

**Senate Legal and Constitutional Committee**

**Inquiry into the provisions of**

**Defence Legislation Amendment (Aid to Civilian Authorities) Bill  
2005**

**Questions on Notice**

**Question 1**

*Senator LUDWIG—The difficulty is also that you are describing something that would be interlocutory in nature. The difficulty then is whether you intend to have merits review under section 39B of the ADJR Act or use the original jurisdiction of the High Court for prerogative writs. What you are trying to suggest is very hazy, unless you can bring to it a bit more sharpness. It does not seem to make sense to me, unfortunately, unless you can explain how you intend to define ‘standing’. In other words, is ‘standing’, in being able to take an action—where that action is going to be interlocutory in nature because it is going to stop the military or the minister from doing some action or force the minister to revoke a ministerial decision—going to be based on merits review or law? And, if it is by operation of law, what you are saying should be reviewed is ministerial discretion, and that is very hard.*

AMCRAN has sought advice from academics knowledgeable in the field of administrative law and constitutional law to examine possible practical suggestions for mechanisms for review. However, given the complexity of the issues highlighted by the Committee, this may take some time. We will provide their advice as soon as possible to the Committee.

**Question 2**

*CHAIR—Yes, and Mr Khan indicated that would be the case. I wanted you to have a look at your references to the application of the laws of the Jervis Bay Territory and the points made in part 7 of the Department of Defence’s submission to clarify the point that you were making, because I am not sure that I quite understood the detail of that. That would be helpful for us.*

We thank the Committee for the opportunity to clarify our statement in this regard.

Proposed s 51WA provides for crimes perpetrated by members of the ADF acting under Part IIIAAA to be charged under the laws of the Jervis Bay Territory. One complication is that charges would be laid by the Commonwealth Director of Public Prosecutions who is ultimately directed by the Attorney-General, who may have been one of the authorizing ministers for the call out. In some

cases, therefore, this constitutes a conflict of interest.

Part 7 of the Department of Defence submission states that:

"As the ADF is a Commonwealth entity operating under Commonwealth law, it is appropriate that any prosecutions arising from a domestic security operation should also be considered by the Commonwealth Director of Public prosecution ... The laws of the Jervis Bay Territory will apply to ADF personnel in the event of a prosecution resulting from a domestic security operation."

However, when ADF personnel are acting within a State or a Territory, citizens of a State or a Territory of the Commonwealth will assume – and this would seem to be a reasonable assumption – that they are subject to the laws of that State or Territory in which they are present. This follows from the well-established principle of equality before the law: that two individuals in the same context who commit the same crime should be treated equally. If this is not the case, this would be perceived to be putting ADF personnel above the law, and it would also lead to people being confused about their rights in dealing with ADF personnel.

In their submission, the Department of Defence argues that the "security operations will be cross-jurisdictional" as a grounds for their being a necessity for one consistent set of laws to apply. However, this need not be the case. For example, many large corporations operate in a number of states, and thus they too are "cross-jurisdictional". Multi-state and Multi-national corporations are expected to abide by both the State laws (such as State fair trading laws), as well as Commonwealth law (such as the Trade Practices Act 1974).

For these reasons, we believe that for call-out activities within a state, the laws of the state in which the activity is conducted should be applied and ADF personnel should be tried under normal procedures within that state. If they commit an offence under the Commonwealth *Criminal Code*, they should also be charged under that law. This is identical to the treatment of other citizens.

This does leave the question open as to what happens in offshore areas which are outside state or territory jurisdiction. In such a situation, the suggestion of using the laws of the Jervis Bay Territory is appropriate.