were used in the Attorney-General's remarks and explanatory materials.[28]

29. Following that exchange, the Explanatory Memorandum to the 2018 Amendment was amended to clarify:[29]

> *The term 'domestic violence' is not defined in the Bill but refers to conduct that is marked by great physical force and would include a*

[24] Peta Stephenson, 'Fertile Ground for Federalism? Internal Security, the States and Section 119 of the Constitution' (2015) 43(2) *Federal Law Review* 289, 298.
[25] Michael Head, 'The Military Call-Out Legislation – Some Legal and Constitutional Questions' (2001) 29 *Federal Law Review* 273.
[26] Issues Paper, [18] 6-7.
[27] Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest 10 of 2018 (Report, 12 September 2018), [2.4 – 2.6]
[28] Ibid, 4 [2.6].
[29] Addendum to the Explanatory Memorandum (Defence Amendment (Call Out of the Australian Defence Force) Bill 2018), [165A].

> *terrorist attack, hostage situation, and widespread or significant violence. Part IIIAAA uses the term 'domestic violence' as this is the term used in section 119 of the Constitution, which deals with state requests for assistance in responding to domestic violence. Peaceful protests, industrial action or civil disobedience would not fall within the definition of 'domestic violence'.*[30]

30. In our view, greater specification regarding the definition of domestic violence would provide needed certainty regarding key thresholds that pick up this definition. For example, in relation to the making of a call out order to protect Commonwealth interests under section 33, the authorising Ministers must be satisfied that, among other grounds, 'domestic violence that would, or would be likely to, affect Commonwealth interests is occurring or is likely to occur in Australia'. In light of the historical examples highlighted above, it may be preferable to specify in primary legislation the level of disruption or violence associated with domestic violence—for example, that the violence must be something like a terrorist attack or hostage situation, and involve widespread or significant violence.

31. The authorising ministers must also be satisfied that 'the Defence Force should be called out and the Chief of the Defence Force should be directed to utilise the Defence Force to protect the Commonwealth interests against the domestic violence or threat, or both'. This requires a judgement about whether the nature of the incident as an example of domestic violence is one that is suited to the capabilities of the ADF (including the type of violence, types of weapons used, number of perpetrators, and the scale of violence as well as the capability and availability of state or territory law enforcement agencies).

Definition of Commonwealth interests

32. For similar reasons, we also suggest that 'Commonwealth interests' be defined in primary legislation, noting that the addendum to the Explanatory Memorandum to the 2018 amendments provides some guidance as to how this phrase is to be interpreted (including a non-exhaustive list of examples):[31]

> *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.*

33. In our view, such a key concept in the operation of Part IIIAAA should be defined in primary legislation with reference to the matters set out above.

Recommendation 1

- **'Domestic violence' and 'Commonwealth interests' should be defined non-exhaustively in primary legislation having regard to the matters set out in the Addendum to the Explanatory Memorandum to the *Defence Amendment (Call Out of the Australian Defence Force) Act 2018* (Cth).**

[30] Addendum to the Explanatory Memorandum (Defence Amendment (Call Out of the Australian Defence Force) Bill 2018), 2.
[31] Addendum to Explanatory Memorandum, Defence Amendment (Call Out of the Australian Defence Force) Bill 2018, [189A].

Last resort

34. Having regard to the constitutional and democratic context outlined above, we remain of the view that the removal of the requirement—that the State or Territory authorities are unable, or likely to be unable, to deal with the particular threat—by the 2018 Amendment should be revisited.

35. Prior to the 2018 Amendment, the statutory criteria for making a domestic call out order required, among other conditions, the authorising Ministers to be satisfied that the State or governing territory 'is not, or is unlikely to be, able to protect itself against the domestic violence'.[32] Following the 2018 Amendment, the comparable threshold was diminished in the following ways:

    - In relation to calling out the ADF to protect Commonwealth interests under section 33 and contingent call out of the ADF to protect Commonwealth interests under section 34—the requirement was removed altogether. Instead, the relevant provisions require that, in making a call out order, the authorising ministers be satisfied that the ADF 'should be called out'.[33]
    - In relation to calling out the ADF to protect States and Territories under section 35 and contingent call out of the Defence Force to protect States and Territories under section 36—the requirement was diminished. It now only requires that 'whether the utilisation of the Defence Force would be likely to enhance the ability of the State or Territory to protect the State or Territory against the domestic violence'.

36. We reiterate our concern that these elements of the 2018 Amendment provide insufficient specification to guide the authorising Ministers' decision making. As noted, the Law Council considers that these powers should only be used in exceptional circumstances.

37. We agree with the Scrutiny of Bills Committee that consideration of whether the State or governing territory 'is not, or is unlikely to be, able to protect itself against the domestic violence' has greater objective specification. This has the advantage of providing authorising Ministers greater justification for making call out orders or refusing applications for call out orders from state and territory governments on an objective basis. However, the threshold introduced by the 2018 amendment that in making a call out order the authorising ministers must be satisfied that the ADF 'should be called out' grant authorising ministers a far broader discretion with much less objective specification.

