



Federation of Community Legal Centres (Vic) Inc

16 January 2006

Committee Secretary  
Senate Legal and Constitutional Legislation Committee  
Parliament House  
Canberra ACT 2600  
Email: legcon.sen@aph.gov.au

Dear Secretary

**Submission Regarding the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005 (Cth)**

We understand that the Senate Legal and Constitutional Legislation Committee is currently conducting an inquiry into the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005 (Cth). We enclose a submission detailing our views on this Bill to assist the Committee's inquiry.

The Federation of Community Legal Centres Vic. Inc ('the Federation') is the peak body for forty-nine Community Legal Centres ('CLC's') across Victoria, including both generalist and specialist centres. This submission has been prepared on behalf of the Federation by its Anti-Terrorism Laws Task Group, in consultation with various other members of the Federation.

The Anti-Terrorism Laws Task Group is one of a number of issue-specific working groups within the Federation comprising workers from member centres. This Task Group supports CLC's to provide targeted community legal education programs for communities affected by the State and Commonwealth anti-terrorism laws and supports CLC lawyers to provide up-to-date legal advice to clients affected by the State and Commonwealth anti-terrorism laws. The Task Group also works to monitor the impact of State and Commonwealth anti-terrorism laws on affected communities and individuals.

Should you have any questions regarding our submission, please do not hesitate to contact Marika Dias, Convenor, Anti-Terrorism Laws Working Group on (03) 9363 9924 or via [Marika\\_Dias@fcl.fl.asn.au](mailto:Marika_Dias@fcl.fl.asn.au).

We hope that the Committee will give due consideration to the matters raised in our submission during the course of its inquiry. We would welcome any opportunity to elaborate further on our submission should the Committee require additional input.

Yours sincerely

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**SUBMISSION OF THE FEDERATION OF COMMUNITY  
LEGAL CENTRES (VIC.) INC**

**TO THE SENATE LEGAL AND CONSTITUTIONAL  
LEGISLATION COMMITTEE**

**DEFENCE LEGISLATION AMENDMENT (AID TO  
CIVILIAN AUTHORITIES) BILL 2005 (CTH)**

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**January 2006**

**This submission was prepared by Marika Dias, Convenor, Anti-Terrorism  
Laws Working Group (with the assistance of Helen Arblaster) on behalf of  
the Federation of Community Legal Centres (Vic).**

## **About The Federation Of Community Legal Centres Victoria**

The Federation of Community Legal Centres Vic. Inc ('the Federation') is the peak body for forty-nine Community Legal Centres across Victoria, including both generalist and specialist centres. Community Legal Centres ('CLC's') assist in excess of 60,000 people throughout Victoria each year by providing free legal advice, information, assistance, representation, and community legal education.

Overwhelmingly, the people who use CLC's are on low incomes, with most receiving some form of pension or benefit. CLC's also see a considerable number of people from culturally and linguistically diverse communities.

The Anti-Terrorism Laws Working Group is one of a number of issue-specific working groups within the Federation comprising workers from member centres. This Working Group supports CLC's to provide targeted community legal education programs for communities affected by the State and Commonwealth anti-terrorism laws and supports CLC lawyers to provide up-to-date legal advice to clients affected by the State and Commonwealth anti-terrorism laws. The Working Group also monitors the impact of State and Commonwealth anti-terrorism laws on affected communities and individuals.

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## **Introduction**

This submission relates to the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005 (Cth) ('the Bill').

The Federation has a number of broad concerns regarding the possible passage of the Bill. We will also discuss several key issues, which arise from specific provisions of the Bill.

## **Justification**

The Explanatory Memorandum to the Bill ('the Explanatory Memorandum') indicates that it is intended 'to improve responsiveness of the Australian Defence Force ('ADF') to domestic security incidents in the current threat environment'.<sup>1</sup> The Explanatory Memorandum suggests that each Schedule of the Bill is designed to counter terrorist activity. It would therefore seem that the 'threat environment' referred to above, is the threat of terrorist activity.

