SENATE STANDING COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND TRADE

LEGISLATION COMMITTEE

LEGISLATION AMENDMENT BILL (AID TO CIVILIAN AUTHORITIES) BILL 2000

SUBMISSIONS

Submission No: 6

Submittor: Department of Defence

Contact: Lieutenant-Colonel Michael Kelly

Address: Russell Offices
CAMPBELL ACT 2600

Telephone No: 6268 8632

Fax: 6268 6037

E-Mail dirmic@itsn.adfa.edu.au

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Attachments Nil

Barsdell, Paul (SEN)

From: dirmlc@ltsn.adfa.edu.au
Sent: Monday, 17 July 2000 9:06 AM
To: paul.barsdell@aph.gov.au
Subject: Inquiry Into the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000


Microsoft Word 4

Paul,

I had word from the Minister's office this morning that the submission has been cleared. Please find attached a copy.

Cheers,

Mike

(See attached file: Defsub-DFACP Bill.doc)

DEPARTMENT OF DEFENCE SUBMISSION ON THE DEFENCE LEGISLATION AMENDMENT (AID TO CIVILIAN AUTHORITIES) BILL 2000

A. HISTORICAL BACKGROUND

The Legislative Framework

1. Throughout the history of the Federation the Australian Defence Force (ADF) has been utilised to support the Australian community in many ways beyond its role in armed conflict and peace operations. There are two main categories of such support. These are supplementation to the law enforcement agencies (Defence Force Aid to the Civil Power or DFACP) and general assistance to the community in the form of disaster relief, technical assistance to State and Federal agencies and participation in community activities (Defence Assistance to the Civil Community or DACC).

2. From the beginning the framers of the Constitution had determined that all authority and responsibility to raise and maintain military forces should vest in the Commonwealth. This is made clear by the specific defence power in s. 51(vi) and by the prohibition on the raising of such forces by the States, without Commonwealth consent, contained in s. 114. These provisions would probably be interpreted to also prevent States from raising paramilitary forces. The result has been that when State or Federal law enforcement agencies have required supplementation they must fall back on the ADF. Throughout the history of Federation Commonwealth governments and the ADF have emphasised that the nature of this support is very much as a last resort option where the capabilities of a State or Territory are not adequate to provide the best resolution to a crisis. This is reflected in the rejection by the Commonwealth of most requests for use of the ADF for DFACP.

3. There are two circumstances in which the ADF be required to provide supplementary law enforcement. Under s. 119 of the Constitution the Commonwealth is obligated to protect a State from "domestic violence", such as a well-armed terrorist attack, where the State requests this protection. The Commonwealth has the discretion to determine whether the State in fact requires this support or whether the State can deal with the situation from its own resources. The other circumstance relates to the responsibility of the Commonwealth to protect its interests and maintain its laws as indicated in ss. 51 and 61 of the Constitution. An example of this last case is where the Commonwealth acted to protect the gathering of foreign VIPs at the Commonwealth Heads of Government Regional Meeting (CHOGRM) at Bowral following the Hilton bombing in 1978 by using the ADF to secure the area.

4. Apart from the Constitutional provisions referred to above the only other legislative references to DFACP call out is in s. 51 of the Defence Act, Part V of the Australian Military Regulations and Part IX of the Air Force Regulations. This legislation draws exclusively on the requirement contained in s. 119 of the Constitution and relates to State requested call outs. There is currently no legislation which specifically regulates Commonwealth interest call outs. An examination of the Regulations will show that that these were designed for a period when terrorism in its contemporary forms was unknown and were aimed only at riot control situations. The regulations contain out of date requirements such as the need for the presence of a magistrate, the reading of proclamations and the blowing of bugles.

5. Other uses of the ADF to support Commonwealth law enforcement have been set out in specific Commonwealth legislation that relates to Customs, Fisheries, and Migration, as well as Commonwealth and Defence property. Under this legislation the ADF is engaged on a daily basis in securing Australia's economic and environmental interests as well as upholding our immigration requirements. The ADF has also been used often to support operations against the illegal importation of narcotics.

