

# **Department of Defence Submission to Senate Legal and Constitutional Committee Inquiry into Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005**

## **Executive Summary**

The Department of Defence's submission to the inquiry into the *Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005* outlines the background and purpose of Part IIIAAA of the *Defence Act 1903* and the proposed amendments.

Part IIIAAA was the subject of a statutory review by Anthony Blunn AO and General John Baker AC DSM (Retd) that was tabled in Parliament in January 2004. The key findings and subsequent recommendations of the review have been addressed in the Bill and are included in this submission. The submission covers the need for changes to Part IIIAAA, noting in particular the significant developments in the security environment since the enactment of Part IIIAAA in September 2000.

The consequent expansion of the scope of potential ADF actions in support of domestic security operations is also discussed.

The current restrictions of Part IIIAAA and the specific changes necessary to address these restrictions and therefore provide an effective basis for future ADF action in support of domestic security operations are also addressed. There are nine specific areas requiring change that are covered in the Bill.

The fundamental principles of Defence Force Aid to the Civil Authorities form the underlying framework for the Bill. Civilian authorities (State and Territory police) will continue to have primary responsibility for responding to a domestic security threat. The use of the ADF in domestic security will be a last resort only. Should ADF support be required, the provisions of the Bill provide greater flexibility and will provide an effective and enduring basis for the employment of the ADF in support of domestic security operations.

The Bill now provides the ADF personnel with the legal authority to take those actions necessary to achieve the objectives of the call out and provides appropriate legal protection to those personnel involved in those actions while making it clear that they do not operate outside the boundaries of Australian criminal law.

## **Introduction**

This Bill will facilitate the employment of the ADF by the Government in preventing, deterring or responding to threats to Australia's domestic security. The Bill is a response to evolving security threats to Australia and will provide appropriate powers and protections for the ADF operating under Part IIIAAA in the land, air and offshore environments.

The fundamental principles of Defence Force Aid to the Civil Authorities form the underlying framework of the Bill. The provisions within are robust and flexible and will provide an effective basis for the employment of the ADF in support of domestic security operations now and into the future.

## **The Creation of Part IIIAAA**

Part IIIAAA of the Defence Act 1903 was enacted on 12 September 2000 to allow potential application in response to threats to the Sydney Olympic Games later that month. It was intended to provide a legislative basis for Defence aid to civil authority in only a narrow set of circumstances within what might be termed "domestic violence" occurring or likely to occur. At that stage, before September 11, only a limited set of circumstances requiring ADF assistance were envisaged.

There has not been any call out of the ADF under Part IIIAAA since its inception. Any experience in its application has been gained from planning and exercise activities.

## **Statutory Review of Part IIIAAA**

Subsection 51 XA (3) of the Defence Act required the Minister for Defence to arrange for an independent review of the operation of Part IIIAAA as soon as practicable after 12 September 2003. A statutory review conducted by GEN John Baker (Retd), Mr Anthony Blunn AO and Mr John Johnson was tabled in Parliament on 2 March 2004.

The review made the following observations of Part IIIAAA:

- (a) Part IIIAAA included processes that were time consuming and complex, negating its effectiveness in short-notice incidents;

- (b) Part IIIAAA was limited in scope and based primarily on siege/hostage concepts;
- (c) Part IIIAAA did not provide for anticipatory operations by the ADF to protect infrastructure or disrupt terrorist planning;
- (d) the level of proscription in Part IIIAAA did not accommodate rapidly evolving terrorist scenarios;
- (e) Part IIIAAA placed undue restrictions on the use of Reserve forces; and
- (f) Part IIIAAA suffered from a lack of clarity regarding the legal responsibilities of ADF personnel.

The statutory review made the following recommendations on Part IIIAAA:

- (a) the scope of the application of Part IIIAAA be reconsidered;
- (b) the call-out and authorisation procedures under Part IIIAAA be reviewed;
- (c) action be initiated to resolve the practical limitations of Part IIIAAA, in particular the use of Reserve forces; and
- (d) action be initiated to provide appropriate recognition to the military context in which members of ADF engaged in domestic security operations must act.

### **The Need for Changes**

These recommendations provided the framework for the development of amendments to Part IIIAAA. Indeed, analysis underpinning the amendments confirmed the enduring currency of the statutory review. In particular it was clear that the current legislative basis for ADF operations in support of domestic security does not reflect: the evolving threat environment; recent security initiatives such as the establishment in March 2005 of the Joint Offshore Protection Command; or the potential range of tasks faced by both Permanent and Reserve forces in periods of heightened alert.