38. We agree with the Scrutiny of Bills Committee that this 'new threshold appears to significantly expand the range of circumstances in which a call out order may be made, including in response to domestic violence incidents which state and territory authorities may be capable of resolving'.[34] It leaves open the risk that the ADF could be deployed, on a routine basis, in order to enhance the State or Territory's ability to

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[32] *Defence Act 1903* (Cth) as at 20 December 2018, s. 51A(1)(b) (Order about utilising Defence Force to protect Commonwealth interests against domestic violence); s. 51AA(4)(b) (Conditions for utilising the Defence Force in the internal waters); s. 51AB(1)(b) (Order about utilising Defence Force to protect Commonwealth interests against violence if specified circumstances arise); s. 51B(1)(a) (Order about utilising Defence Force to protect State against domestic violence); s. 51C(1)(a) (Order about utilising Defence Force to protect self-governing Territory against domestic violence).

[33] Defence Act, s. 33(2), 34(2), 35(2) and 36(2).

[34] Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest 10 of 2018 (Report, 12 September 2018), 20 [2.9].

protect itself or Commonwealth interests without exceptional circumstances existing prior to authorising call out of the ADF.

39. We consider it significant that public justification of this scheme, through its progressive development, has consistently emphasised that call out powers must be exercised as a last resort in exceptional circumstances.[35] For example, the Explanatory Memorandum accompanying the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2006 (Cth), which significantly amended this scheme, stated that 'underlying principles that inform the operation of Part IIIAAA remain the same' and listed, among other principles, 'the ADF should only be called out as a last resort where civilian authorities are unable to deal with an incident'.[36]

40. As we have explained above, this threshold should refer to the core rationale for Part IIIAAA which is that there are specialist skills that the ADF can deploy in these exceptional circumstances to enhance State or Territory police force abilities. A further example is where, in an exceptional situation, State or Territory law enforcement authorities are overwhelmed and unable to provide a certain capability in time. It is appropriate that the authorising Ministers should be required, by primary legislation, to turn their minds to this consideration.

41. We support reinstating the requirement, for domestic call out orders, that the authorising Ministers must be satisfied that the State or governing territory 'is not, or is unlikely to be, able to protect itself against the domestic violence'. We accept that this requirement may not be apposite to call out orders pertaining to Australian offshore areas.

Public messaging and doctrine documents

42. In the United Kingdom, the Ministry of Defence has made publicly available military doctrine guidance that enshrines the principle that domestic deployment of the armed forces should only occur in exceptional circumstances. That document states military aid to civilian authorities may be provided where:[37]

- there is a definite need to act and the tasks the Armed Forces are being asked to perform are clear;
- other options including, mutual aid, commercial alternatives and the voluntary sector have been discounted;
- the civil authority lacks the necessary capability to fulfill the task and it is unreasonable or prohibitively expensive to expect it to develop one; or
- the civil authority has all or some capability, but it may not be available immediately, or to the required scale and the urgency of the task requires rapid external support from the Minister of Defence.

43. We suggest that similar publicly available resources enshrining the exceptional circumstances principle be considered for publication in Australia.

[35] Issues Paper, 9 [24].
[36] Revised Explanatory Memorandum, Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2006 (Cth), 3.
[37] United Kingdom, Ministry of Defence, Joint Doctrine Publication 02: UK Operations: the Defence Contribution to Resilience (November 2021, Fourth Edition).

Recommendation 2

- **Part IIIAAA should be amended to reinstate the requirement, for domestic call out orders, that the ADF should only be called out as a last resort where the civilian authority 'is not, or is unlikely to be, able to protect itself against the domestic violence'.**
- **The ADF should make publicly available a military doctrine document recognising the importance of the exceptional circumstances principle.**

Proposals to extend Part IIIAAA

Cyber threats

44. Consultation Question 1 in the Issues Paper asks about the breadth of the definition of "domestic violence", including whether Part IIIAAA can be effectively utilised to respond to non-physical threats including those in the cyber domain.[38]

45. The Issues Paper, and information available on the public record, provides limited justification for why the broad range of existing powers are insufficient to deal with these types of threats. Without further justification, we are unpersuaded of the need to expand Part IIIAAA in this way.

46. Based on publicly available information, we note the important role played by the Australian Signals Directorate (**ASD**). The Australian Government's 2023–2030 Cyber Security Strategy refers extensively to the capabilities and work of the ASD across the full spectrum of cyber operations to defend Australia from global threats and advance our national interests as well as the law enforcement activities of the Australian Federal Police. In relation to ASD, the Cyber Security Strategy notes the range of functions performed including 'proactive cyber risk advice and assistance' and 'offensive cyber operations' designed to deter, disrupt, degrade and deny adversaries.[39]

47. In recent years, Australia's framework to respond to significant cyber security incidents has been subject to review and amendment to facilitate whole-of-government response. We note that the introduction of the Cyber Security Legislative Package 2024 in Parliament in October 2024 is designed to implement initiatives under the abovementioned Cyber Security Strategy. It also aims to address perceived gaps resulting from recent incidents including Optus and Medibank data breaches.

48. The Cyber Security Legislative Package 2024 also includes reforms to the *Security of Critical Infrastructure Act 2018* (Cth) (**SOCI Act**). These changes, among other things, expand 'last resort' consequence management directions powers for the Secretary of the Department of Home Affairs, when authorised by the Minister, for the purposes of managing both multi-asset incidents and the consequences of serious incidents which could have a 'relevant impact' on one or more critical infrastructure assets. The Law Council has recently considered that package in our submission to the Parliamentary Joint Committee on Intelligence and Security.[40]

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[38] Issues Paper, 24.
[39] Department of Home Affairs, Australian Cyber Security Strategy 2023-2030 (2023), 13.
[40] Law Council of Australia, *Submission on Cyber Security Legislative Package 2024* (31 October 2024) <https://lawcouncil.au/resources/submissions/cyber-security-legislative-package-2024>.

