



Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005

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Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005

Date Introduced: 7 December 2005

House: Senate

Portfolio: Defence

Commencement: On the day after Royal Assent.

Purpose

To increase the flexibility and speed in which the Australian Defence Force (ADF) can be ‘called out’ to respond to security threats under Part IIIAAA of the *Defence Act 1903*. The Bill also clarifies the legal position of ADF members when operating under Part IIIAAA.

Background

The Bill amends, and makes some additions to, the existing ADF call-out provisions contained in Part IIIAAA of the *Defence Act 1903* (the Defence Act). Part IIIAAA was inserted by the *Defence Legislation Amendment (Aid to Civilian Authorities) Act 2000*. That Act was prompted by the possible need to call-out the ADF during the 2000 Sydney Olympics. In introducing the (then) Bill in June 2000, Sharman Stone MP said

The existing legislation is not responsive to contemporary needs. Rather, it reflects its 18th century English origins, which focused on riot control—at a time before modern police services were developed. This can be seen by the archaic references in this legislation to the presence of magistrates, the blowing of bugles and the reading of proclamations, requirements that do not assist, or may possibly even inhibit, the resolution of modern-day terrorist incidents.

The present legislative framework does not provide sufficient accountability to parliament. Nor does the legislation provide members of the Defence Force with appropriate authority to perform the tasks they may be required to carry out, either in an assault upon terrorists or in a related public safety emergency. Furthermore, there needs to be provision both for safeguards in the exercise of such authority and for accountability for the actions of individuals as well as government.¹

The calling out of the ADF for security or law enforcement tasks (often more formally called the ‘Defence Aid to the Civil Power’) should not be confused with situations where ADF personnel, equipment, facilities or capabilities are used to perform emergency tasks during natural disasters or the like when civilian authorities lack the necessary equipment or resources.

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There are three sections of the Australian Constitution that are relevant to calling out of the ADF. The first is section 51(vi), which provides:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to...the naval and military defence of the Commonwealth and, of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth.

The second is section 119, which provides:

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

The third section is the broad-based executive power in section 61. The [Bills Digest](#) for the Bills Digest for the *Defence Legislation Amendment (Aid to Civilian Authorities) Act 2000* states:

Section 61 provides that executive power is 'exercisable by the Governor-General' and 'extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth'. It also includes the Commonwealth's prerogatives, one of which relates to the defence of the realm, and a range of (largely unexplored) powers derived from the 'character and status of the Commonwealth as a national government'.

The legal basis for the call out in 1978² was the executive power in section 61. But the precise aspect of the power appears to be unclear. In a legal opinion given in 1979, Sir Victor Windeyer stated that '[t]he ultimate constitutional authority...was the power and the duty of the Commonwealth Government to protect the national interest and to uphold the laws of the Commonwealth'. But he did not trace the direct source of the power. In fact he stated that the power 'arises fundamentally, I think, because the Constitution created a sovereign body politic with the attributes that are inherent in such a body. The Commonwealth of Australia is not only a federation of States. It is a nation.'³

The *Defence Legislation Amendment (Aid to Civilian Authorities) Act 2000* added new provisions to the *Defence Act 1903* to enable the calling out of the ADF to assist the civilian authorities to protect Commonwealth interests and States and Territories against domestic violence. Prior to that, there was no legislative framework that set out specific powers to the ADF in protecting the States against domestic violence,⁴ nor was there any provision regarding the use of the ADF by the Commonwealth in protecting its own interests. Note that the Commonwealth does not require specific legislative authority to call-out the ADF for certain purposes. It can do so under the Constitutional executive power, section 61, or at the request of a State, under section 119.

A brief history of the issues relevant to call-out can be found in the [Bills Digest](#) for the *Defence Legislation Amendment (Aid to Civilian Authorities) Act 2000* or alternatively the

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August 2000 [report](#) of the Senate Foreign Affairs, Defence and Trade Legislation Committee (the FADT Committee).

