



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

ISSUES PAPER

9 October 2024

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A. Introduction

1. Part IIIAAA of the *Defence Act 1903* (Cth) (**Defence Act**) enables the Australian Defence Force (**ADF**) to be “called out” to assist civilian authorities such as the police in response to “domestic violence” in the States and Territories (so described in s 119 of the Commonwealth Constitution), as well as to protect Commonwealth interests.
2. On 6 June 2024, I was appointed by the Deputy Prime Minister and Minister for Defence, the Hon Richard Marles MP, to undertake an independent review of Part IIIAAA.¹
3. As outlined in the letter of appointment, the purpose of my review is to ensure that Part IIIAAA is appropriate for the Commonwealth to utilise the ADF to protect the States, self-governing Territories and Commonwealth interests (onshore and offshore). My terms of reference are relevantly set out at [72] below. I am to examine, and if appropriate, identify any issues for further consideration relating to the reform of Part IIIAAA.
4. I have considered the history of Part IIIAAA along with a range of academic and other publications in relation to Part IIIAAA. Key written materials are listed at **Annexure A**.
5. As part of my review, it is essential that I consult with key stakeholders. I have already conducted initial consultations with a range of relevant Commonwealth, State and Territory departments and agencies, as well as representatives from relevant cross-government initiatives currently underway,² and a number of academics, as listed at **Annexure B**.
6. I invite written submissions from any interested party regarding the ongoing appropriateness, and potential reform, of Part IIIAAA.
7. This Issues Paper, which outlines key issues and themes that have emerged during my work to date (see Part D below), may guide but ought not limit interested parties in making a written submission.
8. Any written submissions are to be furnished by **4 pm on Monday 4 November 2024**, by email to independent.review@ags.gov.au, for consideration as part of my review.
9. To make arrangements for the furnishing of any submissions containing **confidential information**, or if you do not want your identity revealed in the report of my findings, please contact the Secretariat:

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E: independent.review@ags.gov.au T: (08) 8205 4515.

¹ This is required every five years pursuant to s 51ZB of the Defence Act. I am to provide a written report of my findings by 20 December 2024, which will be tabled in each House of Parliament.

² Including the Defence Act Reform Project, the National Preparedness Taskforce and the National Resilience Taskforce, which may give rise to reforms to the Defence Act and the Scheme for Defence Assistance to the Civil Community (**DACC**).

10. As outlined in Part B below, Part IIIAAA was introduced in 2000 shortly before the Sydney Olympics. Events leading to its insertion included the Hilton Hotel bombing in 1978, and a Protective Security Review completed by Justice Robert Hope in 1979. Part IIIAAA provided a comprehensive statutory framework that replaced earlier provisions enabling the call out of the ADF to protect States from domestic violence. There have been subsequent amendments to Part IIIAAA in 2006 (following an independent review completed in 2004) and in 2018 (following the Lindt Café Siege in 2014 giving rise to coronial recommendations, and terrorist attacks in Paris in 2015 and London in 2017). My review forms part of an ongoing concern that Part IIIAAA of the Defence Act remains appropriate and fit for purpose, which is necessary because Part IIIAAA responds to a dynamic and evolving threat environment.
11. Information furnished to me to date indicates the current threat environment to which Part IIIAAA responds is unpredictable and rapidly changing. Relevant threats include both terrorism (religiously, politically and ideologically motivated violence), as well as espionage and foreign interference. The threat environment also includes the protection of government and critical infrastructure from malicious cyber actors.³ Recently, on 5 August 2024, the Australian National Terrorism Threat Level was raised from “Possible” to “Probable”.⁴ The Director-General of Security has described four core characteristics as underpinning the current counter-terrorism landscape: 1) the threat from lone actors; 2) the acceleration of radicalisation; 3) a resurgence in the number of minors embracing violent extremism; and 4) the diverse drivers of extremism.⁵ There has been an observed emergence of domestic actors who may carry out terrorist actions that are difficult to detect and may occur with little to no warning. It is likely such attacks would involve readily available weapons (up to and including explosives and firearms), and would occur in crowded locations (for example, shopping centres in major cities).⁶ Part IIIAAA must be capable of responding both to the current threat environment of heightened risk and the future environment of unpredictable risk.
12. The scope of my review is confined to the legal framework of Part IIIAAA of the Defence Act. I am not conducting an examination of other parts of the Defence Act or the DACC scheme, except to the extent that this is relevant to the operation of Part IIIAAA. Nor am I scrutinising administrative arrangements, policies and procedures with respect to Part IIIAA (although these will bear on the efficacy of any call out, see [106] below).
13. It is also pertinent to recognise from the outset that while a call out order under Part IIIAAA has been practiced 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.

³ Australian Signals Directorate, *ASD Cyber Threat Report 2022-2023* (Web Page) <<https://www.cyber.gov.au/about-us/view-all-content/reports-and-statistics/asd-cyber-threat-report-july-2022-june-2023>>

⁴ Australian Security Intelligence Organisation, *National Terrorism Threat Level*, (Web Page, 5 August 2024) <<https://www.asio.gov.au/national-terrorism-threat-level-2024>>.

⁵ Australian Security Intelligence Organisation, *National Terrorism Threat Level*, (Web Page, 5 August 2024) <<https://www.asio.gov.au/national-terrorism-threat-level-2024>>.

⁶ Australian National Security, *Current National Terrorism Threat Level*, (Web Page) <<https://www.nationalsecurity.gov.au/national-threat-level/current-national-terrorism-threat-level>>.

B. Background to Part IIIAAA

Constitutional context

14. The constitutional context that underpins Part IIIAAA of the Defence Act is, most relevantly, s 119 of the Commonwealth Constitution which provides that “[t]he Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence”.⁷
15. Furthermore, s 51(vi) of the Constitution 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 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.⁸ Section 114 provides that a State shall not, without the consent of the Commonwealth Parliament, raise or maintain any military force.
16. These provisions form part of a careful constitutional design under which control of the Defence Forces of Australia were transferred to the Commonwealth at Federation, coupled with an obligation on the Commonwealth to protect the States from invasion by foreign powers and domestic violence.
17. These provisions are also underpinned by and reflective of a longstanding historical tradition drawing a distinction between military and civil power, and opposing the use of military force to suppress domestic civil unrest.⁹

History of the call out of the ADF in Australia

18. In the early years of federation, State Governments requested military intervention from the Commonwealth on six occasions between 1916 and 1928. A number of these requests involved disturbances caused by labour strikes (although none invoked s 119 of the Constitution) and all were refused.¹⁰ A request under s 119 has only been invoked

⁷ Section 119 is modelled on s 4 of Art VI of the United States Constitution, which provides “the United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence”: see discussion in John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Lexis Nexis Butterworths, rev ed, 2015), 1178; W Harrison Moore, *The Constitution of the Commonwealth of Australia* (Sweet and Maxwell, 2nd ed, 1910), 338-339. For the history of the term “domestic violence” in s 119, see James Mortensen, ‘A History of “Domestic Violence” in Australian Politics’ (2023) 20(2) *History Australia* 254.

⁸ The command exercised by the Governor-General is titular and is to be exercised in accordance with the principles of responsible government on ministerial advice, and in practice the command of the ADF is placed under the Chief of the Defence Force under the Defence Act (s 9).

⁹ *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 562 (Brennan and Toohey JJ); Michael Head, ‘The Military Call-Out Legislation – Some Legal and Constitutional Questions’ (2001) 29 *Federal Law Review* 273, 278.

¹⁰ Justice Robert Hope, Parliament of Australia, *Protective Security Review* (Parliamentary Paper No 397, 15 May 1979), Appendix 3; Current topics, ‘Protection of Australian States against domestic violence (s 119 of the Constitution)’ (1978) 52 *Australian Law Journal* 345, 351; Elizabeth

once, by the Queensland government in 1912, during a general riot. This was also refused, and to date the Commonwealth has never acted under s 119.¹¹

19. The ADF was called out in response to the Hilton Hotel bombing in 1978, with troops patrolling the streets of Bowral in NSW. This was authorised by an Order-in-Council made by the Governor-General,¹² rather than pursuant to s 119 of the Constitution. Following this, then Prime Minister Malcolm Fraser commissioned Justice Robert Hope to conduct a Protective Security Review, which examined a number of issues including the use of the ADF in aid of civilian authorities.¹³ Justice Hope published his report in May 1979; annexed is an opinion by Sir Victor Windeyer KC on “certain questions concerning the position of certain members of the defence force when called out to aid the civil power”.¹⁴ Sir Victor concluded that the call out of the ADF to respond to the Hilton Hotel Bombing was supported by the Commonwealth’s constitutional authority to protect Commonwealth interests and uphold Commonwealth laws.¹⁵ Justice Hope recommended the Defence Act be amended to introduce a comprehensive legislative framework for the call out of the ADF to protect Commonwealth interests and the States from domestic violence.¹⁶ In subsequent years, the Commonwealth provided ADF assistance (with the agreement of State Governments) to respond to certain events, for example a visit by the President of the United States of America (2001), and the Commonwealth Heads of Government Meeting (**CHOGM**) in Brisbane (2002).¹⁷

Ward, 'Call out the Troops: An Examination of the Legal Basis for Australian Defence Force Involvement in "Non-Defence" Matters' (Research Paper No 8, Parliamentary Library, Parliament of Australia, 24 November 1997), 49-50.