49. The SOCI Act framework already includes broadly expressed ministerial intervention powers in relation to serious cyber security incidents.[41] The Minister may authorise a wide range of acts or things under an intervention request including, for example, accessing or modifying a computer, undertaking analysis of a computer, access, add, restore, copy, alter or delete data held in a computer.[42]

Pre-deployment call out orders

50. The Issues Paper also raises the desirability of expanding Part IIIAAA to authorise a "pre-deployment" phase 'by which the ADF might be authorised to take certain actions (including pre-positioning, reconnaissance, information gathering, and/or compulsory questioning) in preparation for a call out and/or assessing whether statutory pre-conditions for a call out have been triggered'. As with cyber threats, without further justification, we are unpersuaded of the need to expand Part IIIAAA in this way.

51. The Issues Paper does not establish why existing coercive powers of law enforcement agencies or security agencies, and broadly-framed information sharing provisions that enable information gathering, are insufficient.[43] We note, in particular, provision for emergency electronic surveillance warrants, for example, in section 10 of the *Telecommunications (Interception and Access) Act 1979* (Cth) which enables issue of a warrant by the Director-General of Security in an emergency for the Australian Security Intelligence Organisation (**ASIO**) to intercept telecommunications.

52. About compulsory questioning powers, we note that, under Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth), ASIO has extraordinary mandatory questioning powers directed to information relevant to intelligence that is important in relation to a questioning matter.[44] ASIO has experience utilising these powers, and the Inspector General of Intelligence and Security has recently generally endorsed ASIO's compliance with oversight requirements.[45] The Law Council has recently considered these powers and suggested recommendations to improve the proportionality of the scheme.[46]

Recommendation 3

- **Part IIIAAA should not be expanded to address cyber threats or authorise 'pre-deployment' information gathering in preparation for a call out.**

Contingent Call Out Orders—Special Circumstances

53. Section 34 confers a power on the Governor General, if authorising Ministers are satisfied, to provide for the contingent call out of the ADF to protect Commonwealth interests, and allows such an order to be made if 'specified circumstances' arise.

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[41] SOCI Act, s. 35AB.
[42] SOCI Act, s. 35AC.
[43] See for example, the range of telecommunications related data access (including the mandatory data retention scheme) and interception powers authorised under the *Telecommunications (Interception and Access) Act 1979* (Cth) and *Surveillances Devices Act 2004* (Cth).
[44]
[45] Office of the Inspector-General of Intelligence and Security, Submission no. 3 to the Parliamentary Joint Committee on Intelligence and Security, Review of Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979 (Submission, 1 February 2024).
[46] Law Council of Australia, *Review of Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979* (Cth) (Submission, 1 March 2024).

However, 'specified circumstances' is not defined in the legislation. Similarly, section 36, which provides for contingent call out of the ADF to protect States and Territories, also makes reference to 'specified circumstances' as a basis for making the order (i.e., as such circumstances would make it impracticable to make an order in the ordinary way).

54. We acknowledge that the Addendum to the Explanatory Memorandum accompanying the 2018 Amendment provides welcome clarification regarding the scope of 'specified circumstances'. In particular, it clarified that, while the concept specified circumstances will depend on the situation in question, there are certain paradigmatic examples that are intended to be captured:

> *Contingent call out orders under proposed section 34 will typically be used as part of a request for ADF security support for major international events hosted within Australia, where there is a foreseeable or anticipated threat against Commonwealth interests. Such orders have been regularly made as part of security measures to protect major Commonwealth events including the 2014 G20 Leaders' Summit in Brisbane, the 2018 Gold Coast Commonwealth Games and the 2018 ASEAN-Australia Summit, from circumstances involving air threats.*

55. While we accept that these examples may not be able to be captured in a more precise definitional concept in primary legislation, we suggest that guidelines should also be developed around the types of specified circumstances that might be seen to satisfy the requirements around the appropriate and proper use of the 'specified circumstances' provisions.

56. In our assessment, there is particular need for retrospective independent review of contingent call out orders made on the basis of 'specified circumstances' to determine whether the calling out of the ADF was in fact justified.

Recommendation 4

- **Guidelines should be developed around the types of specified circumstances that might be seen to satisfy the requirements around the appropriate and proper use of the 'specified circumstances' provisions.**
- **Primary legislation should specify that there should be retrospective review of contingent call out orders, within a certain time period, made on the basis of 'specified circumstances' to determine whether the calling out of the ADF was in fact justified.**

Divisions 3 and 4—Special powers generally authorised by the Minister and powers authorised in specified areas

57. We retain the concerns we expressed in our 2018 Submission about the ancillary powers that may be exercised by the ADF when they are deployed under a call out order under Part IIIAAA and the need for strengthened safeguards.[47]

[47] 2018 Submission, 8-9.

Division 3—Special powers generally authorised by Minister

58. Division 3 confers powers on members of the Defence Force if the Defence Force is being utilised under a call out order that specifies that this Division applies. Generally, the powers must be authorised by an authorising Minister. The powers can be exercised without Ministerial authorisation in sudden and extraordinary emergencies. We are most concerned about the disproportionate limitation on the privilege against self-incrimination and freedom of movement, without appropriate safeguards, arising in relation to the following powers:

- Section 46(7)(f) permits members of the ADF, in connection with an authorised action, to 'detain any person found in the search that the member believes on reasonable grounds is a person who may be detained in relation to the call out order for the purpose of placing the person in the custody of a member of a police force at the earliest practicable time'.
- Section 46(7)(h) permits members of the ADF, in connection with an authorised action, to 'direct a person to answer a question put by the member, or 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)'.

