

DISSENTING REPORT BY GREENS SENATOR BOB BROWN

1.1 Senator Brown recommends that this bill be opposed.

1.2 The Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005 will allow the Government to:

- further circumvent safeguards in the Constitution which limit the use of the defence force in domestic conflict;
- expand the powers of the defence force when called out to suppress domestic unrest: and
- give greater immunity to members of the defence force if they misuse their powers.

Protests and industrial disputes at risk

1.3 The Government has argued the new powers are necessary to fight terrorism, however the laws have significant broader implications including the capacity to use the defence force against peaceful civil protests and in industrial disputes.

Bill may exceed constitutional power

1.4 The Government claims this bill is primarily codifying existing practice, while meeting the new and unprecedented threat posed by contemporary terrorism. However the bill will also legislate powers that may exceed the Constitution and certainly will create legal immunities that should not be provided to the military in a domestic context.

Policing should be left to the police

1.5 Senator Brown believes that the primary role of policing should be performed by police. If the military are to be used in a domestic context their powers should be tightly circumscribed and they should not have greater immunity than that currently granted to the police.

Too much power in hands of government

1.6 This bill places few limits on members of the Australian Defence Force called out by the Prime Minister or two of their senior Ministers. Under this bill members of the ADF are provided significant legal immunity if they act illegally in following orders and are shielded from prosecution by state authorities.

1.7 While the bill outlines the processes for the call-out of troops it places few limits on the ministers, chief of defence or the troops. The explicit limits in s.119 of

the Constitution, requiring a state executive to request a call-out, are effectively circumvented.

1.8 The bill provides inadequate definitions of terms upon which its whole premise and justification are based. The call-out is based on the broad term “domestic violence” which encompasses a wide range of disorders. The use of the term “critical infrastructure” means a call-out of the troops could occur in a wide range of circumstances.

1.9 History shows that the use and abuse of military power by governments is a common feature of authoritarianism. Democracies must place limits on the use of the military by governments.

1.10 While Senator Brown is opposed to this bill the following two recommendations would significantly improve accountability as well conformity of the bill with international law.

Accountability to Parliament

1.11 Senator Brown accepts that there are circumstances in which the military may be needed to assist civilian authorities. In those circumstances a prompt decision by the executive may be needed.

1.12 However, there is no reason that such decisions should not be subsequently ratified or overruled by the Parliament representing the people of Australia. Such protection could be an important bulwark against the inappropriate, or at worse, authoritarian use of the military by any future government.

1.13 The bill allows the Prime Minister, without reference to either his colleagues or the Governor General to call out the troops to suppress domestic disorders. The Parliament should not place in the hands of one person such enormous power.

Recommendation 1

1.14 That all orders made under Part IIIAAA of the Defence Act 1903 trigger a recall of Parliament and be subject to disallowance by either House of Parliament.

Conformity with the International Covenant of Civil and Political Rights

1.15 Evidence to the inquiry from the Human Rights and Equal Opportunity Commission outlined how the bill may contravene the right to life contained in Article 6 of the International Covenant on Civil and Political Rights.

1.16 In particular the Commission noted that proposed clause 51T(2A) and 51T(2B) 'impermissibly widens the circumstances in which the Defence Force are authorised to use lethal force' beyond the limits set by international law.¹

1.17 These clauses allow the use of force, including lethal force, if a member of the ADF believes it is necessary, on reasonable grounds, to 'protect critical infrastructure against a threat of damage or disruption to its operation.'

1.18 Senator Brown shares the concerns of a number of submitters to the inquiry, including the NSW Council for Civil Liberties, that such broad grounds for the use of lethal force could be used against groups of people or individuals who, while posing a threat of disruption or even damage to infrastructure, would not pose a threat to life. For example, protesters or striking workers could be subject to these shoot-to-kill powers.

Recommendation 2

1.19 That proposed s.51T(2A) and s.51T(2B) be removed from the Bill.

Immunity from prosecution

1.20 The bill provides for a defence of superior orders for members of the ADF who are subject to prosecution for actions taken during a callout.

1.21 Senator Brown agrees with Dr Ben Saul of UNSW's Centre of Public Law who stated in a submission to the inquiry that '[t]here is a danger that such a defence would result in impunity for serious violations of the rights of Australian citizens and residents.'²

1.22 The bill also removes members of the Australian Defence Force deployed during a call-out from the jurisdiction of state and territory criminal law. This prevents any State Director of Public Prosecutions from instituting proceedings against members who may use their powers illegally during a call out. The power to prosecute should not be left in the hands of the Commonwealth DPP who could be subject to the direction of the same ministers who made the call-out order.

1.23 Dr Ben Saul of UNSW's Centre of Public Law suggested a solution to this problem in his submission to the inquiry:

State and Territory prosecutors could, for example, be empowered to investigate and prosecute in circumstances where the Commonwealth DPP is unable or unwilling to prosecute, under a complementarity regime similar to that applicable under the Rome Statute of the International Criminal Court.³

¹ Human Rights and Equal Opportunity Commission, Submission 13, p. 12

² UNSW Gilbert & Tobin Centre for Public Law, Submission 10

³ UNSW Gilbert & Tobin Centre for Public Law, Submission 10

1.24 Senator Brown would support such an approach.

Inquiry inadequate

1.25 The truncated inquiry into this bill operated over a very short period of time. Senator Brown is concerned that the public has not had sufficient time to become aware of the significant new powers for the government and the military proposed in the bill.

1.26 Examination of such an important piece of legislation should not be conducted in such a perfunctory manner.

1.27 The bill should be opposed.

Senator Bob Brown

Australian Greens