Requests by States for Use of the ADF

6. The first instance when the use of the ADF in aid to the civilian authorities was contemplated was in 1912 when the Queensland Government requested the Commonwealth to provide ADF support to deal with unrest arising from a general strike at that time in the following terms:

> In consequence of general strike riot and bloodshed are imminent in Brisbane. State Police are not able to preserve order. Firearms have been used to prevent arrests of a man guilty of riotous conduct. Executive Government of State requests that you direct steps to be taken immediately to protect the State against domestic violence in terms of s. 119 of Commonwealth of Australia Constitution Act. As the situation is extremely grave my Ministers urge immediate action. (*sic*)

On the advice of the Federal government the Governor-General sent the following reply:

> That whilst the Commonwealth Government is quite prepared to fulfil its obligations to the States if ever the occasion should arise, they do not admit the right of any State to call for their assistance under circumstances which are proper to be dealt with by the Police Forces of the States. The condition of affairs existing in Queensland does not in the opinion of my Ministers warrant the request of the Executive Government of Queensland contained in Your Excellency's message being complied with.

7. In 1916, the Tasmanian Government requested the assistance of troops from the Commonwealth to put down expected disturbances on the occasion of a referendum. In 1919, the Governor of Western Australia forwarded to the Governor-General a request from the Western Australian Premier for Commonwealth assistance to control expected violence during a wharf strike. In 1921, the Premier of Western Australia telegraphed the Acting Prime Minister requesting him to 'instruct permanent force to be sent to Perth and be made available to maintain order' in the event that the Western Australian Police were unable to do so during 'labour troubles'. In 1923, during a police strike, the Premier of Victoria, in a letter to the Acting Prime Minister, requested the Commonwealth Government to 'arrange for troops to parade the City and take positions' at specified locations, as a 'precautionary measure designed to make an impression and to have a strong force of men available at suitable points ready for instant use if the situation should demand their being called upon in the regular manner'. In 1928, the Premier of South Australia requested the Commonwealth to issue ammunition to the South Australian Police Commissioner for use in case of absolute necessity during a strike. At about the same time, the Premier also made a request for military equipment. The Commonwealth did not agree to any of these requests.

Call Out of the ADF by the Commonwealth

8. In Papua New Guinea in 1970-71, there was civil unrest on the Gazelle Peninsula. At the time Papua New Guinea was a territory of the Commonwealth of Australia. Since 1946, the territory had been governed by agreement with the Trusteeship Council of the United Nations. The local Administration requested assistance from the Federal Government on

several occasions believing that at any stage the situation on the Gazelle Peninsula might no longer be within the control of the local police. On 19 July 1970, an Order-in-Council was signed by the Governor-General calling out members of the Defence Force serving in Papua New Guinea. The Order empowered the Administrator to requisition the three services if the police lost or feared losing control of law and order on the Gazelle Peninsula. Ministerial approval of the requisitions was required but not necessarily before they were issued. In September 1970, this was changed to require approval before requisitioning the forces. The Order was not revoked until the following April (1971) upon a change of Prime Minister. As events transpired the troops were not required.

9. In February 1978 a bomb exploded outside the Hilton Hotel in Sydney, killing three people. At the time the hotel was host to the CHOGRM. The blast set off a security scare which ultimately saw an official call-out of the Defence Force by the Governor-General. The meeting involved a visit to Bowral, south of Sydney. One thousand troops were used as a security force both in Bowral itself and to safeguard rail and road links between Bowral and Sydney. Most delegates were in fact transported by helicopter in an unannounced change of plans. Helicopter support was provided by RAAF personnel.

10. Professor A.R. Blackshield, a Constitutional law academic, points out in his analysis of the Bowral incident (Pacific Defence Reporter, March 1978) that the Executive Council minute authorising the use of troops raised more questions than it answered. The call-out was clearly not an exercise of Section 119 of the Constitution because there was no application of the Executive Government of the State. The call-out occurred with the concurrence of the New South Wales Premier, Mr Wran, but did not follow a specific request. The Prime Minister, Mr Fraser, said at the time:

> the mechanism for the legal approach to the call-out was discussed with the Premier in two terms: In terms of a strict request from the State, and therefore in terms of aid to the civil power; or, secondly, in terms of the use of the Commonwealth's own authority and responsibility to protect people against possible acts of terrorism. For various reasons as I explained to the House I think yesterday, the second course was chosen, but the Premier had made it perfectly plain to me that if it was thought best to pursue it through the first mechanism, the Premier would certainly act in full co-operation.