The privilege against self-incrimination and right to silence

59. The common law privilege against self-incrimination provides that 'a person is not bound to answer any question or produce any document if the answer or the document would expose, or would have a tendency to expose, the person to conviction for a crime'.[48] The privilege against self-incrimination is 'one aspect of the right to silence'.[49] The right to silence is broader and 'protects the right not to be made to testify against oneself (whether or not that testimony is incriminating)'.[50]

60. Furthermore, Article 14(3) of the *International Covenant on Civil and Political Rights* (**ICCPR**)[51] provides that in the determination of any criminal charge, a person shall be entitled to the right not to be compelled to testify against themselves or to confess to guilt.[52] We agree with the Australian Law Reform Commission that legislative provisions that abrogate the privilege against self-incrimination require further review including 'whether its abrogation in Commonwealth laws has been appropriately justified, and whether statutory immunities offer appropriate protection'.[53]

61. As a matter of statutory construction, there is a presumption that Parliament does not intend to alter fundamental common law doctrines except by clear words. A corollary of that principle is that the common law privilege against self-incrimination is not to be taken to be abrogated by statute except in the clearest

[48] *Griffin v Pantzer* (2004) 137 FCR 209, [37] (Allsop J); *Sorby v Commonwealth* (1983) 152 CLR 281; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328.
[49] ALRC, Traditional Rights and Freedoms – Encroachments by Commonwealth Laws (Report 129, December 2015) 312.
[50] Ibid, [12.5].
[51] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[52] See Human Rights Committee, General Comment No 13: Article 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law, 21st sess, UN Doc CCPR (13 April 1984).
[53] Australian Law Reform Commission, Traditional Rights and Freedoms – Encroachments on Commonwealth Laws, Report No 129 (2016), 18.

terms.[54] Applying that principle of statutory construction, the High Court has found that a statute empowering the Australian Crime Commission to examine persons in relation to organised crime did not permit post-charge questioning on the subject matter of a crime for which the subject of questioning was awaiting trial.[55]

62. In this regard, we note that Part IIIAAA does not explicitly abrogate the privilege against self-incrimination without providing safeguards to ensure that these rights are preserved in practice. At the same time, section 51R of the Defence Act makes it an offence for a person to fail to comply with a direction given under Divisions 3, 4 or 5. There are no offence-specific defences described in section 51R that would excuse a person for refusing to answer a question on the ground of the right to silence or privilege against self-incrimination.

63. We have identified three risks with the approach taken.

- The first risk is that, notwithstanding the statement[56] in the explanatory materials that the privilege against self-incrimination is intended to be preserved, the privilege against self-incrimination may be abridged by necessary implication, at least in certain emergency cases. In this regard, we note that the special powers in section 46(7)(f) and (h) could be authorised without Ministerial authorisation if a sudden and extraordinary emergency exists.[57] In that emergency context, taking into account the context of domestic violence and the objectives of Part IIIAAA, it seems likely that the privilege against self-incrimination could be abridged by necessary implication. By contrast, in other contexts where the privilege against self-incrimination is intended to be preserved there is a provision in primary legislation to that effect.[58] We suggest that greater clarity can be achieved by explicitly identifying that the privilege against self-incrimination is preserved except in the case of emergencies.
- The second risk is that, in practice, because there is no requirement that a lawyer be present during questioning and the extraordinary circumstances associated with deployment of ADF members under a call out order, persons who are subject to these powers may lack the understanding of their rights to exercise their right to silence. This is made even more likely when the person subject to questioning is informed that failing to comply with a direction under this Division is an offence under section 51R of the Defence Act. It seems likely that, if these powers are exercised, prejudicial material will be generated without safeguards regarding use and derivative use.
- The third risk is that, given the context of domestic violence, it seems possible that there could be multiple and successive use of similar coercive powers by state and federal law enforcement and intelligence agencies. For example, there is the possibility that ASIO might exercise its compulsory questioning powers (discussed further below); law enforcement may seek to detain a subject under a preventative detention order[59] where there is a threat of a terrorist attack that is capable of being carried out, and could occur, within the next 14 days; or law enforcement officers could exercise their extraordinary

[54] *Smith v Read* (1736) 1 Atk 526 at 527; [26 ER 332]; *R v Associated Northern Collieries* (1910) 11 CLR 738 at 742, 744; *Sorby v Commonwealth* (1983) 152 CLR 281, 309–310 and 316; *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543, 554; *Rich v ASIC* (2004) 220 CLR 129, 141-143.
[55] *X7 v Australian Crime Commission* (2013) 248 CLR 92.
[56] Explanatory Memorandum, Defence Amendment (Call out of the Australian Defence Force) Bill 2018: in relation to paragraph 46(7)(h): 58 [322]; paragraph 51D(2)(i): 68 [381]; paragraph 51L(3)(g) 74 [418].
[57] Defence Act, s. 46(1)(b).
[58] See for example, ASIO Act, s. 34FI. The privilege against self-incrimination is abrogated in the context of mandatory questioning powers, subject to safeguards discussed further below.
[59] *Criminal Code Act 1995* (Cth), Division 105.

powers of warrantless search, seizure and arrest under Division 3A of Part IAA the *Crimes Act 1914* (Cth). It would be problematic if the same examinee is subject to questioning under regimes that apply different rules regarding the privilege against self-incrimination and applicable use and derivative use immunities.