¹¹ See, for example, HP Lee, *Emergency Powers* (Law Book Co, 1st ed, 1984) 201-202; Michael Head, *Calling out the Troops* (Federation Press, 2009), 45.

¹² H E Renfree, *The Executive Power of the Commonwealth of Australia* (Legal Books, 1984), 466-469; Justice Robert Hope, Parliament of Australia, *Protective Security Review* (Parliamentary Paper No 397, 15 May 1979) 27-30; Opinion of Sir Victor Windeyer in Justice Robert Hope, Parliament of Australia, *Protective Security Review* (Parliamentary Paper No 397, 15 May 1979), 278-279.

¹³ Justice Robert Hope, *Protective Security Review* (Parliamentary Paper No 397, 15 May 1979) Ch 10 (Defence and civilian security).

¹⁴ Justice Robert Hope, *Protective Security Review* (Parliamentary Paper No 397, 15 May 1979) Appendix 9 (dated 13 November 1978).

¹⁵ At [7], referring to John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, rev ed, 2015) 1178, and *Re Debs* (1895) 158 US 564. See also *R v Sharkey* (1949) 79 CLR 121 at 151 (Dixon J). The then Attorney-General (Hon Peter Durack QC) and Solicitor-General (Maurice Byers QC) gave a joint opinion dated 28 February 1979 which reached a similar view on the call out of the ADF in response to the Hilton Hotel Bombing.

¹⁶ Justice Robert Hope, *Protective Security Review* (Parliamentary Paper No 397, 15 May 1979), [125]. Appendix 18 of the Protective Security Review contains an outline of proposed legislative provisions to amend the Defence Act in relation to the call out of the ADF to protect Commonwealth interests and the States from domestic violence.

¹⁷ Michael Head, *Calling out the Troops* (Federation Press, 2009) 49-50, 77-78; Cameron Moore, *Crown and Sword – Executive Power and the Use of Force by the Australian Defence Force* (Australian National University Press, 2017) 197; Margaret White, *The Executive and the Military* (2005) 28(2) *UNSW Law Journal* 438, 444-445 and 447-451; Norman Charles Laing, 'Call out the Guards – Why Australia Should Not Longer Fear the Deployment of Australian Troops on Home Soil' (2005) 28(2) *UNSW Law Journal* 507, 509-511.

Introduction of Part IIIAAA of Defence Act

20. The immediate precursor to Part IIIAAA was s 51 of the Defence Act, accompanied by Part V of the *Australian Military Regulations 1927* (Cth) and Part IX of the *Air Force Regulations 1927* (Cth) and Defence Instructions. Section 51 dealt only with the call out of the ADF to protect the States from domestic violence following an application by the Executive Government of a State, and did not provide for the call out of the ADF to protect Commonwealth interests.¹⁸ The procedures derived from 18th century British common law practice relating to riot control, and were outdated and cumbersome. For instance, providing for a magistrate to accompany the ADF into an area, an alarm to be sounded on a bugle, and for a proclamation to be read aloud.¹⁹
21. In the lead up to the 2000 Sydney Olympics, the Commonwealth Parliament passed the *Defence Legislation Amendment (Aid to Civilian Authorities) Act 2000* (Cth), which took effect from 12 September 2000. The amending legislation introduced Part IIIAAA and repealed s 51 of the Defence Act along with relevant parts of the regulations referred to above. The Minister's Second Reading Speech explained the amendments were "to bring the framework for the call out of the Defence Force in law enforcement emergencies up to date" and provide "a sound basis for the use of the Defence Force as a last resort in resolving such emergencies".²⁰ Part IIIAAA dealt with call out of the ADF for the protection of States from domestic violence and for the protection of Commonwealth interests; it also provided for ADF members to have a range of specific powers during a call out.²¹
22. A statutory review of Part IIIAAA of the Defence Act was conducted in 2004 by Anthony Blunn AO, Gen (Retd) John Baker AC DSM and John Johnson AO APM QPM (**2004 review**).²² This was focused on the use of Part IIIAAA to respond to terrorist incidents; it concluded that Part IIIAAA was too narrowly focused to be of much use other than in siege/hostage situations.²³ The 2004 review also noted that the prescriptiveness and complexity of the legislation did not facilitate speed and responsiveness.²⁴ It recommended that the scope of the application of Part IIIAAA be reconsidered, along

¹⁸ See Justice Robert Hope, *Protective Security Review* (Parliamentary Paper No 397, 15 May 1979), [10.13]-[10.18]; David Letts and Robert McLaughlin, 'Military Aid to the Civil Power' in Robin Creyke et al (eds), *Military Law in Australia* (Federation Press, 2019), 117.

¹⁹ See Justice Robert Hope, *Protective Security Review* (Parliamentary Paper No 397, 15 May 1979), Appendix 17 Australian Military Regulations, Part V, 333-338. See also Elizabeth Ward, 'Call out the Troops: An Examination of the Legal Basis for Australian Defence Force Involvement in "Non-Defence" Matters' (Research Paper No 8, Parliamentary Library, Parliament of Australia, 24 November 1997), 4-5; Michael Head, 'The Military Call-Out Legislation – Some Legal and Constitutional Questions' (2001) 29 *Federal Law Review* 273, 284.

²⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 28 June 2000, 18410 (Sharman Stone, Parliamentary Secretary to the Minister for Environment and Heritage).

²¹ Explanatory Memorandum, *Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000* (Cth), 2.

²² As required by then s 51XA(3) of the Defence Act.

²³ Anthony Blunn, John Baker and John C Johnson, *Statutory Review of Part IIIAAA of the Defence Act 1903 (Aid to the Civilian Authorities)* (Commonwealth of Australia, 2004), [28].

²⁴ Anthony Blunn, John Baker and John C Johnson, *Statutory Review of Part IIIAAA of the Defence Act 1903 (Aid to the Civilian Authorities)* (Commonwealth of Australia, 2004), [35].

with a range of other changes including providing for anticipatory operations, the use of force and the utilisation of the Reserves.²⁵

Amendments to Part IIIAAA in 2006 and 2018

23. Following the 2004 statutory review (and in the lead up to the Melbourne Commonwealth Games), amendments were made to Part IIIAAA by the *Defence Legislation Amendment (Aid to Civilian Authorities) Act 2006* (Cth). These amendments, which commenced on 1 March 2006, included provisions for expedited call outs, contingent (or specified circumstances) call outs, call outs to respond to incidents in the air-environment and offshore areas, the use of reasonable and necessary force when protecting critical infrastructure, and enabling all aspects of the ADF (including the Reserves) to be utilised during a call out.²⁶
24. The Minister's Second Reading Speech emphasised that the 2006 amendments were designed to enable the ADF to respond to the evolving and dynamic threat environment, but did not involve any change to the fundamental principles underlying Part IIIAAA of the Defence Act.²⁷ Those fundamental principles were outlined in the Explanatory Memorandum²⁸ (reflecting similar principles set out in the 2004 review),²⁹ including:
- the ADF should only be called out as a last resort where civilian authorities are unable to deal with an incident;
 - where the ADF is called out the civil power remains paramount;
 - ADF members remain under military command;
 - if called out ADF members can only use force that is reasonable and necessary in the circumstances; and
 - ADF personnel remain subject to the law and are accountable for their actions.
25. In the wake of the Lindt café siege in 2014 and subsequent inquest completed in 2017, as well as terrorist attacks in Paris in 2015 and London in 2017, further amendments to Part IIIAAA were made by the *Defence Amendment (Call Out of the Australian Defence Force) Act 2018* (Cth), which took effect on 10 June 2019. These amendments were also informed by the Review of Defence Support to National Counter-Terrorism Arrangements conducted in 2017. The Minister's Second Reading speech explained that the purpose of the amendments was to "amend part IIIAAA of the *Defence Act 1903* by streamlining the legal procedures for the call-out of the ADF and enhancing its ability to protect states, territories, and Commonwealth interests, onshore and offshore, against

²⁵ Anthony Blunn, John Baker and John C Johnson, *Statutory Review of Part IIIAAA of the Defence Act 1903 (Aid to the Civilian Authorities)* (Commonwealth of Australia, 2004), [49]-[50].

²⁶ Revised Explanatory Memorandum, *Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2006* (Cth), 2-3.

²⁷ Commonwealth, *Parliamentary Debates*, Senate, 7 December 2005, 26 (Helen Coonan, Minister for Communications, Information Technology and the Arts).

²⁸ Revised Explanatory Memorandum, *Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2006* (Cth), 3.

²⁹ Anthony Blunn, John Baker and John C Johnson, *Statutory Review of Part IIIAAA of the Defence Act 1903 (Aid to the Civilian Authorities)* (Commonwealth of Australia, 2004), [20].

terrorism”.³⁰ There was a reiteration of the fundamental principles underlying Part IIIAAA as set out at [24] above.