11. The issue as to whether s. 119 would have been an appropriate basis for the CHOGRM call out is contentious. The situation in fact falls much more comfortably into the category of protecting a Commonwealth interest. The Commonwealth was hosting an international meeting to discuss regional matters. Delegates were heads of state from other nations. There existed a relevant Commonwealth Act implementing an international Convention. Thus Sections 61 and 68 of the Constitution, Section 51(vi) and Section 51(xxix) (the external affairs power, given Australia's international obligations), would authorise the Government's use of troops at Bowral. It can be argued that even without specific international obligations and their enactment into Australian domestic law, the welfare of visiting heads of state would be a matter of sufficient international concern to ensure that the executive power (Section 61) had a sufficiently broad operation to justify the Bowral call-out. Professor Blackshield put it this way:

> But, just as the 1971 legislation (*Public Order (Protection of Persons and Property) Act 1971*) was clearly valid as an exercise of Commonwealth legislative power over 'external affairs' (Constitution Section 51(vi)), so the CHOGRM call-out was valid as an exercise of the corresponding executive power. According to the High Court of Australia, even apart from the express legislative interest in 'external affairs', the

> Commonwealth's executive power (formally 'exercisable by the Governor-General' under Section 61) includes an amorphous and unexplored bundle of attributes of sovereignty, 'inherent in the fact of nationhood and of international personality', which 'come from the very formation of the Commonwealth as a polity and its emergence as an international State'. Whatever else these powers include, they certainly include all the incidents of 'international status', and corollary powers 'as to international relations and affairs'.

12. Professor Blackshield observes that at the time of the crisis the Government did not rely on the specific constitutional sections discussed above in justifying its actions. Instead it invoked the notion of national security or the inherent 'nationhood' power. In a letter to Sir Victor Windeyer seeking advice in connection with the Protective Security Review being conducted by Justice Hope, the Attorney-General of the day, Senator Peter Durack, referred to the category of the Commonwealth protecting its own interests and claimed this as the correct basis for the Bowral call-out.

13. The Bowral incident gave rise to concern over the position of members of the ADF in such situations. The tasks required clearly did not fit the out dated processes and regulations laid out in the existing legislation which, as noted relate to riot control scenarios. In this respect Professor Blackshield stated:

> To say that legal rights and duties are determined by military status, in a situation largely unprovided for by military regulations, is obviously anomalous; and to say that the relevant rights and duties are those of the ordinary private citizen may be even worse. To be sure, there are statutory provisions for citizen's powers of arrest; but they differ from State to State. To ask a soldier to adjust his behaviour not only to the exigencies of a volatile situation, but to the law of the particular State to which he happens to be assigned, is surely to ask too much – even if we ignore the nightmare of a border-hopping guerilla campaign along a State boundary.
>
> (I)f Australian soldiers are ever again to undertake the kind of assignment they had at Bowral... legislation to codify and clarify their position is even more sorely required. Indifference to careful legal thinking was manifest throughout the CHOGRM call out, but nowhere more than in the government's cavalier disregard for the legal position of army personnel.

These views were echoed and supported by Mr N.S. Reaburn, Senior Lecturer at the University of New South Wales law School at the time, when he stated in an article that:

> It would be constitutionally possible for the Commonwealth to enact legislation specifying the powers to be exercised by the military forces used in an emergency anywhere in Australia. This would end reliance on differing and inadequate State and Territory laws. It would concentrate attention on the powers necessary for security operations, and allow them to be set down in clear detail. It would allow the citizen to know in advance where he stood, and the response he must make to, the presence of the military on such an operation. And it would enable the essentially emergency nature, and limited duration, of such operations to be built into rules, and made clear for all to see. And it would release military personnel from the threat of liability for actions which were both reasonable and necessary.