The Federation is concerned that the Bill represents an unjustifiable and disproportionate legislative response to the threat of terrorist activity, particularly given the extraordinary nature of the amendments contained in the Bill. It is our understanding that the national terrorism threat level, as assessed by the Australian Security Intelligence Organisation ('ASIO') has remained at 'medium' level since 11 September 2001, notwithstanding various overseas terrorism events in the intervening period. This means that a terrorist act 'could' occur in Australia but is neither 'likely' (which would attract a 'high' level assessment) nor 'imminent' (which would attract an 'extreme' level assessment). Given this assessment, we do not believe that an extreme legislative response is required. We take the view that extraordinary legislation, such as the Bill, is particularly

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<sup>1</sup> *Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005, Explanatory Memorandum*, Circulated by the Minister for Defence, Senator Robert Hill, 2004-2005 ('Explanatory Memorandum'), 2.

unjustifiable in a context where our national security agencies are only able to indicate that a terrorist act may, or similarly may not, occur.

As the level of terrorist threat has remained unchanged in the last four to five years, we would also question the necessity of legislative change. We raise this question particularly in light of the amendments made by the *Defence Legislation Amendment (Aid to Civilian Authorities) Act 2000 (Cth)* ('the 2000 Amendment Act'), which originally vested the government with legislative call-out powers and the non-use of those powers to date. The Bill substantially broadens the government's power to make call-outs and also broadens the powers of the ADF once a call-out is made. In our submission, it has not been demonstrated that these extensions of power are necessary.

### **Building on the 2000 Amendment Act**

The Federation notes the haste with which the 2000 Amendment Act was passed and the lack of public debate, media attention and due consideration prior to its enactment. At the time the impending Olympic Games were cited as the reason for its swift passage. The Federation is concerned that the current Bill, which supplements and broadens the powers afforded by the 2000 Amendment Act, is indicative of legislative creep. In as much as the 2000 Amendment Act was not afforded due scrutiny, all further extensions of that Act such as the Bill are based on inadequately debated and hastily considered primary legislation. As a result, the amendments proposed by the Bill must be viewed in light of the extraordinary nature of the changes brought about by the 2000 Amendment Act.

While we acknowledge that the Bill is largely a response to recommendations emerging from the statutory review of the 2000 Amendment Act, we are concerned that this review was not reflective of broader public opinion and was

severely limited in its scope.<sup>2</sup> The 2000 Amendment Act provides for a three year review to be conducted by a review panel, the members of which are to be appointed by the defence minister, or by parliamentary committee. To our knowledge, the review was conducted by Anthony Blunn, former Secretary of the Attorney-General's department, John Baker, retired Chief of the Defence Force and John Johnson, former Federal and Tasmanian Police Commissioner. Given the constituency of the review panel, it is more than likely that this review was more indicative of the views of government, military and law enforcement officials rather than of the broader community. This was compounded by the fact that in preparing the report there was only consultation with the Attorney-General, the Prime Minister's Office, the Australian Security Intelligence Organisation, the Chief of Defence, departmental heads and the States and Territories. That is, there was no general public consultation. Furthermore, given the obvious vested interest that government, military and police officials have in this particular piece of legislation, it can hardly be said that this three year review was entirely independent.

Given the haste with which the 2000 Amendment Act was passed, the lack of public debate prior to its passage and the extraordinary powers it vests in government and the ADF, in our opinion the review process has been grossly inadequate and of grave concern.

In light of these issues, we submit that the 2000 Amendment Act requires serious reconsideration and that any further expansions of power should not take place before it is adequately considered and publicly debated.

## **Militarisation of Society**

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<sup>2</sup> Department of Defence, *Statutory Review of Part IIIAAA of the Defence Act 1903 (Aid to Civilian Authorities)*, Australian Government, Canberra (2004).