64. We note that there are much stronger safeguards in relation to similar mandatory detention and questioning powers in the context of ASIO's mandatory questioning powers under Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth). While the ASIO Act generally preserves the privilege against self-incrimination,[60] in relation to compulsory questioning powers it is an offence to fail to give information and produce things required under a mandatory questioning warrant or direction. In that context, the offence specifies the questioning subject is not excused from giving information or producing the record or thing on privilege against self-incrimination grounds.[61] While there is an explicit abrogation of the privilege against self-incrimination, there are safeguards regarding thresholds, a lawyer being present during questioning and how information elicited under a compulsory questioning warrant is used.

- A warrant must be sought from the Attorney-General, if in relation to adults, there are reasonable grounds for believing that the warrant 'will substantially assist the collection of intelligence' that is important in relation to the protection of Australia from 'espionage', 'politically motivated violence' or 'acts of foreign interference'.[62]
- The Attorney-General may only issue a warrant that authorises the apprehension of the subject of the warrant if the warrant includes an 'immediate appearance requirement', and the Attorney-General is satisfied that there are reasonable grounds for believing that, if the subject is not apprehended, the person is likely to, among other grounds, alert a person involved in an activity prejudicial to security that the activity is being investigated or not appear before the prescribed authority.[63]
- The subject of mandatory questioning has a qualified right to legal representation.[64]
- There are also use and derivative use immunities.[65]
- ASIO has recently submitted that the power to issue questioning warrants in respect of minors is redundant to security needs and should not be renewed.[66]

[60] ASIO Act, s. 34FI.
[61] ASIO Act, s. 34GD(7).
[62] ASIO Act, s. 34BA.
[63] ASIO Act, s. 34C.
[64] ASIO Act, s. 34F.
[65] For example, the prescribed authority is required to give a direction limiting disclosure of information obtained under a questioning warrant if satisfied that this action is necessary to protect the subject's right to a fair trial, if the subject has been charged with a related offence or such a charge is imminent. ASIO Act, s. 34DF(1). Questioning material and derivative material can only be disclosed to a prosecutor post-charge under a court order: ASIO Act, s. 34EA(1)(b), 34EB(1)(b) and 34EC(1).
[66] Australian Security Intelligence Organisation, ASIO Submission no 1 to the Parliamentary Joint Committee on Intelligence and Security, Review of Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth) (Submission, 2024).

65. The Law Council has recently provided detailed recommendations for improvements to this regime.[67] We submit that consideration should be given to replicating these safeguards in Part IIIAAA of the Defence Act.

Recommendation 5

- **The intention to preserve the privilege against self-incrimination should be incorporated in primary legislation. We accept that the privilege against self-incrimination may be abrogated in emergency situations.**
- **Consideration should be given to incorporating a defence to the offence in section 51R of the Defence Act to the effect that a person is excused from complying with a direction about answering a question, producing a document or thing on the ground of the privilege against self-incrimination.**
- **Primary legislation should specify compulsory questioning safeguards regarding the presence of a lawyer during questioning and use and derivative use immunities. In this regard, consideration should be given to the safeguards in Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth).**

Division 4—Powers exercised in special areas

66. Division 4 confers powers on members of the Defence Force if the Defence Force is being utilised under a call out order that specifies that this Division applies. The powers are to be exercised in a specified area which may be in Australia or the Australian offshore area. The authorising Ministers specify the area in a specified area declaration.

67. We reiterate the concerns outlined above at paragraphs 59 to 64 regarding disproportionate interference with the privilege against self-incrimination and right to silence.

68. As above, we note that section 51R of the Defence Act makes it an offence for a person to fail to comply with a direction given under Divisions 3, 4 or 5. There are no offence-specific defences that would excuse the conduct of a person refusing to provide an answer, document or thing on the basis it would incriminate them.

Recommendation

- **We reiterate Recommendation 5, outlined above.**

Subdivision C, Division 4: Powers to search premises in specified areas

69. Subdivision C provides power to search premises in a specified area. Section 51A permits the Chief of the Defence Force, or an authorised officer, to authorise a search of premises in a specified area if, while the Defence Force is being utilised under a call out order, the authorising officer believes on reasonable grounds that, on any premises in the specified area, there is:

[67] Law Council of Australia, Submission no 8 to the Parliamentary Joint Committee on Intelligence and Security, Review of Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth) (Submission, 1 March 2024).

- a person who is likely to pose a threat to: any person's life, health or safety; or public health or public safety; or
- a thing that is likely to: pose a threat to any person's life, health or safety; or pose a threat to public health or public safety; or cause serious damage to property; or
- a person or thing connected with the domestic violence or threat specified in the order.

70. In our assessment, the criteria set out above are over-broad and there should be a higher threshold given the extraordinary implications of these powers. We consider it significant that existing extraordinary law enforcement powers contained in Division 3A of Part IAA the *Crimes Act 1914* (Cth) (e.g., including extraordinary powers of stop, search, seizure, warrantless emergency entry to premises) set a higher threshold. For example, section 3UEA of the Crimes Act states that a police officer may enter premises without a warrant if the police officer suspects, on reasonable grounds, that:

    - it is necessary to exercise search and seizure powers in order to prevent a thing that is on the premises from being used in connection with a terrorism offence; and
    - it is necessary to exercise the power without the authority of a search warrant because there is a serious and imminent threat to a person's life, health or safety.

