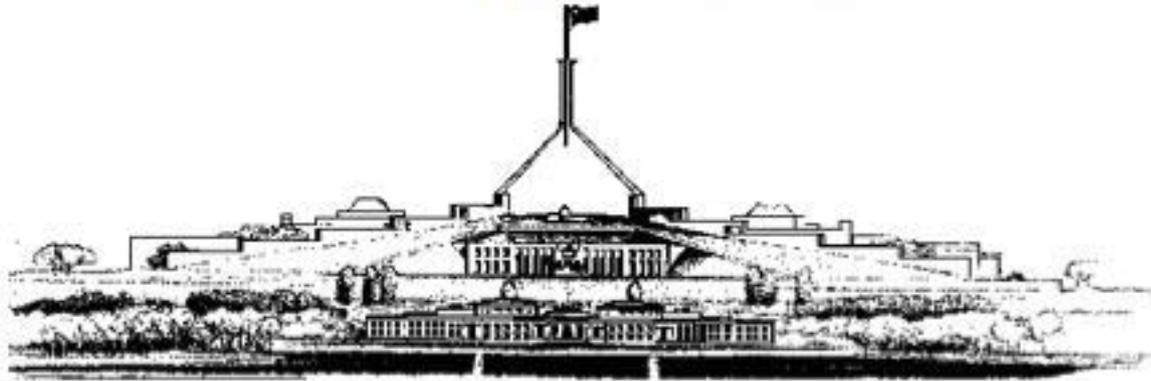




COMMONWEALTH OF AUSTRALIA

PARLIAMENTARY DEBATES



THE SENATE

BILLS

**Defence Amendment (Call Out of the
Australian Defence Force) Bill 2018**

Second Reading

SPEECH

Monday, 26 November 2018

BY AUTHORITY OF THE SENATE

SPEECH

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Speaker Kitching, Sen Kimberley	Question No.

Senator KITCHING (Victoria) (21:02): I rise to speak on the Defence Amendment (Call Out of the Australian Defence Force) Bill 2018. As the shadow minister for defence, Mr Marles indicated in his speech in the second reading debate that Labor will be supporting this bill. In doing so, we are following the recommendation of the Senate Legal and Constitutional Affairs Committee, which conducted an inquiry into the bill and tabled its report on 3 September. It's a sobering experience to debate a bill of this kind following the terrorist incident which occurred in Melbourne in the last few weeks. We've now had a number of such incidents on Australian soil in which six Australians, not counting the perpetrators, have been killed. Although this number is very low compared to those experienced in Britain, France or Germany, every such incident comes as a profound shock.

Australia is one of the world's most successful multicultural and multifaith societies. I have great faith in pluralistic societies. I think they are the best types of societies. Over the last 70 years, we have welcomed more than seven million immigrants to this country. Close to a million people have come as refugees fleeing poverty, war and persecution in their home countries. The overwhelming majority of these immigrants and refugees, wherever they came from and whatever religion they profess, have successfully integrated into Australian society and have become useful and productive citizens. Australia would not be the wonderful place it is today without their contribution to our society. But that is why we find it so shocking and distressing that even a very small number of people who come here as refugees should fall under the sway of radical religious ideology and make such murderous attacks on their fellow Australians, such as we saw at the Martin Place siege in 2014, the shooting at Parramatta Police Station in 2015 and the recent incident in the Bourke Street Mall.

I take this opportunity to express my gratitude to and support for the men and women of our federal, state and territory police forces and of our security and intelligence services. Between them, as we know, they have detected and prevented a number of potentially serious terrorist plans before those plans have come to fruition. As we saw in Melbourne recently, they are frequently called on to put their lives at risk to protect the safety of the public, and they do so unflinchingly. We should remember to always be grateful to the men and women of those services.

I also acknowledge that, in most of these cases, terrorist plans are detected early and terrorist attacks are prevented because of the willingness of the leaders of our communities and the great majority of people from those communities to cooperate with the police and the intelligence services. No-one suffers more when one of those attacks takes place than the community from which the perpetrators come.

Thanks to the vigilance of our police and security service and the co-operation of our communities, Australia has so far been spared the kind of large-scale terrorist attack that we have seen with tragic frequency in Europe, the Middle East and other parts of the world. But we cannot be complacent. We need to recognise that the danger of such an attack is always with us. We cannot know where or when such an attack might occur or how serious such an attack might be, nor can we be certain that our police services will be able to cope with such an attack, even though all states and territories have increased their expenditure on hardening their police services so that they can respond quickly and appropriately to any kind of terrorist incident.

The ultimate guarantor of the security of Australia and the safety of the Australian people is the Australian Defence Force. This has always been recognised. Section 199 of the Constitution says:

The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.

The Defence Act, first passed by the parliament in 1903, has always contained provisions for the ADF to be called out in support of the civil authorities in an emergency. Section 51 of the act allows the ADF to be called out by the Governor-General acting on the advice of the Minister for Defence. One of the grounds on which the ADF may be called out is:

(a) domestic violence is occurring or is likely to occur in Australia; and

(aa) the domestic violence would, or would be likely to, affect Commonwealth interests; and

(b) if the domestic violence is occurring or is likely to occur in a State or self governing Territory—the State or Territory is not, or is unlikely to be, able to protect Commonwealth interests against the domestic violence ...