The Federation is deeply concerned that the Bill is part of an increasing militarisation of society, which has largely been justified by the so-called war on terror. It is our view that use of the military to supplement civilian power is an inordinate incursion on civil liberties and a dangerous extension of state apparatus.

The Federation is particularly concerned about three potential ways in which the call-out power may be used:

- to respond to the arrival of boats of asylum seekers;
- to respond to protests and political activism;
- to respond to industrial action.

### Asylum Seekers

The Federation is of the belief that the military should not be used to apprehend or deter the arrival of asylum seekers to Australia. The use of the military in the widely known *Tampa* and *Siev 4* cases are particularly telling examples.<sup>3</sup> In the case of the *MV Tampa*, a large number of soldiers boarded the ship with intention of taking into detention asylum seekers who had been rescued after their own boat encountered problems. The subsequent dispatch of navy ships and air-force planes to prevent refugee boats nearing Australian shores was another perturbing use of military power. In the case of the *Siev 4*, shots were fired towards the boat which itself was overcrowded and sinking. These are recent examples of the use of the military against asylum seekers notwithstanding the right to make onshore applications for asylum. It is particularly telling that these incidents have occurred in the context of a government which, generally speaking, has vigorously pursued an exclusionist policy with respect to asylum seekers. The amendments proposed in the Bill significantly increase the likelihood that, in the future, the military may be used to enforce the policy of the government of the day with respect to asylum seekers.

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<sup>3</sup> For a more detailed discussion of these examples see Michael Head, *Calling out the Troops – Disturbing Trends and Unanswered Questions*, submission to this enquiry, 5.

The amendments contained in Schedule 1, and in particular the amendment to Section 51A of the Defence Act 1903 ('the Defence Act'), make it highly likely that the ADF will be called-out to deter or prevent the arrival of asylum seekers.<sup>4</sup> Pursuant to the Bill, the authorising Ministers may authorise call-out of the ADF where they are satisfied that there is a threat in the Australian offshore area to 'Commonwealth interests'.<sup>5</sup> The Bill removes the requirement that the call-out be aimed at protecting Commonwealth interests against 'domestic violence'. Furthermore, the term 'Commonwealth interests' remains undefined and therefore is open to very broad interpretation. As a result, the authorisation of a call-out will depend largely on the policy of the government of the day and how it defines the interests of the Commonwealth. Clearly, under the present government, the deterrence or interception of asylum seekers would be readily regarded as in the Commonwealth interests.

The Federation is deeply concerned that, when used in combination with section 198A of the *Migration Act 1958 (Cth)*, the Bill may have the effect of permitting ADF personnel to use weapons against unarmed asylum seekers simply for the purpose of detaining or removing them. The *Migration Act* already permits the use of 'necessary and reasonable' force to prevent off-shore entry to Australia.<sup>6</sup> The broad terms used in the Bill make it much more likely that the ADF will be called-out to respond to a situation of off-shore entry and therefore the possibility that force or weaponry will be used against asylum seekers is also increased. In addition, the proposed section 51SE also permits that use of force against a vessel or aircraft, up to and including destroying the vessel or aircraft.<sup>7</sup>

In our view the ADF should not, under any circumstances, be called-out to deter or prevent the arrival of asylum seekers. In particular, such usage of the ADF

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<sup>4</sup> Proposed s51AA, *Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005 (Cth)* ('The Bill')

<sup>5</sup> *ibid*

<sup>6</sup> s 198A, *Migration Act 1958 (Cth)*

<sup>7</sup> Proposed s 51SE(1)(a)(i), *The Bill*



would be in direct contravention of the *Convention Relating to the Status of Refugees*. Insofar as it permits, and even facilitates the use of military intervention to deter or prevent the arrival of asylum seekers, the Federation is fundamentally opposed to the Bill's passage. If the Bill is to be passed, however, an exception relating to asylum seekers should be provided for.