71. Furthermore, as background to these extraordinary law enforcement powers it is worth noting that law enforcement officers may, without warrant, arrest a person for an offence if the officer believes on reasonable grounds that the person has committed or is committing the offence and proceeding by summons would not achieve certain purposes: for example, preventing repetition or continuation of the offence or another offence; or preventing the concealment, loss or destruction of evidence.[68] Law enforcement officers also have a power to, without warrant, arrest a person for a terrorism offence or an offence against section 80.2C of the *Criminal Code* if the officer suspects on reasonable grounds that: the person has committed or is committing the offence; and proceedings by summons against the person would not achieve certain prescribed purposes.[69] There are also extensive search, information gathering, arrest and interrogation powers available to law enforcement agencies in ordinary circumstances subject to a warrant.[70]

72. We submit that language similar to section 3UEA of the Crimes Act—that is, 'serious and imminent threat to a person's life, health or safety—should be considered for replication in this context.

[68] *Crimes Act 1914* (Cth), s. 3W.
[69] *Crimes Act 1914*, s. 3WA.
[70] See generally, *Crimes Act 1914* (Cth), Part IAA.

Recommendation 6

- **The threshold of 'a threat to a person's health or safety' should be rephrased to impose a higher threshold commensurate with the potentially serious implications for the use of the powers.**

Division 6—Use of reasonable and necessary force

73. Division 6 of Part IIIAAA contains a broadly framed general authorisation for, a member of the ADF, who is being utilised under a call out order, to use reasonable and necessary force. It is broadly framed because section 51N(1) states that a member of the ADF who is being utilised under a call out order may use reasonable and necessary force—whether or not the member is exercising a power under Part IIIAAA. There are certain restrictions on use of force, for example, a member of the ADF must not use force to direct a person to answer a question put by a member of the ADF or to produce a particular document.[71]

74. There are also certain procedural safeguards that apply to the exercise of these powers. For example, a requirement that persons are to be informed of certain matters if detained,[72] and specifying the actions that may be taken in relation to seized items.[73]

75. Based on our consideration of the Issues Paper and publicly available evidence (including the review history of Part IIIAAA of the Defence Act), we reiterate our view that reasonable, necessary and proportionate use of force is only justified in circumstances where the use of force is linked to the protection of life and serious bodily harm or to arrest a person found committing an offence.

Recommendation 7

- **Division 6 should more clearly state that any use of reasonable and necessary force must be materially connected with the protection of life and preventing serious bodily harm or to arrest a person found committing an offence.**

Use of force against aircraft

76. Section 46(3) states that the Minister must not authorise the taking of measures against an aircraft or vessel unless the Minister is satisfied that taking the measure is reasonable and necessary (or for a contingent call out order, would be reasonable and necessary). Section 46(5)(d) then empowers a member of the ADF to take certain authorised actions, including taking measures (including the use of force) against an aircraft (whether or not the aircraft is airborne) or vessel, up to and including destroying the aircraft or vessel.[74] The provisions of Division 4 in Part IIIAAA also regulate the use of force in exercising powers under Division 3B.

[71] Defence Act, s. 51N(2).
[72] Defence Act, s. 51P.
[73] Defence Act, s. 51Q.
[74] Section 46(5)(e) empowers the member to give an order relating to the taking of measures against an aircraft in section 46(5)(d). This is subject to subject to certain cumulative constraints, for example, regarding

77. We reiterate our support for the recommendation of the First Independent National Security Legislation Monitor (**INSLM**), Bret Walker SC. We consider Mr Walker's reasoning in this regard compelling. He observed:[75]

> *In the opinion of the INSLM, at bottom a necessary element in the purported justification of laws such as Division 3B of Part IIIAAA of the Defence Act must be some crude form of utilitarian head count—along the lines of it being right to kill 200 people in order to save 2000 people, even if all of them are innocent. It is worth noting at once that this kind of ghastly calculus should always, to be fair and accurate, include the worrying qualification that the prospect of the 2000 being otherwise doomed is a matter of possibility or probability, rather than certainty—whereas the act sought to be justified, killing the 200, is for all practical purposes certain, such as shooting down a passenger airliner.*
>
> *ICCPR does not contemplate this as a permissible approach to the qualification of the human rights recognized in it, the observance of which is binding on Australia. It suffices to note the non-derogable status of Art 6.*

78. Accordingly, we recommend that the link to the protection of life and serious bodily harm should be made explicit in subparagraph 51N(3)(iii).

Recommendation 8

- **The link to the protection of life and serious bodily harm should be made explicit in subparagraph 51N(3)(iii).**

Protections for ADF members when acting in good faith

79. As explained above, the rule of law requires that the law should be applied to all people equally and should not discriminate between people on arbitrary or irrational grounds.[76] In particular, no one should be regarded as above the law, and all people should be held to account for a breach of the law, regardless of rank or station. Additionally, where the Executive has acted unlawfully, anyone affected should have access to effective remedy and redress.

80. Compliance with Australia's international human rights law obligations also requires that, where the law recognises a human right, the recognition of the right should be accompanied by provision for an accessible[77] and effective[78] remedy.[79]

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the member taking the action under authority of an order and the superior's order not being 'manifestly unlawful': Defence Act, s. 46(6).

[75] Independent National Security Legislation Monitor Bret Walker SC, Annual Report (Report, 28 March 2014) Recommendation II/1, 7.

[76] Law Council of Australia, Rule of Law—Policy Statement (Policy Statement, March 2011).