Amongst other things, the FADT Committee report recommended that the provisions inserted by the *Defence Legislation Amendment (Aid to Civilian Authorities) Act 2000* be reviewed by a Parliamentary committee within 6 months of a call-out under Part IIIAAA, or if no call-out occurred, within three years of it coming into force. The Government modified this recommendation to have the option of an independent review. A review (the Part IIIAAA Review)⁵ was carried out by Anthony Blunn,⁶ General John Baker (retd)⁷ and John Johnson⁸ and a report was given to the Government in January 2004. The Part IIIAAA review drew upon experiences from nine simulation counter-terrorism exercises and occasions in which the ADF provided assistance to civil authorities under the executive power of the Commonwealth rather than the legislative authority of Part IIIAA.⁹

The Part IIIAAA review concluded Part IIIAAA was too reactive in nature and too narrowly focussed in application to be of much use other than in traditional siege/hostage situations.¹⁰ These findings were the impetus for the proposed amendments in Schedule 1 (dealing with offshore areas), Schedule 2 (protecting critical infrastructure), Schedule 3 (dealing with aviation) and Schedule 4 (expedited call-out) of the Bill. Other findings dealt with specific powers and legal protections of ADF personnel under Part IIIAAA (including when using lethal force against a person or persons) and the restricted role of Reserves.

The main changes introduced by the Bill are:

- to enable the ‘call out’ of the ADF to respond to threats to Commonwealth interests in the air or in Australian waters
- to allow the use of ‘reasonable and necessary force’ by the ADF when protecting declared ‘critical infrastructure’
- in the event of ‘a sudden and extraordinary emergency’, to allow the Prime Minister or certain other Ministers to by-pass the Governor-General in authorising a call-out
- the removal of some of the existing restrictions about using the ADF Reserve
- to facilitate the use of the ADF to more ‘mobile’ security situations rather than just a defined places or premises
- that only Commonwealth, not state or territory, law applies with respect to alleged criminal offences committed by ADF personnel when operating under Part IIIAAA
- to allow for the ‘anonymity’ of ADF personnel engaged in operations under existing Division 3 to be protected by not requiring them to display their name on their uniform, and
- the existing public notification requirements for general security areas will not apply if this would jeopardise ADF operations in the area.

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The Bill was referred to the Senate Legal and Constitutional Legislation [Committee](#) for reporting on 7 February 2006. The Committee held one public hearing on 31 January 2006. Given that the Committee took evidence from a wide range of persons, this Digest does not attempt to reflect the range of commentary on the Bill.

Main Provisions

Schedule 1 – Incidents in the Australian offshore area

Items 1-11 insert various definitions which, amongst other things, define the geographic area (the ‘Australian offshore area’) in which the ADF powers contained in **new Division 3A** will apply. In general the area stretches from the coastline of the States, mainland and external territories out to the edge of the continental shelf claimed by Australia. Ports do not lie within this area unless specified in regulations. Because of **item 12**, if a port or other ‘internal water’ is so specified, the basic procedural requirements for a subsequent call-out of the ADF are much the same as for a call-out on land – for example the requirement to consult with the relevant State or Territory Government ‘where feasible’.

Item 12 inserts **new section 51AA**, which sets out the details of the circumstances and procedure for calling out the ADF in the Australian offshore area. The authorising Ministers¹¹ must all be satisfied that there is a threat¹² in the area to Commonwealth interests¹³ (these interests need not be in the area) and that the ADF should be used to protect such interests. In other respects, the **new section 51AA** procedures are the same as existing section 51A. ADF Reserves cannot be called out or utilised in connection with an industrial dispute: **new subsection 51AA(3)**. This later prohibition is consistent with the call-out provisions of existing sections 51A–C.¹⁴ However, it is arguably at odds with **item 6** in **Schedule 6** which removes the current restriction in paragraph 51G(b) that only permits the operational utilisation of the Reserves if the available permanent ADF forces are insufficient for the job.

Existing section 51 requires the Chief of the Defence Force (CDF) to, ‘as far as reasonably practical’ act cooperatively and in agreement with State and Territory police forces.¹⁵ However, this requirement does not apply to the ADF operations in the Australian offshore area, unless those operations are in the internal waters of a State or Territory: **item 14**. It is worth noting that intelligence and related information obtained or used by the ADF officers directing counter-terrorism operations may often be classified at higher level than even fairly senior police are cleared to.¹⁶ It is possible that this may therefore limit the information sharing between the ADF and police officers working ‘on the ground’.

Item 15 inserts **new Division 3A (new sections 51SA-SQ)** which sets out the powers of the ADF when operating in the Australian offshore area under section 51AA.