26. The 2018 amending legislation re-enacted Part IIIAAA adopting a simplified structure comprising eight Divisions. A key amendment was lowering the threshold for a State protection call out – replacing a requirement that States and Territories “are not, or are unlikely to be, able to protect themselves or Commonwealth interests against domestic violence”, with a requirement to consider “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”. Other relevant amendments included enabling action in multiple jurisdictions under Commonwealth interests call out orders, expanding contingent call out orders to respond to land and maritime threats as well as aviation threats, providing for contingent call out orders for the protection of States and Territories, increasing requirements for the ADF to consult with State and Territory police, amending ADF powers with respect to search and seizure and to control movement during an incident, and removing the distinction between general and designated security area provisions.³¹

C. The operation of Part IIIAAA

27. In the present form of Part IIIAAA, the ADF can be called out under a call out order made by the Governor-General if the Prime Minister, the Minister for Defence and the Attorney-General (**the authorising Ministers**) are satisfied of certain matters. There are two types of call out orders – Commonwealth interests orders and State protection orders. For both, the order may be general, expedited or contingent.
28. 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 be consulted before the order is made.
29. 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” (see [32] below). 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 Divisions 3, 4 and 5, described below.
30. Commentators have suggested that the constitutional basis for Part IIIAAA may relevantly include ss 51(vi), 51(xxxix), 61, 68 and 119 of the Constitution.³²

³⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 28 June 2018, 6746 (Christian Porter, Attorney-General). See also Explanatory Memorandum, Defence Amendment (Call Out of the Australian Defence Force) Bill 2018 (Cth), [9].

³¹ Explanatory Memorandum, Defence Amendment (Call Out of the Australian Defence Force) Bill 2018 (Cth), 5-6.

³² See, for example, Michael Head, *Calling out the Troops* (Federation Press, 2009), 63; HP Lee (et al), *Emergency Powers* (Cambridge University Press, 2nd ed, 2018), 223-224; David Letts and Rob McLaughlin, ‘Military Aid to the Civil Power’ in Robin Creyke et al (eds), *Military Law in Australia*

31. The term “domestic violence” is defined in s 31 to have the same meaning as in s 119 of the Constitution, while the terms “Commonwealth interest” and “threat” are undefined.
32. The term “domestic violence” as used in s 119 is taken from s 4 of Art IV of the US Constitution, where it has been understood to broadly refer to local uprisings, insurrections or internal unrest within a State.³³
33. In the context of the 2018 legislative amendments, it was stated that 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”, and excludes “[p]eaceful protests, industrial action or civil disobedience”.³⁴
34. It was also stated that the term “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”.³⁵

Commonwealth interests order

35. The Governor-General may make a Commonwealth interests order pursuant to s 33(3), if the authorising Ministers are satisfied that:
 - 35.1. domestic violence that would, or would be likely to, affect Commonwealth interests is occurring or is likely to occur in Australia (s 33(1)(a)(i)); or
 - 35.2. there is a threat in the Australian offshore area to Commonwealth interests (s 33(1)(a)(ii)); or
 - 35.3. domestic violence that would, or would be likely to, affect Commonwealth interests is occurring or is likely to occur in Australia, and there is a threat in the Australian offshore area to those or any other Commonwealth interests (s 33(1)(a)(iii)); and
 - 35.4. the ADF should be called out and the Chief of the Defence Force should be directed to utilise the ADF to protect the Commonwealth interests against the domestic violence or threat or both (s 33(1)(b)); and
 - 35.5. one or more of Divisions 3, 4 and 5 should apply in relation to the order (s 33(1)(c)).
36. In determining whether domestic violence would affect the Commonwealth, the authorising Ministers must consider the nature of the domestic violence, and whether the utilisation of the ADF would be likely to enhance the ability of the relevant States and

(Federation Press, 2019), 116; Tristan Skousgaard et al, ‘Military Aid to the Civil Power: Part IIIAAA’ in Robin Creyke et al (eds), *Military Law in Australia* (Federation Press, 2nd ed, 2024), 96.

³³ Peta Stephenson, ‘Fertile Ground for Federalism? Internal Security, the States and Section 119 of the Constitution’ (2015) 43(2) *Federal Law Review* 289, 298.

³⁴ Addendum to Explanatory Memorandum, Defence Amendment (Call Out of the Australian Defence Force) Bill 2018 (Cth), sch 1, item 2.

³⁵ Addendum to Explanatory Memorandum, Defence Amendment (Call Out of the Australian Defence Force) Bill 2018 (Cth), sch 1, item 2.

Territories to protect Commonwealth interests against the domestic violence, and may consider any other matter that the authorising Ministers consider is relevant (s 33(2)).

37. The Commonwealth Government must generally consult the affected State or Territory Government before the Governor-General makes or varies a Commonwealth interests order, unless the authorising Ministers are satisfied that for reasons of urgency it is impracticable to do so (s 38).

State protection order

38. The Governor-General may make a State protection order pursuant to s 35(3), if:
 - 38.1. A State or Territory Government applies to the Commonwealth Government to protect the State or Territory against domestic violence that is occurring, or is likely to occur, in the State or Territory (s 35(1)(a)); and
 - 38.2. The authorising Ministers are satisfied that:
 - 38.2.1. the ADF should be called out and the Chief of the Defence Force should be directed to utilise the ADF to protect the State or Territory against domestic violence (s 35(1)(b)(i)); and
 - 38.2.2. one or more of Divisions 3, 4 or 5 should apply in relation to the order (s 35(1)(b)(ii)).
39. In deciding whether the ADF should be called out to protect the State or Territory in relation to domestic violence, the authorising Ministers must consider the nature of the domestic violence, and whether the utilisation of the ADF would be likely to enhance the ability of the State or Territory to protect the State or Territory against the domestic violence, and may consider any other matter that the authorising Ministers consider is relevant (s 35(2)).

Contingent call out order

40. The Governor-General may make a contingent Commonwealth interests order under s 34(3), if the authorising Ministers are satisfied that:
 - 40.1. if specified circumstances were to arise, the circumstances for a Commonwealth interests call out order would be satisfied (s 34(1)(a)(i)); and
 - 40.2. if the specified circumstances were to arise, for reasons of urgency, it would be impracticable for a Commonwealth interests order to be made under s 33 (s 34(1)(b)); and
 - 40.3. if the circumstances arise, the ADF should be called out and the Chief of the Defence Force should be directed to use the ADF to protect the Commonwealth interests against the violence or threat or both (s 34(1)(c)); and
 - 40.4. if the circumstances arise, one or more of Divisions 3, 4 and 5 should apply in relation to the order (s 34(1)(d)).

41. In determining whether the authorising Ministers are satisfied as to domestic violence that would occur or is likely to occur in one or more States or Territories if the specified circumstances were to arise, the authorising Ministers must consider the nature of the domestic violence, and whether the utilisation of the Defence Force would be likely to enhance the ability of each of those States and the Territories to protect the Commonwealth interests against the domestic violence (s 34(2)).
42. The Governor-General may make a contingent State protection order under s 36(3) if:
 - 42.1. a State or Territory Government applies to the Commonwealth Government to protect the State or Territory against domestic violence that would occur, or would be likely to occur, in the State or Territory if specified circumstances were to arise (s 36(1)(a)); and
 - 42.2. the authorising Ministers are satisfied that, if the specified circumstances were to arise, for reasons of urgency, it would be impracticable for a State protection order to be made under s 35 (s 36(1)(b)); and
 - 42.3. the authorising Ministers are satisfied that, if the specified circumstances arise:
 - 42.3.1. the ADF should be called out and the Chief of the Defence Force should be directed to utilise the ADF to protect the State or Territory against the domestic violence (s 36(1)(c)(i)); and
 - 42.3.2. one or more of Divisions 3, 4 or 5 should apply in relation to the order (s 36(1)(c)(ii)).
43. In determining whether the ADF should be called out in relation to domestic violence that would occur or would be likely to occur in the State or Territory if specified circumstances were to arise, the authorising Ministers must consider the nature of the domestic violence and whether the utilisation of the ADF would be likely to enhance the ability of the State or Territory to protect the State or Territory against the domestic violence, and may consider any other matter that the authorising Ministers consider is relevant (s 36(2)).

Common provisions relating to call out orders

44. A call out order under Part IIIAAA comes into force when it is made (ss 33(5)(d)(i), 33(6), 34(5)(d)(i), 34(6), 35(5)(d)(i), 35(6), 36(5)(d)(i), 36(6)).
45. A Commonwealth interests order and State protection order ceases to be in force at the end of the period specified in the order (which must be no more than 20 days), unless it is revoked earlier (ss 33(5)(d)(ii), 33(6), 35(5)(d)(ii), 35(6)). A contingent call out order ceases to be in force at the end of the period specified in the order, unless it is revoked earlier (ss 34(5)(d)(ii), 34(6), 36(5)(d)(ii), 36(6)).
46. The Governor-General must revoke a call out order if:
 - 46.1. one or more authorising Ministers cease to be satisfied as mentioned in ss 33(1), 34(1), 35(1) or 36(1); or

- 46.2. for a State protection order, the State or Territory government withdraws its application to the Commonwealth Government from the call out order (s 37(3)).
47. A call out order may be varied, including to extend the period during which the order is in force for a period of no more than 20 days (s 37(1)-(2)).