### **The Evolving Threat**

The evolving threat environment is presenting increasing challenges to State, Territory and Federal Governments. The scope of the threat outlined within the statutory review has been reinforced by recent terrorist operations both regionally and globally:

- Terrorist techniques now commonly use innocent bystanders as targets rather than simply as hostages;
- Mass civilian casualties may be a terrorist objective;
- Suicide is commonly used by terrorists;
- Warning times of impending action may be very short or non-existent;
- Deterrence is not a realistic concept against terrorist groups or individuals welcoming martyrdom in support of their cause;
- Much greater reliance must be placed on intelligence, surveillance and border controls to provide adequate warning and a first line defence;
- There is likely to be greater call for anticipatory action possibly involving the ADF to secure potential targets indicated in intelligence assessments;
- Approval process for the authorisation of military assistance to the civil authority (after call-out) must be available at very short notice or “delegated” at the time of call-out in limited circumstances such as APEC or M2006;
- Incidents may go beyond a single site and consist of series of situations or involve rapid movement rather than a static stronghold;
- The use of chemical, biological, radiological or nuclear agents in urban environments can not be ruled out; and
- A terrorist incident at one site might prompt the need for concurrent protection of other targets across Australia.

### **The Scope of ADF Responsibilities**

The amendments to Part IIIAAA will retain existing processes and provide greater transparency for the role of the ADF in operations in support of domestic security. In particular the amendments clarify the scope of ADF responsibilities for undertaking activities that would be otherwise authorised under section 61 of the Constitution and where there are no written guidelines (such as for aviation, maritime and infrastructure protection operations).

The proposed amendments to Part IIIAAA will clarify accountabilities, facilitate the effective use of ADF capabilities and ensure that there are adequate legal protections for ADF personnel when conducting domestic security operations.

The proposed amendments to Defence legislation do not constitute a change to the fundamental principles underlying Part IIIAAA. In particular, while the current threat environment is likely to remain dynamic, the use of the ADF in domestic security operations remains one of last resort. Equally, retention of the military chain of command and the primacy of the civil authorities underpin the proposed amendments to Part IIIAAA.

### **The Amendments**

There are nine areas that are the focus for amendments to Part IIIAAA of the *Defence Act 1903*. They are:

- The use of Reserve Forces in domestic security operations;
- Identification of ADF personnel;
- Public notification of some ADF activities;
- ADF powers to resolve mobile terrorist incidents;
- Expedited call-out procedures;
- Critical infrastructure protection;
- The role of the Commonwealth Director of Public Prosecutions;
- The creation of an ‘aviation’ division within Part IIIAAA; and
- The creation of an ‘offshore’ division within Part IIIAAA

#### **1. The use of Reserve Forces in domestic security operations**

Currently there are restrictions within Part IIIAAA limiting the use of Reserves unless the authorising Ministers are satisfied that sufficient numbers of the Permanent Forces are not available. This does not reflect the increasingly integrated nature of the ADF or niche capabilities established specifically for domestic security tasks (such as the Reserve Response Force). In circumstances of a large scale incident of domestic violence occurring it would be limiting and reduce operational flexibility to deploy only Permanent Forces. In some cases Reserves might be better positioned to respond.

The Bill removes these restrictions to ensure the ADF can, if required, provide a timely and effective response to a domestic security incident. The Reserve Forces will

operate under the same statutory authority as Permanent Forces with the same powers and protections.

## **2. Identification of ADF personnel**

Currently a response to a domestic security incident involves specialist members who conduct specific operations (such as the Tactical Assault Group) and supporting forces who undertake tasks such as cordon and search operations. Supporting forces are required to wear uniform including surname identification.

Part IIIAAA has been amended so that ADF personnel such as the Tactical Assault Group who conduct assault operations are not required to wear surname identification if they are also required to conduct cordon and search tasks. Preserving the anonymity of such specialist forces is an important operational requirement. A suitable numeric or other form of identification will instead be developed. This will ensure that the identity of Special Forces members is protected.

## **3. Public notification of some ADF activities**

There is currently a requirement to broadcast on radio or television the establishment of a General Security Area and a Designated Area in the event of a domestic security incident. This requirement may jeopardise a clandestine siege/hostage recovery operation under Part IIIAAA.

This Bill will reduce the notification and broadcast requirements in limited circumstances where ADF elements are called out and a public broadcast would prejudice a specific operation.

## **4. ADF powers to resolve mobile terrorist incidents**

Part IIIAAA was designed primarily to resolve siege / hostage situations, where the location of a threat is well known and where there is sufficient warning time to undertake the arrangements for call-out. This is not suitable given the wide range of potential threats in the current threat environment, and the need for the ADF to be employed in a flexible and responsive manner.

Part IIIAAA has been amended so that the powers of ADF personnel apply to an incident or event (or series of events) rather than the narrowly-focussed ‘subject premises’ currently found within the Act. This Bill includes powers to conduct actions in support of the civil authorities, such as:

- Prevent acts of violence;
- Protect persons;
- Recapture a location or thing;
- Seize dangerous items related to a threat;
- Control the movement of persons or means of transport; and
- Evacuate persons to a place of safety.

## **5. Expedited call-out procedures**

The current call-out mechanisms were developed in the pre-11 September 2001 strategic environment where it was assumed that there would be graduated response to a terrorist event. These mechanisms have a limited application in the event of a rapidly developing threat (such as a rogue aircraft or fast-moving vessel). Threats are now likely to emerge with little or no warning and would quickly outpace the usual call-out processes. It is vital to ensure that there are flexible response mechanisms in place to enable call-out of the ADF in the event of a sudden and extraordinary emergency.