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New section 51SC provides that, in exercising their various powers under **new Division 3A**, the authorising Ministers must have regard to ‘Australia’s international obligations’. Such obligations would include those relating to the freedom of navigation of international shipping under the United Nations Convention on the Law of the Sea and those towards persons claiming refugee status under the Convention on Refugees.

New section 51SE allows ADF members operating under orders given by the CDF¹⁷ to do certain things in relation to persons, vessels, aircraft or offshore facilities. These include destroying a vessel or aircraft¹⁸ (or ordering it to be destroyed) and preventing, or putting an end to acts of violence. In using force or other measures against a vessel or aircraft, or ordering such¹⁹, the ADF member must conform to the requirements of **new subsections 51SE(2) or (3)**. Amongst other things, key requirements are:

- the order was not ‘manifestly unlawful’
- the member has no reason to believe that circumstances have changed in a material way since the relevant order was given
- the member has no reason to believe that the order was based on a mistake as to a material fact’, and
- taking the measures was reasonable and necessary to give effect to the order.²⁰

In addition, any action, or giving of orders, must have been authorised by an authorising Minister beforehand (**new subsection 51SE(4)**), unless the ADF member believes on reasonable grounds that there is insufficient time to obtain the authorisation because a ‘sudden and extraordinary emergency exists’: **new subsection 51SE(5)**. This would appear to require that any orders passed down the chain of command must include confirmation of what types of action have been approved by the authorised Minister – although presumably such authorisation would be cast in very broad terms such that virtually any reasonable action or order would fall within the scope of the authorisation. However, on this last point, the Part IIIAAA Review makes the rather cryptic remark that ‘it is at least questionable whether any authorisation so general as to provide for all contingencies would be upheld’.²¹

New sections 51SF-SK deal with powers that may be exercised in a declared offshore area. There are two types of area that may be declared under **new Division 3A**. The first is a ‘general security area’, which essentially allows the ADF to search vessels, aircraft, facilities or persons for dangerous things²² or other things related to the threat. Any part of the ‘general security area’ may itself be then declared a ‘designated area’, which then gives the ADF additional powers to control or prohibit the movement of vessels or aircraft in the designated area. These two types of areas, and the ADF powers attached to them, are analogous to existing provisions in Division 3 of Part IIIAAA.

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Under **new subsection 51SF(3)**, a declaration of a ‘general security area’ is to be summarised in a statement and notified to persons within the area ‘to the extent practical’. The statement is also to be gazetted, and copies given to the Presiding officers of each House of Parliament within 24 hours of the declaration being made. Parliament must sit within 6 days of the statement being given to the Presiding officers; **new subsection 51SF(5)**. However none of the **new subsection 51SF(3)** provisions (presumably including the requirement for Parliament to sit) apply if the authorising Ministers declare, in writing, ‘that they are satisfied they would prejudice the [ADF’s] exercise of powers’ under **new section 51SE**. The various procedural safeguards – for example requirement for search authorisation to be given to occupier, occupier entitled to be present during search etc – are the same as the corresponding provisions in existing Division 3.

In relation to a declaration of ‘designated area’, the declaration is to be summarised in a statement and notified to persons within the area ‘to the extent practical’, but there are no gazettal or Parliamentary requirements: **new subsection 51SL(3)**. Again, no statement need be made if Ministers are satisfied that this would prejudice the ADF’s exercise of powers: **new subsection 51SL(4)**.

New section 51SM provides powers for controlling movement of vessels and aircraft in and around a designated area. The ADF may for example ‘compel’²³ a person in charge of a vessel or aircraft²⁴ to take it out from the area. Similar powers can be exercised in relation to persons. The ADF may allow persons, vessels or aircraft to enter a designated area only on the condition that they be searched for ‘dangerous things or other things related to the threat concerned’ and that any such things found be seized. The ADF may also erect barriers to prevent movement into or within a designated area.

In exercising any power under **new Division 3A**, **new section 51SO** provides that an ADF member may require persons to answer questions or produce documents – however this power can only be exercised where the member ‘believes on reasonable grounds’ that it is necessary for the ‘purpose of preserving life, the safety of others or to protect the Commonwealth interest’. The meaning of protecting the Commonwealth interest would seem very broad in scope. A failure to answer required questions or produce required documents is subject to a fine of 30 penalty units (\$3 300): **new subsection 51SO(3)**. A person is not excused from this requirement even if it would tend to incriminate them or expose them to a penalty. However, any answer given or document produced is *not* admissible in evidence in criminal proceedings²⁵ against that person except for the standard provision of prosecution for giving false or misleading information or documents: **new subsection 51SO(5)**. Information gained under **new section 51SO** could however potentially be used as evidence for other purposes such as to support an application for an anti-terrorism control order under the *Criminal Code Act 1995*.