Effect of making a call out order

48. If a call out order is made (or the specified circumstances for a contingent call out order arise), the Chief of the Defence Force must utilise the ADF in such manner as is reasonable and necessary for the purpose specified in the order (s 39(1)-(2)). However, in doing so, the Chief of the Defence Force must comply with any direction given by the Minister as to the way in which the ADF is to be utilised, and must not stop or restrict any protest, dissent, assembly or industrial action except in certain circumstances (s 39(3)).
49. In utilising the ADF under a call out order, the Chief of the Defence Force must ensure that as far as is reasonably practicable the ADF is utilised to assist any State or Territory specified in the order, cooperates with the police force of those States and Territories, and the ADF is not used for any particular task in any of those State and Territories (except in relation to airborne aircraft) unless a member of the police force of that State or Territory requests the ADF to be so utilised (s 40).

Powers that may be exercised by ADF members under a call out

50. A call out order must specify which of Divisions 3, 4 or 5 should apply in relation to the order. These divisions outline the different powers that may be conferred on ADF members when the ADF is being utilised under a call out order. As outlined below:
- 50.1. Division 3 contains special powers that are generally authorised by an authorising Minister;
- 50.2. Division 4 contains powers that may be exercised in specified areas (declared by an authorising Minister); and
- 50.3. Division 5 contains powers that may be exercised to protect infrastructure (declared by an authorising Minister).
51. Division 6 provides a general power for ADF members to use reasonable and necessary force in response to a call out order and contains certain other procedural safeguards that apply to the exercise of these powers.

Special powers (Division 3)

52. The special powers under Division 3 must generally be authorised by an authorising Minister (s 46(1)(a)). However, these powers can be exercised without Ministerial authorisation in sudden and extraordinary emergencies (s 46(1)(b)).

53. The powers under Division 3 may also be exercised in an area specified under Division 4 (s 43), and may be exercised in a State or Territory if the exercise of the powers in that State or Territory is authorised by the order, or the power is exercised for the purpose specified in the order (s 44).
54. The special powers that may be exercised by ADF members under Division 3 include the actions outlined in s 46(5) and the powers outlined in ss 46(7) and (9), as follows.
55. The actions outlined in s 46(5) include:
 - 55.1. Capture or recapture a location (including a facility) or thing (s 46(5)(a));
 - 55.2. Prevent or put an end to acts of violence (s 46(5)(b)(i));
 - 55.3. Prevent or put an end to threats to any person's life, health or safety, or to public health or public safety (s 46(5)(b)(ii));
 - 55.4. Protect any person from acts of violence (s 46(5)(c)(i));
 - 55.5. Protect any person from threats to any person's life, health or safety, or to public health or public safety (s 46(5)(c)(ii));
 - 55.6. Take measures (including the use of force) against an aircraft (whether the aircraft is airborne) or vessel, up to and including destroying the aircraft or vessel, subject to certain restrictions (s 46(5)(d));
 - 55.7. Give an order relating to the taking of measures referred to in s 46(5)(d) (s 46(5)(e)).
56. The additional powers outlined in ss 46(7) and (9) that may be exercised by ADF members include:
 - 56.1. Free any hostage from a location (including a facility) or thing (s 46(7)(a));
 - 56.2. Control the movement of persons or of means of transport (s 46(7)(b));
 - 56.3. Evacuate persons to a place of safety (s 46(7)(c));
 - 56.4. Search persons, locations or things for items that may be seized (s 46(7)(d));
 - 56.5. Search persons, locations or things for people who may be detained (s 46(7)(d));
 - 56.6. Seize anything found in the search that the member believes on reasonable grounds is a thing that may be seized in relation to the call out order (s 46(7)(e));
 - 56.7. Detain any person found in the search that the member believes on reasonable grounds 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 (s 46(7)(f));
 - 56.8. Provide security (whether armed or not, and whether or not with a police force) including by patrolling or securing an area or conducting cordon operations (s 46(7)(g));

- 56.9. Direct a person to answer a question put by the member, or produce a document to the member that is readily accessible to the person (including requiring the person to provide identification) (s 46(7)(h));
- 56.10. Operate or direct a person to operate a facility, machinery or equipment (including electronic equipment) in a particular manner (whether or not the facility, machinery or equipment is on a facility or means of transport) (s 46(7)(i));
- 56.11. Actions incidental to anything in ss 46(5) or (7), including enter any place or premises or board an aircraft or vessel (s 46(9)).

Powers exercised in specified areas (Division 4)

- 57. Division 4 provides for the authorising Ministers to declare an area to be a specified area in relation to a call out order (s 51(1)). A specified area declaration may relate to a part of a State or Territory or an offshore area (s 51(1)). A declaration can be made in relation to a contingent call out order whether or not the circumstances specified for the call out have arisen (s 51(2)). A summary of a call out order that includes a specified area declaration must be broadcast publicly (if relating to onshore areas), and forwarded within 24 hours to the Presiding Officer of each House of Parliament for tabling in each House (s 51(6)-(7)). However, this requirement does not apply if the call out order states that Division 3 applies, and the authorising Ministers declare that the requirement would prejudice the exercise of the powers under Division 3 by ADF members when being utilised under a call out order (s 51(8)).
- 58. The Chief of the Defence Force or an authorised officer (**the authorising officer**) may give an authorisation for ADF members to search premises in a specified area if the authorising officer believes on reasonable grounds that on any premises in the specified area there is a person or thing that is likely to pose a threat to any person's life, health or safety or public health or public safety, or a person or thing connected with the domestic violence or threat specified in the order (s 51A). Certain information must be given the occupier of premises described in a search authorisation (s 51B). The occupier of premises described in a search authorisation is also generally entitled to be present during the search (s 51C).
- 59. An ADF member may also exercise certain powers in a specified area if the member believes on reasonable grounds that there is in a specified area 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 person connected with the domestic violence or threat specified in the order (s 51D(1)). These powers include those relating to means of transport and persons in a specified area and other general powers, including the power to erect barriers or other structures, stop any person or means of transport, direct the movement of persons and means of transport, conduct searches of persons and means of transport, direct persons to answer questions or produce documents, and operate or direct persons to operate a facility, machinery or equipment (s 51D(2)). An ADF member additionally has certain search and seizure powers relating to means of transport and persons suspected or being a threat or connected to domestic violence (ss 51D(3)-(5)).

Powers to protect declared infrastructure (Division 5)

60. Division 5 provides that the authorising Ministers may declare that particular infrastructure is declared infrastructure (s 51H(1)). An infrastructure declaration can relate to infrastructure in Australia or an offshore area, and the declaration can be made whether or not a call out order is in force (s 51H(1)). An infrastructure declaration may only be made if the authorising Ministers believe on reasonable grounds that:
 - 60.1. There is a threat of damage or disruption to the operation of the infrastructure or part of the infrastructure (or for a contingent call out order, that this would be the case if the specified circumstances were to arise) (s 51H(2)(a)); and
 - 60.2. The damage or disruption would directly or indirectly endanger the life of or cause injury to any person (s 51H(2)(b)).
61. An infrastructure declaration may be made in relation to infrastructure in a State or Territory whether or not the State or Territory requests the declaration (s 51H(6)). However, if the Government of the State or Territory does not request the declaration, an authorising Minister must (except in cases of urgency) consult that Government about the declaration before it is made (s 51H(7)-(8)).
62. ADF members being utilised in a call out may exercise a range of powers to protect declared infrastructure under Division 5 including:
 - 62.1. Prevent or put an end to damage or disruption to the operation of the declared infrastructure (s 51L(2)(a));
 - 62.2. Prevent or put an end to acts of violence, or threats to any person's life, health or safety or to public health or public safety (s 51L(2)(b));
 - 62.3. Protect any persons from acts of violence, or threats to any person's life, health or safety or public health or public safety (s 51L(2)(c)).
63. ADF members may take a range of actions in connection with the exercise of these powers including:
 - 63.1. Controlling the movement of persons or means of transport (s 51L(3)(a));
 - 63.2. Evacuating persons to a place of safety (s 51L(3)(b));
 - 63.3. Search persons, locations or things for any thing that may be seized, or any persons who may be detained, in relation to the call out order (s 51L(3)(c));
 - 63.4. Seize any thing found in the search that the member believes on reasonable grounds is a thing that may be seized in relation to the call out order (s 51L(3)(d));
 - 63.5. Detain any person found in the search that the member believes on reasonable grounds is a person who may be detained or is a person who is likely to pose a risk to the operation or integrity of the declared infrastructure for the purpose of placing the person in the custody of the member of a police force (s 51L(3)(e));

- 63.6. Provide security (whether or not armed, and whether or not with a police force) including by patrolling or securing an area or conducting cordon operations (s 51L(3)(f));
- 63.7. Direct a person to answer a question or to produce a document that is readily accessible (s 51L(3)(g));
- 63.8. Operate or direct a person to operate a facility, machinery or equipment (including electronic equipment) in a particular manner (s 51L(3)(h)).