### Political Protest

The Federation is also opposed to the use of military personnel to control or suppress political demonstrations and protesting. In our view, military call-outs in response to political protest are both undemocratic and dangerous. Both the 2000 Amendment Act and the Bill extend the government's capacity to call-out the military to respond to political demonstrations insofar as they may readily be classed as 'domestic violence' – this term being undefined in the 2000 Amendment Act and in the Bill. Further, the use of the ADF in relation to protests is specifically contemplated in section 51G, which provided that ADF must not stop or restrict any protest, dissent, assembly or industrial action except where there is a reasonable likelihood of death, serious injury or serious property damage.<sup>8</sup> Despite this attempt to protect political dissent, given the general lack of clearly defined terms in the Bill and the 2000 Amendment Act, the government would be afforded a broad discretion in deciding whether to call-out the ADF. This makes it more likely that the ADF may be called out to deal with political protest which challenges the policies of the government of the day. In this regard the Bill is a serious threat to fundamental democratic principles and it therefore has no place in a modern, democratic society.

Furthermore, the use of armed soldiers against unarmed protesters may more easily lead to civilian casualties than intervention by ordinary law enforcement officers. In particular, the provisions relating to call-outs where there is a threat to critical infrastructure permit the use of force in order to protect the designated

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<sup>8</sup> Propose s 51G, *ibid*

critical infrastructure or the life of another.<sup>9</sup> This may include acts that cause grievous bodily harm or death.<sup>10</sup> We refer the Committee to the 'Manual of Land Warfare', which was leaked in 1993. Disturbingly, this document specifically referred to the use of military personnel in response to 'civil disobedience, mass violence and terrorism' and permitted the ADF to shoot into crowds in order to disperse them.<sup>11</sup> While, to our knowledge, this manual has since been revised, its classified status means that we are unable to ascertain whether this kind of protocol remain or have been removed.

As discussed above, the Bill is primarily aimed at responding to terrorist activity. It is important to note, however, that Australia's legislation relating to acts of terrorism and national security tends to rely on a definition of 'terrorist act' that is extremely broad and which may, under certain circumstances encompass political dissent and industrial action (discussed below). Broadly, in our security legislation a 'terrorist act' is defined as an action or threat of action done or made with the intention of advancing a political, religious or ideological cause and with the intention of coercing or influencing by intimidation any government form. Further, to be a 'terrorist act', the action must either cause or threaten serious physical harm to a person, serious property damage, a person's death, endangerment to a person's life, a serious risk to public health or safety, or serious interference with an electronic system.<sup>12</sup> An exception has been created for advocacy, protest, dissent or industrial action but only where that is not intended to cause death, physical harm, endangerment to a person or a serious risk to public health or safety.<sup>13</sup> Where protest or dissent is not captured by this exception, the provisions of the Bill and its stated aims of responding to terrorist activity mean that the military may be readily called-out against protestors.

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<sup>9</sup> Proposed s 51T(2A), *ibid*

<sup>10</sup> *ibid*

<sup>11</sup> Michael Head, *op cit*, 16.

<sup>12</sup> Paragraph 100.1, Schedule 1, *Criminal Code Act 1995 (Cth)*

<sup>13</sup> *ibid*

The Federation is fundamentally opposed to the use of call-outs to quash political protest and, as the Bill clearly facilitates the use of call-outs in this way, we oppose the Bill's passage. If the Bill is to be passed, the Federation recommends that a prohibition against the use of call-outs in response to protest, assembly or dissent be included.

### Industrial Action

It is deeply concerning that the Bill expressly contemplates that the ADF may be called-out to intervene in industrial disputes. Section 51G, discussed above, permits use of the ADF in relation to industrial action under certain circumstances. The proposed s 51AA prohibits the use of Reserve Forces offshore in an industrial dispute and therefore clearly envisages that a military call-out may be used to intervene in industrial action offshore.