An ADF member may require a person to operate a vessel or machinery or equipment on a vessel or aircraft, if they believe on reasonable grounds that it is necessary for the ‘purpose of preserving life, the safety of others or to protect the Commonwealth interest’. A failure

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to comply with a direction is subject to a fine of 30 penalty units (\$3 300): **new section 51SP**.

No force may be used to compel persons under **new sections 51SO** or **51SP: item 16**.

Schedule 2 – Incidents involving designated critical infrastructure

Under **new section 51CB**, infrastructure may be declared as ‘critical infrastructure’ by authorising Ministers if they believe on reasonable grounds that there is both a ‘threat of damage or disruption’ to the infrastructure and that damage or disruption would ‘directly or indirectly endanger the life of, or cause serious injury to, other persons’. The rationale for this and the associated ADF powers for protecting critical infrastructure in **Schedule 2**, is explained in the Explanatory Memorandum as:

A primary concern is the authority to use force to protect uninhabited infrastructure, where the loss of that infrastructure is likely to have cascade effects directly resulting in serious injury or the loss of life. Within the current Commonwealth, State and Territory criminal law frameworks, force can only be used if an attack against infrastructure is likely to cause immediate death or serious injury to persons (such as the inhabitants of infrastructure targeted for attack).

No provisions currently exist that allow the use of lethal force where this is necessary to protect uninhabited infrastructure from attack, even if the consequences of that attack would have secondary effects resulting in the death or serious injury to others. The increasingly close interrelationships between infrastructure, critical services and facilities means that the destruction or disabling of a system or structure could have significant flow-on effects that may result in loss of life or serious injury. Examples include the potential loss of power to a hospital, the disruption of communications and the interruption of vital utilities. Sophisticated terrorists may employ tactics that could disable critical infrastructure without posing an immediate and direct threat to those within its environs.²⁶

No consultation is required with the owners of any infrastructure declared as critical infrastructure, nor with the state or territory governments(s) in which it is located. The NSW Government has urged that consultation with governments should be required, except in urgent situations, so as to ‘ensure the effective deployment of military and civilian assets in times of increased threat’.²⁷

New section 51IB provides that an ADF member protecting critical infrastructure from ‘damage or disruption’ under **new Division 2A** has a range of powers. Amongst other things, they may:

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- detain a person suspected on reasonable grounds of having committed an offence under Commonwealth, state or territory law
- control the movement of persons or transport, and
- search persons or things for dangerous things or other things related to the threat to the infrastructure.

In exercising these powers, ADF members may use lethal force in certain circumstances. One is the standard ‘protecting the life of a person, or preventing serious injury to them’. However, ADF members may also use lethal force against another person to protect the critical infrastructure against the threat concerned: **new subsection 51T(2)**. Note that the declaration of a thing as critical infrastructure would not confer any additional powers on any Federal, state or territory police in terms of their ability to guard or protect it.

Schedule 3 – Aviation incidents

Item 1 inserts **new section 51AB** which is essentially a ‘preparatory’ call out order that will allow the CDF to subsequently order ADF aviation assets to be utilised if specified circumstances arise. The CDF would not have to seek any further authorisation from the authorising Ministers. This would be of use should the ADF be required to provide defensive aircover over particular areas – thus a **new section 51AB** order, depending on its contents, might allow for the shooting down of a civil aircraft without further approval from a Commonwealth Minister. The unsuitability of the existing Part IIIAAA to such purposes was a major point raised by the Part IIIAAA review.

New subsection 51AB(1) provides that there are a number of conditions that must be met before a **new section 51AB** order can be given to the CDF. It can only be given if the authorising Ministers are satisfied that for reasons of urgency, it would be impractical for the Governor-General to make an order under section 51A.