General power to use reasonable force and procedural safeguards

- 64. Under Division 6, a member of the ADF being utilised under a call out order may use reasonable and necessary force against persons or things, whether or not the member is exercising a power under Part IIIAAA (s 51N(1)). However, various restrictions are imposed on the use of force by ADF members, including prohibiting the use of force in directing persons to answer questions or produce documents, and prohibiting anything likely to cause death or grievous bodily harm except in certain limited circumstances (s 51N(2) and (3)).
- 65. Other procedural safeguards include a requirement that persons are to be informed of certain matters if detained (s 51P), and specifying the actions that may be taken in relation to seized items (s 51Q). An ADF member who exercises a power under Divisions 3-6 and fails to comply with an obligation imposed under the Division is taken not to have been authorised to exercise the power unless the member exercised the power in good faith (s 51S(1)). ADF members are not subject to criminal or civil liability for powers exercised or purportedly exercised under Divisions 3-6 if the relevant order, declaration or authorisation was not validly made and the powers were exercised or purportedly exercised in good faith (s 51S(2)).

Expedited call out orders and declarations

- 66. Division 7 deals with expedited call out orders and declarations. Under s 51U of the Defence Act, an expedited call out order, infrastructure declaration or specified area declaration may be made if the relevant decision maker or makers are satisfied that:
 - 66.1. Because a sudden and extraordinary emergency exists, it is not practicable for an order or declaration to be made under the section under which the order or declaration would otherwise be made (s 51U(1)(a)); and
 - 66.2. For a call our order or infrastructure declaration, the circumstances referred to in ss 33(1), 34(1), 35(1). 36(1) or 51H(2) (as the case requires) exist (s 51U(1)(b)).
- 67. Expedited call out orders and declarations may be made in the first instance by the Prime Minister, the two other authorising Ministers (but only if they are satisfied the Prime Minister is unable to be contacted), or an authorising Minister jointly with the Deputy Prime Minister, Foreign Affairs Minister, Treasurer or Minister for Home Affairs (but only if the available authorising Minister and the alternative Minister are satisfied the other authorising Ministers are unavailable to be contacted) (s 51U(2)). An expedited call out order or declaration need not be in writing (it may be verbal), but if it

is not in writing, a written record must be made and signed by the decision maker or makers and the Chief of the Defence Force (s 51U(3)). An expedited call out order or declaration has effect as if it were a call out order by the Governor-General or an infrastructure declaration or specified area declaration by the authorising Ministers (s 51V(1)). An expedited call out order or declaration comes into force when it is made, or (if it is not in writing) when the Prime Minister or the other two Ministers and the Chief of the Defence Force sign the electronic record of the order or declaration (s 51V(5)).

Miscellaneous provisions

68. Division 8 contains a range of miscellaneous provisions, including that the criminal law of the Jervis Bay Territory applies in relation to criminal acts of ADF members acting under Part IIIAAA (s 51Y). In addition, under s 51Z, ADF members may invoke a defence of superior orders for actions taken under Part IIIAAA where:
 - 68.1. A criminal act was done by an ADF member under an order of a superior;
 - 68.2. The member was under a legal obligation to obey the order;
 - 68.3. The order was not manifestly unlawful;
 - 68.4. The member had no reason to believe that the circumstances had changed in a material respect since the order was given;
 - 68.5. The member had no reason to believe that the order was based on a mistake as to a material fact; and
 - 68.6. The action taken was reasonable and necessary to give effect to the order.
69. Under s 51ZA, the Minister must arrange for a copy of any call out order that has ceased to be in force, any specified area declarations that relate to the order and a report on any utilisation of the ADF that occurred under the order to be presented to each House of Parliament (s 51ZA(1)). The copy of the call out order and the report must be forwarded to the Presiding Officer of each House of Parliament before the end of 7 days after the order ceases to be in force for tabling in that House (if the House is sitting) or otherwise for distribution to all Senators or Members before the end of that period (s 51ZA(2)).
70. Section 51ZD provides that Part IIIAAA does not affect any utilisation of the ADF that would be permitted or required, or any powers that the Defence Force would have, if the Part were disregarded.

D. Terms of reference and issues arising

Terms of reference for my review of Part IIIAAA

71. As set out in Part A above, the purpose of my review is to ensure that Part IIIAAA is appropriate for the Commonwealth to utilise the ADF to protect the States, Territories and Commonwealth interests (onshore and offshore). I am required to examine, and if appropriate, identify any issues for the further consideration relating to the reform of Part IIIAAA.
72. The terms of reference for my review, as set out in my letter of appointment, require me to consider:
 - Whether the existing Part IIIAAA powers (including the incidental power) support the full range of activities and use of capabilities that the ADF alone possesses and may be required to use to protect the States, self-governing Territories and Commonwealth interests (onshore and offshore), where such activities may be prohibited under other Commonwealth or State/Territory legislation (**Term of Reference 1**);
 - How a call out under Part IIIAAA interacts with relevant Commonwealth, State and Territory legislation (**Term of Reference 2**);
 - Whether there are appropriate limitations and controls on the use of the existing Part IIIAAA powers (**Term of Reference 3**);
 - Whether the current oversight, accountability and transparency mechanisms in Part IIIAAA are sufficient (**Term of Reference 4**); and
 - Whether there are any anomalies, errors, inconsistencies or other drafting issues in Part IIIAAA that require amendment (**Term of Reference 5**).
73. These terms of reference have informed the initial consultation undertaken to date, and also this Issues Paper as outlined below.
74. As noted in Part A, in examining Part IIIAAA it is pertinent to recognise that while a call out order under Part IIIAAA has been practiced for (and contingent call out orders have been made), the deployment of the ADF under a call out to protect Commonwealth interests or a State or Territory from domestic violence has never occurred. That is, the legislative regime has been trained for but never tested, which may impede the identification of issues for further consideration with respect to the reform of Part IIIAAA.

Issues emerging in relation to Terms of Reference

75. Having regard to the terms of reference and the work undertaken during my review to date (including review of material at Annexure A and consultations with the various entities and individuals listed in Annexure B), a range of issues have emerged for particular consideration, as outlined below.
76. As indicated in Part A, written submissions are invited from any interested party which addresses the appropriateness, and potential reform, of Part IIIAAA, having regard to

my terms of reference, including but not limited to the issues outlined below. Any submissions are to be furnished by **4pm on Monday 4 November 2024**.

Term of Reference 1

77. As to whether the existing Part IIIAAA powers (including the incidental power) support the full range of activities and use of capabilities that the ADF alone possesses and may be required to use to protect the States, self-governing Territories and Commonwealth interests (onshore and offshore), to date in my review there has been no suggestion that the broadly-expressed powers in Part IIIAAA (specifically Division 3, 4 and 5) are regarded as insufficient to support the full range of capabilities the ADF possesses to respond to events which would be engaged by Part IIIAAA – although it is acknowledged the focus is generally kinetic.
78. That being the case, an issue arises as to whether Part IIIAAA can be utilised to respond to non-physical threats including **cyber attacks** and/or so-called “**grey zone**” threats.³⁶
79. This raises for particular consideration the breadth of the definition of “domestic violence” – which is only defined by reference to s 119 of the Constitution. In the work of this review to date, it has not been suggested the “domestic violence” ought be the subject of more precise definition. But submissions may wish to address this.
80. This also raises for consideration – perhaps more fundamentally – whether Part IIIAAA is the suitable vehicle to respond to such threat(s). Arguably if a statutory source of power is regarded as appropriate (compare, for instance, non-statutory executive power as the source of authority), this type of threat may be better addressed through reforms to the Defence Act elsewhere, rather than the narrower prism of Part IIIAAA.
81. Turning to kinetic threats in the land, maritime and air environment – and whether Part IIIAAA permits exploitation of the full range of capabilities of the ADF – while there was some uncertainty across the State and Territory agencies as to whether they are alive to the nature and full extent of ADF capabilities (which is unsurprising, since such information is likely to be sensitive), there was broadly expressed satisfaction that if police indicated to the ADF the effect sought to be achieved, the ADF would identify the most appropriate capability to seek to achieve this effect. It was not suggested that Part IIIAAA as presently framed inhibited this.
82. State and Territory police agencies consulted generally considered they had similar **land-based** capabilities to the ADF. It was observed that in looking to enhance capability in response to an incident, police agencies would first look to utilise other State police forces under the Police Assistance to Neighbouring States (**PANS**) Agreement – before seeking to call upon the ADF. It was broadly recognised there were potential

³⁶ See, for example, Hywel Evans and Andrew Williams, ‘ADF Offensive Cyberspace Operations and Australian Domestic Law Proprietary and Constitutional Implications’ (2019) 47(4) *Federal Law Review* 606, 621-622; Samuel White and Cameron Moore, ‘Calling out the ADF into the Grey Zone’ (2022) 43(1) *Adelaide Law Review* 479, 482-484; Tristan Skousgaard et al, ‘Military Aid to the Civil Power: Part IIIAAA’ in Robin Creyke et al (eds), *Military Law in Australia* (Federation Press, 2nd ed, 2024), 100 and 104.

land-based scenarios in which the ADF might enhance police capability – and to varying degrees regular training and liaison is undertaken to ensure interoperability.