This bill seeks to clarify the circumstances in which the ADF can be called out to assist a state or territory to cope with an incident of domestic violence on its territory. Although the term 'domestic violence' in the Constitution and the Defence Act was originally intended to refer to events such as riots and civil conflict, it is obvious that a terrorist attack on Australian soil, whether launched from inside or outside Australia, would fall under this heading. If this is a matter that needs clarification, the addendum to the explanatory memorandum to this bill states:

The term 'domestic violence' ... refers to conduct that is marked by great physical force and would include a terrorist attack, hostage situation, and widespread or significant violence.

But the act was not written with terrorist attacks in mind, and some of its provisions need to be clarified and strengthened so that the ADF can react promptly and, most importantly, within the law when it is called on to do so.

Section 51A of the Defence Act specifies the circumstances in which the ADF can be called out to assist a state or territory if:

... Ministers are satisfied that ... if the domestic violence is occurring or is likely to occur in a State or self-governing Territory—the State or Territory is not, or is unlikely to be, able to protect Commonwealth interests against the domestic violence ...

In other words, the act stipulates that the ADF can only be called if the Minister for Defence believes that the state or territory authorities are unable to cope with the situation that has arisen. Clearly, in the current circumstances, that is an unrealistically restrictive provision. Its effect is to say that a state or territory must have exhausted its law enforcement resources before the Minister for Defence can agree to a request from the state or territory for the assistance of the ADF.

The amendments in this bill provide a more flexible provision. It requires the Minister for Defence to consider, firstly, the nature of the violence or threat; and, secondly, whether the calling out of the ADF would be likely to enhance the ability of the state or territory to respond to that threat. The effect of this provision would be to allow greater flexibility for the ADF to provide at the request of a state or territory the most rapid, effective and appropriate specialist support in responding to terrorist incidents while, at the same time, respecting the position of the states and territories as the first responders.

The Defence Act, as it currently stands, outlines two basic types of call-out orders: an order for the ADF to be called out immediately; and a contingent call-out order whereby the ADF can be called out if specified circumstances arise. This bill amends the Defence Act for four purposes: first, to make it easier for states and territories to request ADF support; secondly, to simplify, expand and clarify the ADF's powers; thirdly, to enhance the ADF's ability to respond to incidents occurring in more than one jurisdiction or across jurisdictions; and, fourthly, to allow for pre-authorisation for the ADF to respond to threats on land and sea as well as in the air typically used as part of the measures during major events such as the G20 or the Commonwealth Games.

It's important to note that, following implementation of these changes, the state and territory police forces will continue to be the first responders to terrorist incidents, and call-out of the Australian Defence Force for the protection of states and territories will only be able to be considered following a request by the state or territory.

Call-out of the ADF for the protection of Commonwealth interests may be initiated by the Commonwealth itself or requested by a state or territory. To this end, the explanatory memorandum outlines four principles that underpin the proposed changes in this bill. The four principles are: firstly, the ADF should only be called out to assist civilian authorities; secondly, if the ADF is called out the civilian power remains paramount, but ADF members remain under military command; thirdly, if the ADF is called out, ADF members can only use force that is reasonable and necessary in the circumstances; and, fourthly, ADF personnel remain subject to the law and are accountable for their actions.

Concern may be felt that the provision for a contingent call-out order may be abused—that is, an order whereby the ADF can be called out for specified circumstances where they arise but before these circumstances have arisen. Senator Patrick alluded to a concern that such a provision could be abused for perhaps political purposes. In response to these concerns, the explanatory memorandum now states:

It is not intended that contingent call out orders under proposed section 34 will be made on the basis of vague or indefinite specified circumstances. The specified circumstances must be sufficiently particular to allow authorising Ministers to make the assessments required—

in order to satisfy themselves that the domestic violence or threat is likely and that the call-out of the ADF would resolve the incident. Further:

For example, a contingent call out order could be made to protect Commonwealth interests during a major international summit. Commonwealth interests requiring protection in these circumstances could include Commonwealth property, and visiting dignitaries or heads of state. A foreseeable risk may be a chemical, biological, radiological or nuclear attack at the summit venue. Accordingly, it would be appropriate for a contingent call out order to be in place to deal with this foreseeable risk, empowering the ADF to use its specialist capabilities should the specified circumstances of an imminent or actual CBRN attack at the summit arise.

The explanatory memorandum also makes it clear that the amended criteria that the Minister for Defence will be required to consider in making a call-out order stipulate that:

... calling out the ADF to respond to an incident is a significant and exceptional act and ensures that it is not done in relation to incidents that are within the ordinary capability of the police.

The act, as amended, thus precludes any possibility, no matter how remote, that a state or territory government could call on a Minister for Defence to call out the ADF without good cause or for any cause other than a serious emergency. Taken together, these are important safeguards against the unlikely circumstance that a Minister for Defence would seek to use these powers in an improper way. I'm pleased that the government has listened to some of the concerns initially expressed about some provisions of this bill and has clarified them in such a way as to satisfy any reasonable concerns. It is on this basis that the opposition has decided to support this bill as a necessary, carefully calibrated response to the heightened level of threat that we sadly find ourselves facing. I commend this bill to the Senate.