The authorising Ministers must also be satisfied that if ‘specified circumstances’ were to arise, then either domestic violence affecting Commonwealth interests, or a threat in the Australian offshore area affecting Commonwealth interests would occur, or be likely to occur. The Explanatory Memorandum comments that the meaning of specified circumstances ‘are matters for the authorising Ministers based on advice relating to particular threats’. If the result of the specified circumstances is likely to result in domestic violence, they must also be satisfied that the relevant State or Territory would not be, or unlikely to be, able to protect the Commonwealth interests.

If the order specifies that it relates to domestic violence, then an authorising Minister must arrange for the Government of the relevant State or Territory to be notified of the making or the revocation of the order as soon as is reasonably practicable: **new subsection 51AB(9)**. The legislation contains no details about what information must be contained in a notice about the making of an order.

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Item 2 inserts **new Division 3B – Powers relating to aircraft**. This Division may apply where a specified order has been made under Division 1, including **new section 51AB**.

The ‘special powers’ that ADF members have under **new Division 3B** are listed in **new section 51ST**. They are essentially the same as those in **new section 51SE** (which relate to ADF powers when operating in the Australian offshore area under **new Division 3A**) and include destroying, or giving an order for destroying, an aircraft. The necessary requirements before exercising such powers are also the same as for **new section 51SE**.

Schedule 4 – Expedited call-out

Schedule 4 essentially by-passes the Governor General and allows, in certain situations, either the Prime Minister or the two other authorising Ministers (the Attorney-General and the Defence Minister) to give a call-out order directly to the CDF.

In relation to Schedule 4, the Explanatory Memorandum comments:

[this] will enable ‘call-out’ or utilisation of the ADF to be activated in a timely and transparent fashion as any unnecessary delay could potentially impact adversely on the ADF’s ability to respond. For example, a response might be required at very short notice (such as an aircraft or a ship heading for a vessel, installation or facility with the intention of damaging it and/or killing those onboard).

135. When an immediate ADF response is required these expedited call-out arrangements will permit a timely and appropriate authorisation, whilst preserving the powers and protections of ADF personnel conferred by Part IIIAAA.

136. This amendment is not intended to circumvent existing processes and is instead only to be used in a sudden and extraordinary emergency (such as rapidly developing aviation or maritime threats).²⁸

The circumstances and process for expedited call-out are contained in **new section 51CA**. They allow for the making of the types of orders that the Governor-General could otherwise make under the other call-out provisions of section 51A, new section 51AA, new section 51AB, and sections 51B or 51C. A **new section 51CA** call-out order can be made by the Prime Minister or the other two authorising Ministers acting together. If made by the Prime Minister, he or she must be satisfied *both* that because of a ‘sudden and extraordinary emergency, it is not practicable for a call-out order to be made’ by the Governor-General under those sections previously mentioned *and* the circumstances referred to in the relevant section(s) exist. If made by the authorising Ministers, they must be both satisfied of the above matters and also that the Prime Minister is unable to be contacted for the purposes of making of a **new section 51CA** order.

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If the order is not made in writing, both the person(s) giving the order (the Prime Minister or the two authorising Ministers) and the CDF must each make a written record of the order, sign the record and cause the signing of the record to be witnessed: **new subsection 51CA(4)**. An unwritten order has no effect until both parties have signed a record and had it witnessed. The records are to be exchanged as soon as practicable, with a copy going to the Governor-General.

Orders made under **new section 51CA** have a maximum life of 5 days.

Any authorisations or declaration made under **new section 51CA** need also not be in writing.²⁹ In such cases, the requirements for recording, witnessing and exchange of records are the same as the above.

Schedule 5 – Consequential amendments

Items 1-29 are principally administrative in nature in that they amend various Acts to include references to the new divisions inserted in Part IIIAAA by the Bill.

However, a few items clarify the meaning of existing provisions – notably **items 15 and 16**, which deal with the use of force by ADF members. **Item 15** clarifies that any use of force under Part IIIAAA must be in accordance with **section 51T**. **Item 16** clarifies the Divisions of Part IIIAAA that the restrictions on the use of force in **subsection 51T(2)** apply to – **item 16** is necessary as some of the new Divisions have different restrictions as compared to the existing Divisions.

It is notable that existing subsection 51T(3) is not repealed or amended by the Bill. Subsection 51T(3) provides that:

In addition, if a person is attempting to escape being detained by fleeing, a member of the Defence Force must not do anything that is likely to cause the death of, or grievous bodily harm to, the person unless the person has, if practicable, been called on to surrender and the member believes on reasonable grounds that the person cannot be apprehended in any other manner.