83. There was general recognition across the agencies consulted that police agencies had relatively limited capabilities – compared to the ADF – to respond to threats in the maritime and air environments.
84. As to the **maritime environment**, information furnished to this review to date indicates the *Maritime Powers Act 2013* (Cth) (**MPA**) provides relatively comprehensive and satisfactory arrangements for (relevantly) dealing with threats at sea. It is not apparent there are inconsistencies between the powers in the MPA and those in Part IIIAAA. While the MPA would be the natural and preferred statutory source of power for most maritime operations, there remains a role for Part IIIAAA because, for instance (assuming the statutory requirements in Part IIIAAA are met for a call out) the powers in the MPA do not extend to the use of lethal force.
85. As to the **air environment**, the role for Part IIIAAA was recognised as perhaps the most significant in protecting Commonwealth interests and providing assistance to State and Territory police, given the limited capability of State and Territory police in the air, particularly compared with the capability of the ADF. An issue arises as to whether reform to Part IIIAAA is warranted to better enable a response to threats in the air environment.³⁷ Again, a more fundamental question is whether dealing with such a threat is most appropriately addressed through reforms to the Defence Act elsewhere, or other statute – rather than the narrower prism of Part IIIAAA. Submissions on this would be most helpful.
86. Turning to the existing Part IIIAAA powers, two specific issues have been identified by the review to date.
87. First, the possible desirability of a “**pre-deployment**” phase under Part IIIAAA has been raised, 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.³⁸
88. Related to this, is a question as to the role of s 51ZD in preserving powers for the utilisation of the ADF apart from Part IIIAAA³⁹ – and whether introducing power with respect to a “pre-deployment” phase under Part IIIAAA would have an undesirable

³⁷ As to the use of Part IIIAAA to respond to threats in the air environment, see Simon Bronitt and Dale Stephens, ‘Flying Under the Radar – The Use of Lethal Force Against Hijacked Aircraft: Recent Australian Developments’ (2007) 7(2) *Oxford University Commonwealth Law Journal* 265, 266, 270-275.

³⁸ See, for example, David Letts and Robert McLaughlin, ‘Military Aid to the Civil Power’ in Robin Creyke et al (eds), *Military Law in Australia* (Federation Press, 2019), 129-130; Tristan Skousgaard et al, ‘Military Aid to the Civil Power: Part IIIAAA’ in Robin Creyke et al (eds), *Military Law in Australia* (Federation Press, 2nd ed, 2024), 105.

³⁹ See, for example, David Letts and Robert McLaughlin, ‘Military Aid to the Civil Power’ in Robin Creyke et al (eds), *Military Law in Australia* (Federation Press, 2019), 129-130; Samuel White, *Keeping the Peace of the Realm* (LexisNexis Australia, 2021), 98-100.

limiting effect upon the way the ADF may undertake such activities as the circumstances arise.

89. Second, unsurprisingly there has been particular attention by agencies and academics to the terms of Part IIIAAA with respect to the ADF **use of force**, particularly lethal force, under a call out.⁴⁰ The power to do so is expressed in s 46(5). The power to use force is broadly expressed. It has not been suggested this ought be expanded. While there may be some desirability for ADF members under a call out in having greater guidance as to their power to use force, particularly lethal force, a real question arises whether this may have an unduly limiting consequence. As to the potential for legal protections for ADF members who use force, particularly lethal force, under a Part IIIAAA call out, see [97] below.
90. For completeness, it is noted that questions of resourcing, distance and timeframes for call outs under Part IIIAAA in urgent and emergency circumstances were raised during the initial consultations – in particular by States and Territories not proximate to the ADF Tactical Assault Group (**TAG**) locations in the East (Sydney, NSW) and West (Perth, WA). However, this does not appear capable of amelioration by statutory reform to Part IIIAAA.
91. It is also noted for completeness that during initial consultation, some issues were raised about the desire for clarity and consistency in operational procedures and systems of tasking between the ADF and police agencies during a call out and as part of post-incident handover processes. However, this does not appear to be the appropriate subject of statutory reform to Part IIIAAA, but rather would fall to relevantly involved agencies to develop by way of, for example, a memorandum of understanding.
92. Finally: one point of view expressed to the review is that Part IIIAAA is unduly limiting and prescriptive in its conception of and thus capacity to respond to potential threats to the Commonwealth (that is, including the States and Territories and offshore areas). It is suggested the answer may be to repeal Part IIIAAA altogether (or only retain those parts directed toward a State protection order), with the ADF's authority to respond to such threats sourced elsewhere (in statutory form, for example, through amendment to other parts of the Defence Act, or via non-statutory executive power) accompanied by a broadly expressed immunity to protect ADF members⁴¹ on such deployment (akin to s 123AA of the Defence Act which applies to the DACC scheme).⁴² While the review would approach such a suggestion with considerable caution, it is nevertheless worthy of consideration and submissions may wish to address this.

⁴⁰ See, for example, Robert McLaughlin, 'The Use of Lethal Force by Military Forces on Law Enforcement Operations – Is There a "Lawful Authority"?' (2009) 37(3) *Federal Law Review* 441, 465-467; David Letts and Robert McLaughlin, 'Military Aid to the Civil Power' in Robin Creyke et al (eds), *Military Law in Australia* (Federation Press, 2019), 130-131; Tristan Skousgaard et al, 'Military Aid to the Civil Power: Part IIIAAA' in Robin Creyke et al (eds), *Military Law in Australia* (Federation Press, 2nd ed, 2024), 105.

⁴¹ potentially also Defence employees.

⁴² See eg Cameron Moore, 'Military Law and Executive Power' in Robin Creyke (et al), *Military Law in Australia* (Federation Press, 2019), 77-78; Cameron Moore, 'The Executive Power During a Conflict in the 21st Century' (Speech, Defence Legal Division Joint Legal Workshop, 19 June 2024), 5.

93. To the extent the final aspect of Term of Reference 1 requires consideration as to whether activities and use of capabilities that the ADF alone possesses may be prohibited under other Commonwealth or State/Territory legislation, this is conveniently dealt with in conjunction with Term of Reference 2 below.

Term of Reference 1 – Issues

Whether the existing Part IIIAAA powers (including the incidental power) support the full range of activities and use of capabilities that the ADF alone possesses and may be required to use to protect the States, self-governing Territories and Commonwealth interests (onshore and offshore), where such activities may be prohibited under other Commonwealth or State/Territory legislation.

1. 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.
2. Whether reform to Part IIIAAA is warranted to better enable a response to threats in the air environment, including whether this would most appropriately be dealt with through reforms to the Defence Act elsewhere or other statutes.
3. Whether Part IIIAAA should be amended to provide for “pre-deployment” actions in preparation for a call out.
4. Whether the use of force provisions in Part IIIAAA are appropriate, including whether they provide appropriate guidance as to the use of force.
5. Whether Part IIIAAA should be repealed altogether (or only retain those parts directed toward a State protection order).
6. Any other issues arising from this Term of Reference.

Term of Reference 2

94. To date the review has not identified any critical difficulties in the interaction between Part IIIAAA and relevant Commonwealth, State and Territory legislation.
95. As noted above, the final aspect of Term of Reference 1 requires consideration as to whether activities and use of capabilities that the ADF alone possesses may be prohibited under other Commonwealth or State/Territory legislation. The review has not identified such instances – but submissions are welcome on this topic including any proposed reform to deal with such a difficulty.
96. Otherwise, during the initial consultations some agencies raised a concern that legislative restrictions on the disclosure of information may **inhibit information flows** in the lead up to a call out. A related issue was the barriers to **information gathering** created by Commonwealth, State and Territory legislation relating to information protection – including with respect to surveillance devices. It is not presently clear the extent to which such challenges warrant reform to Part IIIAAA and if so, the form of such reform to effectively deal with the difficulty.

97. An issue does arise as to the desirability of (additional) **legal protections** for ADF members exercising powers under the Part IIIAAA. This has been raised generally (see [92] above) and also more specifically to deal with the use of force, particularly lethal force, by ADF members under a Part IIIAA call out having regard to their potential exposure to the criminal law, including, for example, the offence of murder.⁴³ There is a defence of superior orders available in certain circumstances (s 51Z). To the extent it is suggested a more broadly expressed immunity (akin to s 123AAA of the Defence Act, or for example, s 148B of the *Police Administration Act 1978* (NT) considered by the High Court in *R v Rolfe* (2021) 273 CLR 413) is warranted, the review would welcome submissions on this topic – recognising such an immunity could have fundamental consequences and implications including with respect to accountability in the exercise of power under Part IIIAAA (in this respect, there is intersection with Term of Reference 4 below).