B. THE HOPE PROTECTIVE SECURITY REVIEW

Recommendations as to Capabilities and Roles

14. Following the CHOGRM call out of 1978 the Commonwealth government appointed Justice R.M. Hope in Feb 1978 to head a Protective Security Review. His terms of reference included all aspects of Australia's counter terrorism (CT) preparedness including the inter-relationship and coordination among military and civilian agencies and the issues identified by Professor Blackshield and Mr Reaburn set out above. Justice Hope made many recommendations concerning intelligence, assault and containment capabilities and the appropriate role of the ADF. Justice Hope concluded that there was a role for the ADF in providing security supplementation to the civilian authorities and rejected any suggestion of raising paramilitary or so-called "Third Force" options. He stated that although it was not possible to describe all the circumstances in which the resort to the ADF may be necessary there were three key areas that could be identified, being:

(a) the assault of buildings, aircraft, or other forms of public transport seized and held by terrorists, with or without hostages;

(b) cordoning off or otherwise protecting large areas where terrorists may seek to enter by means of violence, as, for example, an airport; and

(c) situations involving large or remote areas or areas outside police control, such as the sea, or very large numbers of personnel, or requiring special skills or equipment, where the police are unable, adequately or at all, or within imperative time limits, to do what is required.

15. Justice Hope was influenced in his reasoning by the special training of ADF members in close quarter combat in relation to the need to carry out CT assaults and the skills acquired on overseas operations providing the public security and safety tasks that were performed around Bowral, including disciplined and coordinated cordon and search activities. Justice Hope was at pains to stress that use of the ADF in these roles should only be "in the most exceptional circumstances" where the police are unable to contain or prevent violence effectively.

16. Following the publication of the Review report in 1979 many of the recommendations of Justice Hope were acted on. This included a directive from the government to the ADF to hone the close quarter combat skills for CT assault and the Commander of the Defence Force (CDF) in turn directed that this should reside within a specialised component of the Special Air Service Regiment (SASR) as it is in the UK. At the same time it was recognised that there would be a need for other units to be identified to provide the public safety and security support tasks as set out in Justice Hope's (b) and (c) categories that may be associated with a terrorist incident. These troops would be designated as the "Response Force".

Recommendations as to the Legal Status of ADF Members

17. Justice Hope devoted significant attention in the Review to the status of members of the ADF in a call out reflecting the concern that had emerged in the articles published by professor Blackshield and Mr Reaburn. He was particularly influenced by the difficulties posed by our Federal system in terms of differing legislation and the inadequacy of authority of the ADF to perform the tasks they were likely to be asked to do. His conclusion was that:

> If the Defence Force is called in to assist the civil power to prevent, contain or suppress violence, they are doing something which it is primarily the role of the police to do but

> which in the circumstances the police are unable to do or, because of the special skills and equipment needed, they should not do. Subject to whatever results from their being members of the Defence Force, servicemen should therefore have the same obligations and the same powers as police officers performing the same task.

He therefore recommended that the Defence Act be amended to make members of the ADF ordered out in civilian security operations special Commonwealth police officers and to give them the powers and obligations of police officers, but consistently with their rights and duties as members of the ADF. Justice Hope recognised, however, that this was not a complete solution and added:

> The powers and duties so conferred and imposed may not be adequate in all cases, particularly when the Defence Force is used to protect a State against domestic violence pursuant to an application under s.119 of the Constitution. Where members of the Defence Force are being used in a State or Territory in aid of civilian security, their powers and duties should, as far as practicable, be made clear.

Justice Hope recommended that to achieve this the Minister of Defence should be authorised to confer or impose by proclamation the necessary powers and duties.

C. CONTEMPORARY CONCEPT FOR USE OF THE ADF IN DFACP

The Counter Terrorist Assault Role

18. Following the Hope Review the concept for the role of the ADF in DFACP was formalised within the framework of the National Anti-Terrorist Plan (NATP) which is now in its sixth edition (Nov 1995). The NATP was produced and is modified under the auspices of the Standing Advisory Committee on Commonwealth/State Cooperation for Protection Against Violence (SAC-PAV). This body has ensured that all State, Territory and Commonwealth law enforcement agencies and governments are agreed as to the Australian CT response and as to the role of the ADF.