This provision was criticised in the Part IIIAAA Review as ‘mak[ing] no sense’ in the context of the apparent intent of the rest of section 51ST as limiting the use of lethal force to situations of protecting life or averting serious injury.³⁰

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Schedule 6 – Other amendments

Items 13 inserts a **new Division 4A - Applicable criminal law** and **items 1 and 2** insert definitions of terms used in that Division.

The effect of **new Division 4A** is that state and territory law will not apply to alleged criminal offences committed by ADF members operating under Part IIIAAA. Instead, only the Commonwealth will have jurisdiction, using the criminal law of the Jervis Bay Territory as the applicable law. Thus it will be the Commonwealth DPP who decides whether to prosecute. On this latter issue, the Explanatory Memorandum comments:

In accordance with normal prosecutorial discretion, the CDPP can be expected to consider the context of a domestic security operation and the military chain of command in deciding whether to prosecute.³¹

This statement in the Explanatory Memorandum is consistent with the Part IIIAAA report which concluded:

In terms of legal responsibility, a lack of recognition of the military context in which the ADF operates in assessing the reasons of actions [is a major flaw and limitation of Part IIIAAA].³²

The current CDPP prosecution policy contains no reference to the issue of prosecution of military personnel for actions done in the line of duty. However, presumably the CDPP would consider whether an ADF member acted consistently with the relevant ‘rules of engagement’ issued by the ADF as a major factor in deciding whether to prosecute. These rules are not in the public domain.

The fact that an ADF member committed an act under superior orders does not of itself provide a defence against prosecution for that act: **new subsection 51WB(1)**. This reflects the common law in Australia.³³ However, it *is* a complete defence under **new subsection 51WB(2)** if the member can show;

- (a) the act was done by the member under an order of a superior,
- (b) the member was under a legal obligation to obey the order,
- (c) the order was not manifestly unlawful,
- (d) the member had no reason to believe that circumstances had changed in a material respect since the order was given,
- (e) the member had no reason to believe that the order was based on a mistake as to a material fact, and
- (f) the action taken was reasonable and necessary to give effect to the order.

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This **new subsection 51WB(2)** defence was discussed in hearings for the current inquiry into the Bill by the Senate Legal and Constitutional Legislation Committee:

Senator JOHNSTON—I know. He has not got the defence if it is manifestly unlawful. He has been told to shoot something down and he is thinking, ‘Crikey, is this lawful or not?’

Col. Dunn—What he has to think about is whether it is reasonable and necessary. It is there to stop people going off at a tangent. For example, he may see an aircraft going away from where he has been told it was going and he might decide to shoot it down. That is not reasonable and necessary and if he then shot it down he could be charged and he could not rely on the defence of it being not manifestly unlawful because in that case it clearly was.³⁴

Senator JOHNSTON—All right, I will wear that.

Col. Dunn—It exists in the law of armed conflict in the current DFDA and it does not cause problems to the soldier on the ground because he makes that decision on whether it is reasonable and necessary and in effect not unlawful based on his training and the circumstances that surround him.

Item 6 removes the current restriction in paragraph 51G(b) that only permits the actual operational utilisation of the Reserves if the available permanent ADF forces are insufficient for the job. The Explanatory Memorandum comments:

As the ADF is an integrated force of both Permanent and Reserve elements, with specific Reserve capabilities established for domestic security tasks (such as Reserve Response Forces), this restriction is no longer required and inhibits the ADF’s operational effectiveness.³⁵

The amendment is consistent with the Part IIIAAA report. However, the NSW Government submission to the current Senate inquiry took a more cautious view on the use of ADF reserves:

NSW Police advise that the use of Reserves in tactical assault situations is not appropriate. Consideration should therefore be given to excluding the use of reserves in exercising powers under Division 2, Part IIIAAA of the Defence Act (which relate to such situations).³⁶

Other persons giving evidence to the Senate inquiry have expressed reservations about whether the Reserves are adequately trained to deal with violence or disturbances in civil, rather than military situations.³⁷

As previously mentioned in this Digest,³⁸ the Reserves are still not able to be utilised in connection with industrial disputes. Whilst there may be a good reason for this, neither the Minister’s second reading speech nor the Explanatory Memorandum shed any light on it.