Historically in Australia, the government's use of military intervention domestically in non-defence matters has often been in relation to industrial disputes, in particular as 'strikebreakers'.<sup>14</sup> The Federation is concerned that use of the call-out power against striking workers will predominantly be dependent on political influences and circumstances. There is the possibility that the call-out power may be used where it is politically expedient to do so. In this sense, the call-out power may also be applied inconsistently and even abused for political gain. The broad governmental discretion in exercising the call-out power (discussed below) exacerbates these concerns.

More generally however, the Federation is of the view that use of the call-out power in industrial disputes is fundamentally undemocratic. In a modern,

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<sup>14</sup> Elizabeth Ward, *Call out the Troops: an examination of the legal basis for Australian Defence Force involvement in 'non-defence Matters*, Research Paper 8, Law and Bills Digest Group, (1997-1998) available at <http://www.aph.gov.au/library/pubs/rp/1997-98/98rp08.htm>; Gary Brown, *Troops as Strikebreakers: Use of the Defence Force in Industrial Action Situations*, Current Issues Brief 3 Foreign Affairs, Defence and Trade Group (1996-97) available at <http://www.aph.gov.au/library/pubs/cib/1997-98/98cib03.htm>

democratic society workers should have the right to strike and collectively bargain. The threat of military intervention may serve to deter this.

The Federation recommends that the use of the call-out power in relation to industrial action should be subject to a blanked prohibition.

## **Definitions**

The above examples relating to asylum seekers, protesters and industrial action highlight one of the key problems we perceive in the Bill: its failure to define certain key terms, namely, 'domestic violence' and 'Commonwealth interests'.

Pursuant to the Bill, the term 'domestic violence' is a pre-condition to call-outs in the off-shore area<sup>15</sup>, in relation to aviation incidents<sup>16</sup>, expedited call-outs<sup>17</sup> and for call-outs within Australian pursuant to section 51A of the 2000 Amendment Act.<sup>18</sup> It is remarkable therefore that this term remains undefined. The term 'commonwealth interests' is also a key criterion for the exercise of each of these powers and similarly is undefined.

Schedule 2 of the Bill extends the powers of the ADF where a call-out has been made and certain 'critical infrastructure' designated in the order.<sup>19</sup> In such situations, the ADF may act to protect the designated critical infrastructure and this protection may involve the use of force.<sup>20</sup> Nonetheless, infrastructure is very broadly defined to include 'physical facilities, supply chains, information technologies and communication networks or systems' and 'critical' remains undefined. Although some definition is provided, largely the exercise of this power will depend on how the government of the day elects to apply that

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<sup>15</sup> Proposed s 51AA, *The Bill*

<sup>16</sup> Proposed s 51AB, *ibid*

<sup>17</sup> Proposed s 51C, *ibid*

<sup>18</sup> s 51A, Defence Legislation Amendment (Aid to Civilian Authorities) Act 2000 (Cth) (*The 2000 Amendment Act*)

<sup>19</sup> Proposed s 51IB, *The Bill*

<sup>20</sup> Proposed s 51T(2A), *ibid*

definition, which is vague enough that it may be very broadly or very narrowly construed. It is particularly concerning that 'critical' has not been defined insofar as this raises the questions regarding 'critical to whom?'. We are concerned this creates the possibility that the call-out power may be used to protect the interests of private profit, rather than in the broader public interest. The Bill's failure to define the term 'critical' allows for the possibility that what is economically essential may be found to be critical rather than just what is essential to the community.