Term of Reference 2 – Issues

How a call out under Part IIIAAA interacts with relevant Commonwealth, State and Territory legislation.

7. Whether legislation (Commonwealth, State and Territory) inhibits information flows or information gathering in the lead up to a call out under Part IIIAAA.
8. Whether additional legal protections should be afforded to ADF members operating under Part IIIAAA.
9. Any other issues arising from this Term of Reference.

Term of Reference 3

98. As to whether there are appropriate limitations and controls on the use of existing powers under Pt IIIAAA, to date, the review has not identified any issues or areas for suggested reform. However, submissions would be welcome on this topic.

Term of Reference 3 – Issues

Whether there are appropriate limitations and controls on the use of the existing Part IIIAAA powers.

10. Whether there are appropriate limitations and controls on the use of powers under Part IIIAAA.
11. Any other issues arising from this Term of Reference.

⁴³ See, for example, Robert McLaughlin, 'The Use of Lethal Force by Military Forces on Law Enforcement Operations – Is There a "Lawful Authority"?' (2009) 37(3) *Federal Law Review* 441, 465-467; David Letts and Robert McLaughlin, 'Military Aid to the Civil Power' in Robin Creyke et al (eds), *Military Law in Australia* (Federation Press, 2019), 130-131; Tristan Skousgaard et al, 'Military Aid to the Civil Power: Part IIIAAA' in Robin Creyke et al (eds), *Military Law in Australia* (Federation Press, 2nd ed, 2024), 105.

Term of Reference 4

99. Turning to whether the current oversight, accountability and transparency mechanisms in Part IIIAAA are sufficient, to date no critical issues of concern have been identified by the review. The 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.
100. While that timeframe may be considered unduly short by some (a point made during initial consultations), the review would be hesitant to suggest any longer timeframes given the significance of a call out order and importance of transparency as to ADF activity under such a call out.
101. It is noted that the issue raised above at [97] regarding potential **additional legal protections** for ADF members is relevant to this term of reference, given the implications of such protection for accountability.
102. Turning to **post-incident investigations**, during initial consultations an issue was raised as to the extent, in the event of a State protection call out which results in use of lethal force, the ADF would cooperate in post-incident investigations (for example, critical incident investigation and/or State coronial processes). While Part IIIAAA is silent on this topic, it may remain preferable for the form and extent of such cooperation to be left to the relevant agencies involved rather than statutory prescription.
103. Also on the topic of post-incident investigations, during initial consultations it was observed that at present, while there are a range of national security oversight bodies, none of them clearly cover a **post-incident review** of a call out under Part IIIAAA. There is a question as to whether it would be desirable for Part IIIAAA to provide for an oversight body at the Commonwealth level (for example, the Inspector General of the Australian Defence Force (**IGADF**)) to be tasked with conducting a review of a call out.
104. Relatedly, during initial consultations, a view was expressed that if the powers under Part IIIAAA are expanded, it would be important for the sufficiency of oversight to be revisited – for example, by providing for a specific statutory role for the IGADF.

Term of Reference 4 – Issues

Whether the current oversight, accountability and transparency mechanisms in Part IIIAAA are sufficient.

12. Whether additional legal protections should be afforded to ADF members operating under Part IIIAAA.
13. Whether Part IIIAAA should provide for cooperation with post-call out investigative processes.
14. Whether Part IIIAAA should provide for review of a call out by an oversight body at the Commonwealth level.
15. Any other issue arising from this Term of Reference.

Term of Reference 5

105. Finally, the review is tasked with identifying any anomalies, errors, inconsistencies or other drafting issues in Part IIIAAA that require amendment. No specific issues were raised during initial consultations, but submissions would be welcome on this topic.

Term of Reference 5 – Issues

Whether there are any anomalies, errors, inconsistencies or other drafting issues in Part IIIAAA that require amendment.

16. Whether there are any anomalies, errors, inconsistencies or other drafting issues in Part IIIAAA that require amendment.
17. Any other issue arising from this Term of Reference.

E. Conclusion

106. The work of this review to date (in particular the initial consultations) suggest that across the jurisdictions, there are varying degrees of familiarity with the processes under Part IIIAAA, as well as variance in the extent of procedures for actioning a request for a call out under Part IIIAAA. This is unsurprising given (as noted above at [13]) circumstances have rarely materialised to warrant a contingent call out, and never has a call out in fact occurred.⁴⁴ The task of this Review is focused upon the terms of Part IIIAAA; it does not extend to scrutinising these administrative arrangements (including policies, procedures and protocols for the implementation of a Part IIIAAA call out). However, such variance and any gaps in administrative arrangements may serve to undermine the efficacy of a call out under Part IIIAAA. Accordingly, it would be highly desirable if this review serves to focus relevant agencies on administrative arrangements for Part IIIAAA.

⁴⁴ This echoes the relative obscurity of s 119 of the Constitution: see James Mortensen, 'A History of "Domestic Violence" in Australian Politics' (2023) 20(2) *History Australia* 254, 257-259.

107. To date the work of this review has been assisted considerably by the generous time, contribution and engagement of various agencies (including the ADF) those involved in relevant cross-government initiatives (for example, the Defence Act Reform Project) and the thoughtful analysis of academics in publications over recent years as well as in direct consultation. To the extent this is further reflected in submissions, the efficacy of the review will be all the more improved.
108. If any interested party seeks clarification or wishes to discuss any issue raised within this paper, please contact the Secretariat:

Australian Government Solicitor

Contact: Domenica Scuteri, Senior Lawyer

E: independent.review@ags.gov.au T: (08) 8205 4515.

Annexure A – list of relevant written material regarding Part IIIAAA

No **Name**

Legislation

- 1 [Defence Act 1903](#) (Cth) (Current)
- 2 [Defence Act 1903](#) (Cth) s 51, as at 1 July 2000, amended by *Defence Legislation Amendment (Aid to Civilian Authorities) Act 2000* (Cth)
- 3 [Defence Legislation Amendment \(Aid to Civilian Authorities\) Act 2000](#) (Cth)
- 4 [Bills Digest](#), Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000
- 5 [Second Reading Speech](#), Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000
- 6 [Explanatory Memorandum](#), Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000
- 7 [Defence Legislation Amendment \(Aid to Civilian Authorities\) Act 2006](#) (Cth)
- 8 [Bills Digest](#), Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005
- 9 [Second Reading Speech](#), Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005
- 10 [Revised Explanatory Memorandum](#), Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2006
- 11 [Defence Amendment \(Call Out of the Australian Defence Force\) Act 2018 \(Cth\)](#)
- 12 [Bills Digest](#), Defence Amendment (Call Out of the Australian Defence Force) Bill 2018
- 13 [Second Reading Speech](#), Defence Amendment (Call Out of the Australian Defence Force) Bill 2018
- 14 [Explanatory Memorandum](#), Defence Amendment (Call Out of the Australian Defence Force) Bill 2018

Reports and Submissions

- 15 Justice Robert Hope, Parliament of Australia, *Protective Security Review* (Parliamentary Paper No 397, 15 May 1979)
- 16 Elizabeth Ward, 'Call out the Troops: An Examination of the Legal Basis for Australian Defence Force Involvement in "Non-Defence" Matters' (Research Paper No 8, Parliamentary Library, Parliament of Australia, 24 November 1997)
- 17 Anthony Blunn, John Baker and John C Johnson, *Statutory Review of Part IIIAAA of the Defence Act 1903 (Aid to the Civilian Authorities)* (Commonwealth of Australia, 2004)
- 18 Department of Defence, Submission to Senate Legal and Constitutional Committee Inquiry into Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005 (6 February 2006)
- 19 Ian McPhee (Auditor-General), *Emergency Defence Assistance to the Civil Community* (Audit Report No 24, Australian National Audit Office, 16 April 2014)
- 20 *Royal Commission into National Natural Disaster Arrangements* (Interim Observations, 31 August 2020)

- 21 *Royal Commission into National Natural Disaster Arrangements* (Report, 28 October 2020) Ch 7

Texts

- 22 John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (1901; LexisNexis Butterworths, rev ed, 2015) 1177–1179
- 23 W H Moore, *The Constitution of the Commonwealth of Australia* (Sweet and Maxwell, 2nd ed, 1910) 337–339
- 24 HP Lee, *Emergency Powers* (Law Book Co, 1st ed, 1984) Ch VI
- 25 HP Lee et al, *Emergency Powers in Australia* (Cambridge University Press, 2nd ed, 2018) Ch VII
- 26 H E Renfree, *The Executive Power of the Commonwealth of Australia* (Legal Books, 1984) 466–469
- 27 Michael Head, *Calling Out the Troops* (Federation Press, 2009) Ch 3 (61–77), Ch 6 (122–137) and Ch 8 (148–164)
- 28 Michael Eburn, *Emergency Law* (Federation Press, 4th ed, 2013) 228–229
- 29 Cameron Moore, *Crown and Sword – Executive Power and the Use of Force by the Australian Defence Force* (Australian National University Press, 2017) 165–203
- 30 Robin Creyke et al (eds), *Military Law in Australia* (Federation Press, 2019) Ch 7 (69–78), Ch 11 (115–132), Ch 12 (133–155), Ch 14 (161–171)
- 31 Samuel White, *Keeping the Peace of the Realm* (LexisNexis Australia, 2021) Ch 5 (81–104)
- 32 Tristan Skousgaard et al, 'Military Aid to the Civil Power: Part IIIAAA' in Robin Creyke et al (eds), *Military Law in Australia* (Federation Press, 2nd ed, 2024)