19. The specific ADF roles set out in the NATP have not changed since the first edition. What has changed is the greater capability of the police to deal with non-terrorist siege and hostage situations as well as advances in crowd control skills and equipment. These developments have ensured that the ADF will only be called out at a very high threshold of threat. The contemporary terrorist threat remains the primary concern of the ADF, however, due to the terrorist's potential for a higher level of sophistication in weapons, combat skills and fanaticism. In this respect the NATP sets out the ADF tasks as:

(a) recovery of hostages held by terrorists;

(b) recovery of aircraft, ships and land vehicles;

(c) recovery of offshore oil and gas installations;

(d) recovery of buildings and installations.

20. Since the directive to base these close quarter CT assault skills within the SASR that unit has reached a high level of capability in terms of training, state of the art technology and

weapons. This capability is focused on the delivery of a decisive and rapid resolution to the classic hostage or asset recovery assault with highly disciplined and precisely directed force when necessary to minimise the risk to hostages and innocent bystanders, both on land and water. This includes the ability to quickly search for locate and neutralise dangerous devices.

The General Public Safety and Security Role

21. As far as the Response Force support function is concerned the tasks envisaged for these troops was set out in the NATP and therefore agreed by all the law enforcement agencies as being:

(a) cordon;

(b) building search;

(c) control of public movement;

(d) picketing and guarding.

Since the development of the Response Force concept a system was established whereby sub units in all major troop locations in Australia where rotated through this function as standby troops and were trained accordingly. It was envisaged that these troops would provide cordoning support to the location of a terrorist incident where the CT assault troops from SASR were operating inside the cordon. It was also envisaged that they may be required to provide broader support to operate a cordoned off "large area" incident, assist in establishing a wide area "net" of vehicle check points, the guarding of specific locations or prevention of looting where the resources of the police are over-stretched and providing extra personnel for emergency searches for destructive devices.

22. A contemporary example of a large area incident would be where terrorists had placed or triggered a Chemical, Biological or Radiological (CBR) device and there was a need to evacuate and cordon off a number of city blocks or suburbs and search for the device. The Tokyo sarum gas incident is illustrative of what can happen in this example.

23. The ADF has acquired familiarity with these types of public safety security activities in recent times in the context of deployments on peace operations. This has included Namibia in 1989; Somalia in 1993, Rwanda in 1994-1995 and East Timor in 1999-2000 where the bulk of the ADF ground forces have served performing these functions. These tasks have included running vehicle and personnel checkpoints, convoy escort, crowd control at food distribution and administrative points. This provides a solid base of experience and training for adjusting to tasks of this nature domestically. Given the larger numbers of ADF personnel who are equipped with uniforms, devices and training to deal with the CBR threat it is highly likely that these personnel would need to be drawn upon in a crisis.

D. THE INTERNATIONAL EXPERIENCE

Paramilitary Options

24. There are many examples of overseas recognition of the special nature of the tasks associated with national defence against terrorism and the options adopted reflect the differing attitudes to the principles of the role of the military, communal policing and the nature of the

State as to whether it be unitary or federal. The paramilitary or "Third Force" examples include National Guard and Coast Guard in the USA, the Bereitschaftspolizei and GSG 9 in Germany, the CRS and Gendarmerie Mobile in France and the Carabinieri in Italy. In the USA the National Guard may be called upon by State governments or they may be "Federalised" to act to enforce Federal law where the State is unwilling or unable to act. The National Guard was called out a number of times in the 1960s by the Federal government to enforce civil rights and electoral laws. They have also been called on to assist in large-scale breakdowns of order on a number of occasions such as during the LA riots in 1992. All these organisations operate under laws that provide specific authority for their specialist tasks. In the case of the US National Guard this varies from State to State except when they are operating under Federal authority. Because these are only State based reserve troops this presents no difficulty from a training perspective. The US has also recently amended their restrictions on use of the regular Armed Forces in assisting civil authorities in the context of the Atlanta Olympics so that this support is available in connection with major sporting events.