[77] An accessible remedy provides access to justice for affected individuals through a mechanism that is both fair (impartial and independent) and accessible (both legally and in fact, including at a cost that does not prevent or discourage victims from seeking redress), including to vulnerable populations.

[78] An effective remedy must be adequate, effective and prompt, amounting to full and effective redress and reparation (including through monetary compensation, restitution, satisfaction, rehabilitation and guarantees of non-repetition, as appropriate to the circumstances).

[79] See for example, *Universal Declaration of Human Rights*, GA Res 217A(III), UN GAOR, UN Doc A/810 (10 December 1948) art 8; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 2(3). The United Nations Human Rights

81. In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, states have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him.[80]

82. The considerations listed above have particular force in relation to the potentially coercive powers attached to Part IIIAAA. As explained above, we have concerns about the proportionality of Divisions 3, 4, 5 and 6 which authorise extraordinary coercive powers including (for example) search, seizure, arrest, detention, mandatory questioning and reasonable use of force. In a recent communication, the United Nations Human Rights Committee found violations by Australia of the right to an effective remedy in relation to cruel, inhuman or degrading treatment, arbitrary arrest and detention.[81] The Committee highlighted the importance of providing an effective remedy. In this regard, the Committee reiterated the importance of both the individual responsibility of perpetrators of violations of human rights alongside state responsibility to not violate human rights and to remedy violations when they occur.[82]

83. It is well-accepted that applying military law in special military courts to members of the ADF in relation to their actions extraterritorially, where it would not be feasible to apply ordinary criminal law, is a justifiable exception to usual principles. However, the ordinary criminal law should generally apply to actions of ADF members where they are acting within Australia's borders. We respectfully agree with the dicta of Brennan and Toohey JJ in *Re Tracey:*[83]

> *The discipline which naval and military law was intended to secure was no mere obedience by individual sailors and soldiers to lawful commands nor even their conformity with particular canons of naval or military behaviour. The most important aspect of the discipline which that law was intended to secure was the control of armed forces to*

Committee have observed, in relation to art 2(3), that '[w]ithout reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged'. United Nations Human Rights Committee, General Comment No. 31 The Nature of the General Legal Obligation Imposed on State Parties to the Covenant UN Doc CCPR/C/21/Rev.1/Add. 13 80th session (29 March 2004), 6 [16]

[80] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, GA Res 60/147 UN Doc A/Res/60/147 (21 March 2006) art 4.

[81] See for example, United Nations Human Rights Committee, Views concerning Communication No. 1885/2009 (*Horvath v Australia*) CCPR/C/110/D/1885/2009, 27 March 2014, (Views). In that communication, the Committee, referring to actions by Victoria Police, said the State party should review legislation to ensure an effective remedy for all torts committed by police including assault, battery, false imprisonment and malicious prosecution. Subsequently, Victoria made amendments to the *Victoria Police Act 2013* (Vic) (replacing section 123 of the *Police Regulation Act 1958* (Vic)) with a statutory model of State liability for police conduct in Victoria. We suggest that these views may be relevant in assessing the human rights compatibility of similar immunities contained in Part IIIAAA of the Defence Act.

[82] *Horvath v Australia*, [5.5]:

> *The author disagrees with the State party's arguments regarding the individual responsibility of perpetrators. It is the State's responsibility to ensure that its police do not violate human rights and to remedy violations when they occur. By directly compensating victims, the State ensure that its obligations in that respect are fulfilled. Such a position does not relieve the individual perpetrators of liability in civil proceedings. It is also possible for the State to pursue the individual perpetrators for reimbursement. Currently, the practical effect of section 123 of the Police Regulation Act is to absolve the State of responsibility for police who act in bad faith, unreasonably and outside the course of their duty. In the light of that, the State of Victoria is obliged to change its domestic laws, as other states have already done. Furthermore, police violence occurs in part owing to systemic failures in training, oversight and disciplinary measures. State liability for the actions of its agents ensures that such systemic failures are addressed.*

[83] *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 562 (Brennan and Toohey JJ).

ensure that their existence as a permanent armed body under hierarchical command should not threaten the peace and civil order of the Realm.

84. In our 2018 Submission, we expressed reservations about the breadth of the immunity with respect to the exercise of power 'in good faith', provided for in subsection 51S(1) of the Defence Act.[84] We acknowledge statements in the explanatory material that section 51S is only intended to remove legal liability in instances where an ADF member has exceeded the member's legal authority in circumstances that can be characterised as minor or technical. For example, 'failing to wear their name badge'.[85] We remain concerned that the breadth of the immunity as drafted has the potential to grant immunity where actions may be considered to be 'manifestly unlawful'.

85. The Issues Paper asks whether additional legal protections should be afforded to ADF members operating under Part IIIAAA.[86] Without careful justification, we are unlikely to support further extending the scope of the immunity in subsection 51S(1) of the Defence Act.