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Items 7 and 8 amend the existing Division 2 and expand the current emphasis in **section 51I** on recapturing a specific thing (such as a building or vehicle) to including preventing, or putting an end to, acts of violence and protecting persons from such violence. Again the amendment is consistent with the Part IIIAAA report. The actual actions that ADF members may do in performing such tasks are essentially the same as the existing **section 51I**, except that they now have the specific ability to ‘control the movement of persons and means of transport’.

Item 10 inserts **new subsection 51K(2AA)** to provide that the normal requirement for publicising the declaration of a ‘general security area’, including a public broadcast, is not required if the authorising Ministers are satisfied that this would prejudice any operations being carried out under **Division 2**. **Item 11** makes a similar amendment in relation to a ‘designated area’.

Item 12 substitutes a new version of **paragraph 51S(1)(b)**. The current version requires ADF members operating under, or in relation to, Division 3 to wear their surname on their uniform for the purposes of identification. The new version allows their surname to be replaced with numbers or letters. The amendment is consistent with the Part IIIAAA report.³⁹ However, it is curious that in carrying out a search under Division 3, the ADF member in charge must ‘identify themselves’ to the occupier and give them a copy of the search authorisation which will contain their name – see existing subsections 51I(2) and 51M(1). It would be useful if it could be clarified whether or not this possible source of identification of an ADF member is consistent with the policy intent of **item 12**.

Item 14 provides that an order, authorisation or declaration made under Part IIIAAA is not a legislative instrument. This means that such orders, authorisations or declarations are not required to be tabled in Parliament (unless required by a specific provision in Part IIIAA) and are not disallowable by either House.

Concluding Comments

The potential use of the military for domestic security or law-enforcement purposes is inherently a controversial one. For some it raises the potential for the suppression of civil disobedience or political protest, or the increased possibility of persons (‘innocent’ or otherwise) being killed during ADF domestic operations. The fact that this Bill extends the situations in which the ADF may be called-out under Part IIIAAA of the Defence Act may mean that it is more likely that they will in fact be called-out. However Part IIIAAA does contain safeguards – how well they will all operate, either in exercises or in real-life situations, is still somewhat speculative. The issue of operation of the safeguards does not seem to have been a major focus of the Part IIIAAA Review discussed in various parts of this Digest.

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There are several areas of the Bill which introduce significant additions and amendments to Part IIIAAA and may be worthy of particular attention:

- **Item 1 of Schedule 3** inserts **new section 51AB** which is essentially a ‘preparatory’ call out order that will allow the CDF to subsequently order ADF aviation assets to be utilised if specified circumstances arise. Potentially a **new section 51AB** order, depending on its contents, might allow for the shooting down of a civil passenger aircraft without further approval from a Commonwealth Minister.
- **Item 12 of Schedule 6** allows for the ‘anonymity’ of ADF personnel engaged in operations under existing Division 3 to be protected by not requiring them to display their name on their uniform. However, in carrying out a search under Division 3, the ADF member in charge must ‘identify themselves’ to the occupier and give them a copy of the search authorisation which will contain their name – see existing subsections 51I(2) and 51M(1). It would be useful if it could be clarified whether or not this possible source of identification of an ADF member is consistent with the policy intent of **item 12**.
- Under **Item 13 of Schedule 6 (new Division 4A)**, state and territory law will not apply to alleged criminal offences committed by ADF members operating under Part IIIAAA - only the Commonwealth will have jurisdiction, and it will be the Commonwealth DPP who decides whether to prosecute. The Explanatory Memorandum comments ‘in accordance with normal prosecutorial discretion, the CDPP can be expected to consider the context of a domestic security operation and the military chain of command in deciding whether to prosecute’ The current CDPP prosecution policy contains no reference to the issue of prosecution of military personnel for actions done in the line of duty. Presumably the CDPP would consider whether an ADF member acted consistently with the relevant ‘rules of engagement’ issued by the ADF as a major factor in deciding whether to prosecute, but these rules are not in the public domain. More information on CDPP prosecution policy in this context would be useful.
- **Item 6 in Schedule 12** removes the current restriction in paragraph 51G(b) that only permits the actual operational utilisation of the Reserves if the available permanent ADF forces are insufficient for the job. There was quite a divergence of views in the Senate inquiry about what situations it would be appropriate to utilise ADF reserves. However, this issue may be more an ADF operational matter than one to be prescribed by legislation.
- **Items 10-11 of Schedule 12** allow for the normal requirement for publicising⁴⁰ the declaration of certain security-controlled areas, including a public broadcast, to be scrapped if this would prejudice relevant ADF operations. Whilst this may be an understandable amendment, no alternative notification arrangements are made.