25. The paramilitary option has been rejected by the UK, Canada, Australia and New Zealand. This attitude reflects doubt as to the appropriateness of this option in the policing traditions of those countries as well as concern over the standards, attitude and concept of paramilitary forces. Sir Robert Mark the former UK Commissioner of Metropolitan Police said on the subject that:

> The Army High Command, the Home Office and the civil police have always been opposed to a third force and believe that the purposes it could achieve are better fulfilled by the police and the army about whose respective roles and accountability there is no ambiguity and who enjoy public confidence.

Justice Hope's conclusion on the issue was that:

> There is strong reason in our type of society to avoid the establishment of paramilitary forces. There may be constitutional difficulties in the way of any State setting up such a body. But quite apart from these difficulties, such a force would have a strength equivalent to that of a similar military body, but would have no military role, and would be without the traditional restraint of the Defence Force and without the system of legal and administrative controls which has been built up in respect of the Defence Force over a long time. Moreover a paramilitary force could do nothing which a police force or the Defence Force, appropriately trained and equipped, could not do.

Legal Status of Defence Personnel

26. If the paramilitary option is not adopted and reliance is placed on Defence Forces to provide support to the civilian agencies then the issue comes back to the legislative standing of Defence Force members to perform the tasks expected of them. Both Canada and New Zealand having rejected the paramilitary option have adopted similar legislative approaches in this respect. The Canadian provision which influenced Justice Hope is contained in s. 282 of their National Defence Act. This section states that:

> Officers and non-commissioned members when called out for service in aid of the civil power shall, without further authority or appointment and without taking oath of office, be held to have, in addition to their powers and duties as officers and non-commissioned members, all of the powers and duties of constables, so long as they remain so called

out, but they shall act only as a military body and are individually liable to obey the orders of their superior officers.

27. New Zealand were motivated to amend their own provisions following the Rainbow Warrior experience in 1985 which had a similarly cathartic effect in relation to focus on public safety and security as did the Hilton bombing in Australia. Having a unitary system they were attracted to the Canadian approach. Under s. 9(6) of their Defence Act, where a part of the Armed Forces is authorised to assist the police in dealing with an emergency:

> Every member of any such part of the Armed Forces –
>
> (a) May, for any purpose necessary to assist the Police in dealing with the emergency, exercise any power of a member of the Police; and
>
> (b) Shall, for the purposes of civil and criminal liability, have the protections of a member of the Police, in addition to all other protections that the member of the Armed Forces may have.

28. As a result of this provision the members of the Armed forces assisting the police would be able to exercise an array of authorities set out in New Zealand legislation such as arrest without warrant, search persons/premises/vehicles/vessels or aircraft for firearms and explosives, enter buildings to arrest offenders or prevent an offence, remove vehicles, close roads, stop and search vehicles, establish road blocks, require assistance of the public, take particulars of and search persons in custody, require evacuation, prohibit or restrict public access, destroy dangerous property, requisition property and prohibit or restrict water, land or air traffic. Members justified in exercising these authorities are not guilty of an offence or liable to any civil proceedings but will be criminally responsible for any excess of force used. Very similar provisions apply to the Papua New Guinea Defence Force.

29. In the UK the approach has been to deal with matters on an ad hoc basis and provide legislative authority to members of "Her Majesty's Forces" to deal with specific situations. As a consequence of the long term terrorist threat emanating from the situation in Northern Ireland there is an array of legislative authorities assigned to members of the Forces in Northern Ireland similar to those enumerated above for the New Zealand provisions but also going further in terms of intrusion on civil liberties than would be considered appropriate or necessary in the Australian context.

E. OPERATIONAL RATIONALE BEHIND THE BILL

Process, Circumstances, Command & Control

30. From the operational perspective the Bill seeks to establish a simplified process common to the different categories of call out and clear command and control arrangements. This is a critical consideration in the effective resolution of an emergency. In Division 1 it can be seen that the steps for call out involve the three key ministers (the Prime Minister, Defence Minister and Attorney General) deciding to act and seeking an order from the Governor General. Once the call out of the ADF has been effected by the order then the Defence Minister makes the required directions to the CDF. At the tactical level the ADF will act on the request of the police of the State or Territory. From the command and control perspective the Bill makes it clear that the CDF acts under the Defence Minister's directions and that notwithstanding the cooperative requirements and the need for a request to act from the

police, the ADF remains at all times under the command of the CDF. In addition the final decision to carry out a counter terrorist assault rests with the authorising Ministers except in a sudden or extraordinary emergency occurring after call out has been initiated.