Articles and Speeches

- 33 A R Blackshield, 'The Siege of Bowral – The Legal Issues' (1978) 4(9) *Pacific Defence Reporter* 6
- 34 Australian Law Journal, 'Protection of Australian States against domestic violence (s 119 of the Constitution)' (1978) 52(7) *Australian Law Journal* 350
- 35 Christopher Doogan, 'Defence Powers under the Constitution' (1981) 31 *Defence Force Journal* 31
- 36 Michael Head, 'The Military Call-Out Legislation – Some Legal and Constitutional Questions' (2001) 29 *Federal Law Review* 273
- 37 Margaret White, 'The Executive and the Military' (2005) 28(2) *UNSW Law Journal* 438
- 38 Michael Head, 'Calling out the Troops – Disturbing Trends and Unanswered Questions' (2005) 28(2) *UNSW Law Journal* 479
- 39 Norman Charles Laing, 'Call-Out the Guards – Why Australia Should No Longer Fear the Deployment of Australian Troops on Home Soil' (2005) 28(2) *UNSW Law Journal* 507
- 40 Cameron Moore, '"To Execute and Maintain the Laws of the Commonwealth" The ADF and Internal Security – Some Old Issues with New Relevance' (2005) 28(2) *UNSW Law Journal* 523
- 41 Michael Head, 'Australia's Expanded Military Call-Out Powers: Causes for Concern' (2006) 3 *University of New England Law Journal* 125

- 42 Simon Bronitt and Dale Stephens, 'Flying Under the Radar – The Use of Lethal Force Against Hijacked Aircraft: Recent Australian Developments' (2007) 7(2) *Oxford University Commonwealth Law Journal* 265
- 43 Rob McLaughlin, 'The Use of Lethal Force by Military Forces on Law Enforcement Operations – Is There a “Lawful Authority”?' (2009) 37(3) *Federal Law Review* 441
- 44 Janine Fetchik, “‘Left and Right of Arc’”: The Legal Position of the Australian Defence Force in Domestic Disaster Response Using the 2009 “Black Saturday” Victorian Bushfires as a Case Study' (2012) 27(2) *Australian Journal of Emergency Management* 31
- 45 Peta Stephenson, 'Fertile Ground for Federalism? Internal Security, the States and Section 119 of the Constitution' (2015) 43(2) *Federal Law Review* 289
- 46 David Letts and Rob McLaughlin, 'Call-Out Powers for the Australian Defence Force in an Age of Terrorism: Some Legal Implications' (Forum Paper, AIAL Forum, October 2016)
- 47 John Sutton, 'The Increasing Convergence of the Role and Functions of the ADF and Civil Police' (2017) 202 *Australian Defence Force Journal* 37
- 48 Samuel White, 'A Soldier by Any Other Name: A Reappraisal of the “Citizen in Uniform” Doctrine in Light of Part IIIAAA of the Defence Act 1903 (Cth)' (2018) 57(2) *Military Law and Law of War Review* 279
- 49 Samuel White, 'A Soldier by Any Other Name: A Reappraisal of the “Citizen in Uniform” Doctrine in Light of Part IIIAAA of the Defence Act 1903 (Cth)' (LLM Thesis, University of Melbourne, 2019)
- 50 Michael Head, 'Another Expansion of Military Call Out Powers in Australia: Some Critical Legal, Constitutional and Political Questions' (2019) 5 *UNSW Law Journal Forum* 1
- 51 Hywel Evans and Andrew Williams, 'ADF Offensive Cyberspace Operations and Australian Domestic Law Proprietary and Constitutional Implications' (2019) 47(4) *Federal Law Review* 606
- 52 Samuel White and Andrew Butler, 'Reviewing a Decision to Call Out the Troops' (2020) 99 *Australian Institute of Administrative Law Forum* 58
- 53 Samuel White, 'A Shield for the Tip of the Spear' (2021) 49(2) *Federal Law Review* 210
- 54 Anthony Gray, 'The Australian Government's Use of the Military in an Emergency and the Constitution' (2021) 44(1) *UNSW Law Journal* 357
- 55 Zoe Lippis, 'The Defence Act 1903 (Cth): A Guide for Responding to Australia's Large-Scale Domestic Emergencies' (2022) 45(2) *Melbourne University Law Review* 597
- 56 Samuel White and Cameron Moore, 'Calling out the ADF into the Grey Zone' (2022) 43(1) *Adelaide Law Review* 479
- 57 Samuel White et al, 'Neither Superior nor Subordinate: An Exploration of the Military Jurisdiction in Domestic Operations' (2023) 44(2) *Adelaide Law Review* 441
- 58 James Mortensen, 'A History of “Domestic Violence” in Australian Politics' (2023) 20(2) *History Australia* 254
- 59 Cameron Moore, 'The Executive Power During a Conflict in the 21st Century' (Speech, Defence Legal Division Joint Legal Workshop, 19 June 2024)

Annexure B – List of initial consultations

No.	Name of Department, agency, body or academic
Commonwealth Departments	
1.	Attorney-General's Department
2.	Department of Defence
3.	Department of Home Affairs ⁴⁵
4.	Department of the Prime Minister and Cabinet ⁴⁶
Cross-government initiatives	
5.	Defence Act Project
6.	National Resilience Taskforce
7.	National Preparedness Taskforce
Federal, State and Territory Police	
8.	Australian Federal Police
9.	New South Wales Police Force
10.	Northern Territory Police Force
11.	Queensland Police
12.	South Australia Police
13.	Tasmania Police
14.	Victoria Police
15.	Western Australia Police Force ⁴⁷
State and Territory Departments	
16.	Australian Capital Territory Justice and Community Safety Directorate
17.	Northern Territory Department of the Chief Minister and Cabinet
18.	South Australia Attorney General's Department ⁴⁸
19.	South Australia Department of the Premier and Cabinet
20.	Tasmania Department of Premier and Cabinet
21.	Victoria Department of Premier and Cabinet
22.	Western Australia Department of the Premier and Cabinet
23.	Western Australia State Solicitor's Office
Bodies / academics	
24.	Professor Cameron Moore
25.	Associate Professor David Letts

⁴⁵ Consultation was undertaken with representatives from the National Security Division, the National Resilience Taskforce and the Cyber & Infrastructure Security Centre.

⁴⁶ The consultation with the Department of the Prime Minister and Cabinet was held in conjunction with Michael Crawford (the point of contact for the National Preparedness Taskforce).

⁴⁷ The consultation with Western Australia Police was held in conjunction with Western Australia State Solicitor's Office and the Western Australia Department of the Premier and Cabinet, which are listed separately.

⁴⁸ The consultation with the South Australia Attorney-General's Department was held with the South Australia Department of Premier and Cabinet, which is separately listed.

26. Dr Robert McLaughlin
27. Dr Samuel White
28. Law Council of Australia
29. National Security College, Australian National University

Annexure C – Privacy notice

Collection and handling of your information for the Independent Review of Part IIIAAA of the *Defence Act 1903* (Cth)

The Department of Defence (**Defence**) and the independent reviewer are committed to protecting your personal and confidential information.

Submissions to the independent review may be made confidentially and will be treated as such by Defence. You should indicate information that you seek to have dealt with as confidential when you provide your submission.

Your personal information is protected by law, including under the *Privacy Act 1988* (Cth) (**Privacy Act**).

Any personal information (including sensitive information) will be collected for the purposes of informing the reviewer's findings in the report. This might include your:

- name
- contact information
- organisation and role
- personal views or information about your experience, and others' experience, with the processes set out in Part IIIAAA of the Defence Act.

You do not have to identify yourself and can choose how much personal information to disclose. However, it may assist the review to have enough information about your views and experience to inform the independent reviewer's understanding. You should also only provide personal information about other people if it is necessary to explain your views and experiences relevant.

The independent reviewer will provide her report to the Minister for Defence, and it will be tabled in Parliament by the Minister within 15 sitting days of receiving the review. The report may also be published online. If you choose to participate in the submission process, your name and quotes from your submission may be included in the report if you consent to this being published. The independent reviewer does not otherwise propose to publish submissions.

Other disclosure of your personal information could occur if Defence is required or authorised by law to do this or if you give consent.

Information you provide for the independent review will be stored securely. Only the independent reviewer, Secretariat staff and Defence officials with a need to access the material for the purposes of the review or other actions arising from the review and management of Defence's records will be able to access your personal information.

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