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Endnotes

- 1 House of Representatives, *Parliamentary Debates*, 28 June 2000, p. 18410.
- 2 This involved using the ADF to safely move foreign heads of Government away from the scene of the 13 February 1978 bombing of the Hilton Hotel which was hosting the Commonwealth Heads of Government Meeting.
- 3 [Bills Digest](#) No. 13 2000-01, p. 3.
- 4 Section 51 of the Defence Act, which was repealed by the 2000 Act, allowed for the call out of the ADF by the Governor General at the request of the relevant State to protect the State against domestic violence.
- 5 *Statutory Review of Part IIIAAA of the Defence Act 1903 (Aid to Civilian Authorities)*, A Blunn et al., Department of Defence, 2004.
- 6 Formerly Secretary of a number of Commonwealth Departments.
- 7 Formerly Chief of the ADF.
- 8 Formerly Deputy Commissioner of the Australian Federal Police and Commissioner of the Tasmanian Police.
- 9 Such occasions included air cover protection for the 2002 Commonwealth Heads of Government Meeting and various border protection, and fisheries enforcement, operations.
- 10 Paragraph 28. It also said that even in those ‘traditional situations’ its utility was severely limited.
- 11 These are the Prime Minister, Defence Minister and Attorney-General.
- 12 Presumably the ‘threat’ does not necessarily have to have of a security-related nature – thus the arrival in Australian waters of ‘unlawful aliens’ seeking asylum would be a threat.
- 13 The term ‘Commonwealth interests’ is not defined in the existing Part IIIAAA or in the Bill. This issue was discussed extensively in the 2000 report of the FADT Committee (see paragraphs 1.52-1.59) but the Committee accepted the impracticality of drafting such a definition.
- 14 Although these also prohibit ‘emergency forces’ being used. However, this term no longer exists in the Defence Act outside of Part IIIAAA, and for completeness should be deleted.
- 15 The CDF must however ensure that his or her actions also comply with any Ministerial directions.
- 16 The issue of information security is addressed in paragraphs 11-12 of the National Counter-Terrorism Plan.
- 17 These orders would be given under existing **section 51D**.
- 18 It is not clear why offshore facilities are not mentioned in this respect.
- 19 An ADF member giving any order must be themselves acting under the authority of an order given by a superior.

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- 20 The submission to the Senate inquiry by the Human Rights and Equal Opportunity Commission recommended an additional requirement to the effect that the ADF member ‘be satisfied in giving the order that no lesser action would give effect to the superior order’.
- 21 Paragraph 36(d).
- 22 A ‘dangerous thing’ is defined in existing section 51 as ‘a gun, knife, bomb, chemical weapon or any other thing that is reasonably likely to be used to cause serious damage to property or death or serious injury to persons.’
- 23 The use of force to compel a person would be limited by the restrictions contained in section 51T.
- 24 If there is no person in charge, the ADF may take control of the vessel or aircraft.
- 25 Note also paragraph 51SO(5)(c) also provides derivative use immunity.
- 26 Explanatory Memorandum, p. 13.
- 27 Submission of the NSW Cabinet Office, p. 2.
- 28 Explanatory Memorandum, p. 21.
- 29 An authorisation might include something like approval to free hostages.
- 30 Paragraph 44.
- 31 Explanatory Memorandum, p. 25.
- 32 Paragraph 49(g).
- 33 *A v Hayden* (1984) 156 CLR 532.
- 34 Senate Committee [hearings](#), p. 40
- 35 Explanatory Memorandum, p. 23.
- 36 Submission of the NSW Cabinet Office, p.2.
- 37 See evidence of Dr Mohammed Kadous, Senate Committee hearings, p. 15. See also the submission of the Law Society of South Australia.
- 38 See discussion of **item 12** of **Schedule 1** in the main provisions section.
- 39 Paragraph 36(c).
- 40 Such a requirement would include public radio and TV broadcasts to the relevant area.

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