31. The operation of the legislation is circumscribed by the circumstances in which it may be used. The legislation cannot be employed unless there is a situation of domestic violence which is beyond the capability of the State or Territory to resolve effectively. This means that the ADF cannot be used under this legislation for any situation that does not involve the threat of a high threshold level of violence or sophistication. This mechanism reflects the concern of Defence not to have resources and time diverted from the primary mission of defending Australia in an armed conflict as well as a commitment to the basic democratic principles of communal policing. Defence is also vitally concerned that any use of ADF resources in this sensitive context occurs within a framework that is based firmly on the support of the community and governmental oversight.

Tasks, Training and Protection

32. The approach that has been taken in the Bill reflects the same concerns with the status of Defence members called out in DFACP as has been demonstrated overseas, domestically by the legal commentators and in the Hope Review. The solution adopted differs from the Hope recommendations and overseas experience to take into account the nature of our federal structure and the enhanced capacity of State and Territory police. The key factors here are firstly that State and Territory emergency, public safety and criminal provisions vary significantly which makes the Canadian/New Zealand/PNG approach undesirable. It is not realistic to expect that members of the ADF will train effectively for all the differing State and Territory laws as pointed out by Justice Hope. Defence also considers it undesirable that the ADF should be granted all the same authorities as the police as this would encourage the view that the ADF is a substitute for the police rather than a supplement. It was further considered more desirable to spell out as clearly as possible the tasks that are expected of the ADF and confine the extent of the authorities to this as a limitation on employment of the ADF. This has the added benefit of making both the public and the ADF clearly aware of what to expect in a call out. This in turn enables the ADF to train to ensure their actions are appropriate.

33. Reflective of the accepted tasks expected of the ADF in this area the Bill sets out the authority for performing them in two divisions. Division 2 deals specifically with the issue of the counter terrorist assault functions residing within the capabilities of the SASR. The Division contains coverage for the things the SASR currently train to do and the tasks themselves are those that are specifically and clearly expected in the context of the NATP. These essence of these tasks is the freeing and evacuation of hostages, the recovery of assets, search for and neutralisation of dangerous things and the detention of suspects so that they may be handed over to the police as soon as possible.

34. The tasks set out in Division 3 are designed to provide for the remainder of the public safety and security functions set out in the NATP. Through the mechanisms of the General Security Area and the Designated Area the operation of the authority to perform these tasks can be limited to only those locations where it is deemed necessary and this prerogative remains with the authorising Ministers. The entire thrust of the authorities contained in Division 3 go to locating a dangerous thing and neutralising it, coupled with the ability to assist in cordoning off large areas of danger to the public, to prevent entry into them and evacuate people from them. The ability to conduct vehicle check points and erect barriers or structures are common provisions found overseas and are to be expected in enabling the cordoning, evacuation and search functions. These authorities allow the ADF to be prepared

to assist in a range of wide area scenarios such as those involving Chemical, Biological or Radiological devices.

35. In all the Division 3 provisions the object is public safety and not the prosecution or incarceration of individuals. In no way do the provisions effect any aspect of the current Commonwealth, State or Territory standards of due process. Nor do they give powers of detention for the commission of offences that are not already available to the citizen. From the point of view of the protection of ADF members having their authorities spelled out will enable them to rely on the Model Criminal Code "lawful authority" defence and will also avail them of the "Obstructing public officers" offence under s. 76 of the Commonwealth Crimes Act.