Recommendation 9

- **Section 51S(1) of the Defence Act should be amended to state that it only applies to situations where there may be minor or technical non-compliance with obligations (as is stated in the explanatory materials).**

The need for strengthened parliamentary oversight

86. The Issues Paper notes that '[t]he primary transparency mechanism is the obligation on the Minister in s 51ZA to arrange for the presentation to each House of Parliament a copy of the call out order and report on utilisation of the ADF that occurred under the order, within seven (7) days of the order ceasing to be in force'. The Issues Paper goes on to ask whether Part IIIAAA should provide for review of a call out by an oversight body at the Commonwealth level and relatedly whether Part IIIAAA should provide for cooperation with post-call out investigative processes.[87]

Accountability and oversight gap

87. The rule of law requires that the use of executive powers should be subject to meaningful parliamentary and judicial oversight, particularly powers: to use force; to detain; and to enter private premises.[88] Mechanisms should be in place to safeguard against the misuse or overuse of executive powers.[89]

[84] 2018 Submission, 10 [21].
[85] Explanatory Memorandum, Defence Amendment (Call out of the Australian Defence Force) Bill 2018, 79 [446].
[86] Issues Paper, Consultation Question 12.
[87] Issues Paper, Consultation Question 13 and 14.
[88] Law Council of Australia, Policy Statement—Rule of Law Principles (Policy Statement, March 2011), Principle 6(b).
[89] Ibid.

88. Having regard to similar reporting, parliamentary accountability, and independent oversight requirements in primary legislation—the current oversight, accountability and transparency mechanisms in Part IIIAAA are insufficient.

89. By way of analogy, we note that Division 3A of Part IAA the Crimes Act contains extraordinary powers of stop, search, seizure and warrantless emergency entry to premises. These powers apply to Commonwealth places and prescribed security zones (the Minister has a broadly framed power to declare areas prescribed security zones). Section 3UJA of the Crimes Act requires that, as soon as practicable after the exercise of a power or powers by an AFP police officer in relation to an incident, the Commissioner must give a report to the Minister, the INSLM and the Parliamentary Joint Committee on Intelligence and Security. That report must address specified matters, including the circumstances in which the powers were exercised.[90] That scheme also contains a retrospective independent oversight safeguard because, where the warrantless entry power has been exercised, the law enforcement officer must apply to an assessment officer[91] for a retrospective warrant as soon as practicable after the exercise of the power.

Parliamentary accountability–Joint Statutory Committee on Defence

90. In recent times, across Westminster legal and political systems that embed broadly defined powers regulating international armed conflict decision making in the executive as a prerogative power, with limited legislative oversight, there has been a movement to strengthen parliamentary accountability.[92] In Australia, we note that the recent report of the Joint Standing Committee on Foreign Affairs, Defence and Trade in the inquiry into international armed conflict decision making contained recommendations directed to strengthening parliamentary oversight.[93]

91. Given this trend towards embedding strengthened parliamentary scrutiny in relation to the extraterritorial deployment of the ADF, the current requirement that call out orders under Part IIIAAA be tabled in Parliament in section 51ZA seems inadequate. We note that meaningful scrutiny of the reasons for a call out order, and operationally sensitive matters pertaining to how powers under Part IIIAAA were exercised, are likely to be subject to security classification making it difficult to be debated in Parliament.

92. Recommendation 6 of that report included support for establishing a new Joint Statutory Committee on Defence to provide oversight and accountability functions in relation to the ADF, the Department of Defence and related agencies including 'inquiry into matters referred by the Minister for Defence or either House of Parliament' and 'general parliamentary oversight of war or warlike operations, including ongoing conflicts and involvement in significant non-conflict-related operations domestically and internationally'.[94]

93. In our assessment, the proposed remit of the new Joint Statutory Committee on Defence would make it a suitable venue to provide strengthened parliamentary

[90] *Crimes Act 1914* (Cth), s. 3UJA(2)(b).
[91] A Federal Court judge or a nominated Administrative Review Tribunal Member: *Crimes Act 1914* (Cth), s. 3UJC(1).
[92] See for example, in the United Kingdom where there is an emerging political convention to hold a parliamentary debate prior to authorising military action: Claire Mills, Military action: Parliament's role House of Commons Library (Research Briefing, 14 October 2024).
[93] Joint Standing Committee on Foreign Affairs, Defence and Trade, Inquiry into international armed conflict decision making (Report, March 2023).
[94] Ibid, Recommendation 6 [3.97].

oversight of call outs, and the exercise of associated powers by members of the ADF, under Part IIIAAA.

Recommendation 10

- **Part IIIAAA, or the authorising legislation for the Joint Statutory Committee on Defence, should be amended to require post-incident Parliamentary review of any call out under Part IIIAAA within a specified time.**

Post-incident review by Inspector General of the ADF

94. In principle, there is no rationale for lower standards of post-incident review and oversight in relation to call outs of ADF members under Part IIIAAA of the Defence Act compared to deployment of law enforcement agencies in similar situations.

95. Conversely, it is noteworthy that the actions of members of the ADF on deployments overseas are subject to retrospective review by reference to standards imposed by the laws of armed conflict. The Law Council strongly endorsed the implementation of the recommendations of the Inspector-General of the Australian Defence Force, which reveal alleged breaches of the laws of armed conflict by members of the ADF in Afghanistan, between 2005 and 2016.[95]

96. Given the scope for the use of force under Part IIIAAA, we submit that Part IIIAAA should specifically require post-incident review by the Inspector General of the ADF.

97. We consider that the primary legislation should specify the scope of the review. We support an obligation in primary legislation on the authorising Ministers, relevant government Departments and ADF to provide relevant documents and cooperate with post-call out investigative processes.

Recommendation 11

- **Part IIIAAA and section 110C of the Defence Act should be amended to require post-incident review by the Inspector General of the ADF .**
- **Part IIIAAA should be amended to include an obligation on the authorising Ministers, relevant government Departments and ADF to provide relevant documents and cooperate with post-call out investigative processes.**

[95] Law Council of Australia, Law Council President, Pauline Wright, response to reports of war crimes by members of the ADF (Media Release, 19 November 2020).