The Bill provides for a streamlined call-out process. Under this process, the Prime Minister is authorised to call-out the ADF in the event of a sudden and extraordinary emergency, where it is not practicable for a ‘normal’ call-out order to be made. Call-out can also be authorised by the two other authorising Ministers (Minister for Defence and Attorney-General) in the event the Prime Minister cannot be contacted.

In order to ensure an expedited call-out, orders need not be made in writing. That is, a verbal order from the Prime Minister (or the two authorising Ministers) to the CDF would be sufficient to initiate call-out. In the event such an order is not made in writing, the Prime Minister (or the two other authorising Ministers) must each make a



written record of the order, sign the record and cause the signing of the record to be witnessed.

## **6. Designated Critical Infrastructure Protection**

The increasingly close interrelationships between infrastructure, critical services and facilities means that the destruction or disabling of a system or structure may have significant flow-on effects that would result in loss of life. There is a requirement to ensure that in the event a threat is likely to overwhelm the capacity of civil authorities, there is sufficient statutory authority for the ADF to be called out and protect infrastructure.

Part IIIAAA has been amended to provide the ADF with the authority to protect infrastructure that is designated as critical infrastructure by authorising Ministers. The authorising Ministers must first be satisfied that an attack on infrastructure will result in the direct or indirect loss of life or serious injury before directing the CDF to utilise the ADF to protect infrastructure.

## **7. The Role of the Commonwealth Director of Public Prosecutions**

Use of the ADF in a domestic security operation has the potential to result in damage to property, serious injury or death. It is possible that domestic security operations will be cross-jurisdictional. This emphasises the importance of a consistent approach to any consideration to prosecute ADF personnel following such an operation.

As the ADF is a Commonwealth entity operating under Commonwealth law (in this case the Defence Act) it is appropriate that any prosecutions arising from a domestic security operation should also be considered by the Commonwealth Director of Public Prosecutions (CDPP). The Bill ensures that the CDPP will assume responsibility for any prosecution of ADF personnel following allegations of unlawful activity when operating under Part IIIAAA. The Bill will also ensure that a uniform set of criminal laws can be applied and the ADF is able to prepare and train for potential domestic security operations under a consistent legal framework. The laws of the Jervis Bay Territory will apply to ADF personnel in the event of a prosecution resulting from a domestic security operation.

In addition the amendments will provide for a defence of superior orders for ADF personnel when operating under Part IIIAAA. This defence is not absolute and does not exempt ADF personnel from the operation of the criminal law when operating under Part IIIAAA. The provision clarifies how the concept of lawful authority applies when an ADF member acts on the basis of a superior order. This ensures that there is not doubt of the part of the ADF member or the public regarding the legal position of the ADF when conducting operations in support of domestic security. This also removes potential inconsistencies where the criminal courts would otherwise be required to determine for defences such as lawful authority apply in a military context.

#### **8. The Creation of an ‘Aviation’ Division within Part IIIAAA**

Currently there are no provisions within Part IIIAAA to enable the ADF to conduct operations against air threats. At present these operations would be authorised by the Government using the executive power in section 61 of the Constitution. As a consequence, ADF personnel would not receive the same powers and protections currently afforded when conducting land-based operations.

A new aviation division within Part IIIAAA has been developed to enable call-out of the ADF to respond to incidents (threats to Commonwealth interests) in the air environment. The intent is to ensure that there are sufficient powers and protections to enable the ADF to resolve aviation security incidents in the protection of State, Territory or Commonwealth interests. The ADF is the only agency equipped to respond to airborne incidents.

#### **9. The Creation of an ‘Offshore’ Division within Part IIIAAA**

Currently there are no provisions within Part IIIAAA to enable the ADF to conduct offshore maritime counter-terrorism activities. Current operations are authorised by the Government using the executive power in section 61 of the Constitution. As a consequence, ADF personnel do not receive the same powers and protections currently afforded when conducting land-based operations.

Compounding these restrictions, the ADF is likely to be the only agency equipped to conduct maritime counter-terrorism operations. The current Part IIIAAA is 'land-centric' in its application in parts and generally does not apply in the offshore area. A new division within Part IIIAAA has been developed to enable call-out of the ADF to respond to incidents (threats to Commonwealth interests) in offshore areas. This division applies a similar range of powers (and constraints), as covered in the land environment, to ADF operations offshore

## **Conclusion**

Part IIIAAA was intended to provide a clear and accessible legislative basis for the use of the ADF as a last resort in aid to civil authorities to protect the interests of the Commonwealth and States and Territories against domestic violence in Australia. The changes to the legislation ensure that Part IIIAAA will achieve this vital objective. The Bill reflects the more complex and evolving threat environment, Australia's recent security initiatives, and the increasing range of tasks that would face the ADF when supporting Australia's domestic security operations in the land, air and maritime environments.

The Bill will provide the ADF personnel with the legal authority to take those actions necessary to achieve the objectives of the call out and provides appropriate legal protection to those personnel involved in those actions.