F. SAFEGUARDS

Searches

36. Under s. 51L of the Bill it is ensured that decisions on searches will be made by responsible officers who will be trained to make this decision based on the test of a belief on reasonable grounds that a dangerous thing is at or in the vicinity of the search location and that the urgency of the situation requires the search to be conducted. Pro-formas will be prepared meeting all the documentary requirements of the section for the search authorisation and receipting of things seized so that this aspect may be dealt with efficiently and in a timely manner. The provisions also ensure that the members authorised to be in charge and conduct the searches will be strictly spelled out and that the public will have all the details of the members and the authorisation provided to them. Training will be undertaken to ensure this process is well understood and adhered to. Training will also be provided to ensure searches of vehicles and persons are done in accordance with the provisions. In this respect it will be noted that strip and cavity searches are prohibited and vehicles are not to be detained for longer than necessary to search it for a dangerous thing.

Identification

37. In relation to the s. 51S requirement for the identification of members, it is currently the case that all members are required to have their surnames affixed to the front of their uniforms. To meet the requirements of the Bill each member to whom this requirement applies will have their service numbers also attached to the front of their uniforms. These numbers are strictly individual to the member and will allow his or her precise identification. These steps are specific obligations imposed upon the CDF under the Bill.

Detention

38. Under s. 51U of the Bill members are required to inform a person of the substance of an offence they are being detained for except where the circumstances make this clear or the detainee makes it impracticable for the member to inform them. Members will be provided training in this respect and in fact all response force troops are currently trained to this requirement which is the existing standard for citizens arrest. Training will include standard, simplified types of wording relating to the relevant offences.

Use of Force

39. Particular care will be taken to ensure members are trained in the appropriate selection of force for a range of given circumstances. This will reflect the requirements spelled out in s. 51T of the Bill which specifies the test of "reasonable and necessary" force. In particular the section states that a member must not do anything that is likely to cause death or grievous bodily harm unless they believe on reasonable grounds that it is necessary to protect life or prevent serious injury to another person or there is no other way to apprehend an escaped detainee. These notions are themes of training ADF members currently receive for many peace operations.

40. Standard methods of providing such training include practical outdoor scenarios. Members are shown demonstrations of situations and right and wrong applications of force. They are able to ask questions on these scenarios and the scenarios themselves are varied to enable the best possible mental reference for the members. In addition a multi-media interactive training package has been produced which canvasses the law relating to self-defence in some depth and enables the member to once again consider a number of situations, which are graphically portrayed, requiring selection of the correct decision. Legal officers are at hand to assist with the delivery of this training and in answering questions. Members will be made clearly aware that they remain subject to investigation and judicial review of their decisions to use force and will be held criminally responsible for any failure to apply reasonable and necessary force. The Bill does nothing to alter their current status in this respect.

41. In relation to the pressing short term need arising from the Olympics, a team has been raised to provide specific training regarding the Bill which will deploy to all the Olympic event locations. The concept behind the team is that it will run "train-the-trainer" sessions that will create wider pools of trainers to enable all ADF personnel who may be called upon during the Olympic period to provide assistance, to be properly trained. This training will include instruction in techniques to enable de-escalation and unarmed restraint to seek to resolve situations with the minimum level of force or the avoidance of the use of force.

G. CONCLUSION

42. Australian governments, Federal, State and Territory and the Australian community have, since Federation, continued to regard the role of assistance to the civilian authorities as an appropriate one for the ADF. While ever this remains the case there will be a need to provide a proper legal framework for the employment of the ADF on these tasks. This Bill and its associated policy have been prepared in the closest cooperation between Defence and the Attorney General's Department over the last two and a half years. It reflects the well understood and agreed tasks expected of the ADF by all Commonwealth, State and Territory law enforcement authorities under the NATP. The Bill has taken a situation of procedural uncertainty and disregard for the status of ADF members and the information of the community and provided a proper democratic framework of control, accountability, authority and safeguards.

43. Defence is strongly committed to ensuring that the role of the ADF in DFACP is strictly limited and in this respect the Bill provides a high threshold and mechanisms for ensuring government oversight and careful demarcation of the areas in which tasks will be performed. Most importantly it enables the ADF to train and prepare for this role for the first time with

some degree of certainty and provides reasonable protection for the members by spelling out their lawful authority. The Bill is long overdue and brings Australia up to date with other developed democratic nations. The passage of the Bill will also send a strong message that Australia is prepared to meet its security responsibilities to its own and the international community and therefore forms part of our deterrence posture.