As noted above, because these terms remain undefined the government is afforded a very broad discretion to determine whether the use of the call-out power is appropriate or not. This is highly concerning, particularly insofar as the call-out power may be used to suppress political dissent and industrial action or to intercept asylum seekers (as discussed above). Whether it will or will not be used in these ways is largely dependent on the policy of the government of the day, given that the criteria for its use are predominantly left open to interpretation. It is also particularly concerning given the proposed 'expedited' call-out power, which would allow the Prime Minister or the Attorney-General and Defence Minister to issue an immediate call-out that is not in writing in the case of a 'sudden and extraordinary emergency' (also undefined).<sup>21</sup>

In this regard, we note the comments of the Senate Standing Committee for the Scrutiny of Bills ('the Standing Committee') in relation to the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000:

*Legislation authorising the call out of the Defence Force, by its very nature trespassed on personal rights and liberties. It was intended to operate at a time of extreme threat and to provide adequate powers to deal with such circumstances. However, the use of undefined terms such as 'domestic violence' and 'Commonwealth interests' in the bill and its failure to fully address the rights and obligations of those who*

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<sup>21</sup> Proposed s 51CA, *The Bill*

*find themselves in military detention, invited great reliance on the good faith of those at whose disposal these powers were placed.*<sup>22</sup>

In our view these comments equally apply to the current Bill. The issue of undefined terms has not been remedied and therefore the Bill may be very broadly applied and with much discretion. Although the Standing Committee accepted the need for such legislation (a view we do not share), it was very clear that such legislation should not abrogate rights and liberties unnecessarily and should not be capable of misinterpretation or misuse.<sup>23</sup>

The lack of key definitions means that the Bill may be very broadly applied. In this sense and insofar as it is aimed at combating terrorist activity, the Bill represents a disproportionate response to threat of terrorism in Australia (given the threat level as discussed above).

While the Federation is opposed to the passage of this Bill, in the event that the Committee is minded to recommend that it be passed, we submit that these key terms must be specifically defined. Further, we submit that these terms should be narrowly defined so as to minimise the impact of the Bill on civilians' rights and liberties and thereby ensure that the Bill is proportionate to the problems it purports to address.

### **Accountability**

Given the broad discretion afforded to governments because of undefined legislative terms contained in the Bill, the issue of accountability is all the more significant.

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<sup>22</sup> *The Work of the Committee during the 39<sup>th</sup> Parliament*, Senate Standing Committee for the Scrutiny of Bills, November 1998-October 2001, 2.166.

<sup>23</sup> *ibid*, 2.165.

The Federation is concerned that the Bill does not provide any mechanism by which the legitimacy of a decision to call-out the ADF may be tested. Given the lack or breadth of definitions relating to the criteria for making a call-out, it is particularly concerning that the Bill makes no provision for judicial review either prior to the issue of an order or afterwards. In this sense, the Bill represents a serious excess of executive power that may readily be abused or misused. Further, the Bill's failure to define key terms also means that the power may be used with a lack of transparency. In our view, to prevent abuse of these extraordinary powers, it is crucial that the way in which the criteria for making a call-out order are applied and the information relied upon in applying those criteria, are matters of public knowledge and open to public debate and scrutiny.

As discussed above, the Bill affords the government of the day with an extremely broad discretion and creates the risk that the making of call-out orders may be influenced by political motives. In our view, it is therefore imperative that provisions be made for that discretion to be checked and reviewed. We note the comments of the Standing Committee in this regard:

*[L]aws which affect rights and liberties should not be drafted on the assumption that those using them will necessarily always be of good faith. Laws which assume good faith are inevitably misused by those whose motives are less than good.*<sup>24</sup>

While the Federation opposes the passage of this Bill, if it is to be passed we submit that mechanisms for review, transparency and accountability relating to call-out orders must be provided for.

### **ADF Powers Under a Call-Out**

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<sup>24</sup> *The Work of the Committee during the 39<sup>th</sup> Parliament*, ibid, 2.167.

Broadly speaking, with respect to call-outs, ADF members are given range of powers exceeding those of ordinary law enforcement officers. Pursuant to the 2000 Amendment Act, during call-outs soldiers may have the power to:

- Capture and search buildings, means of transport or other things without warrants;<sup>25</sup>
- Detain persons in order to hand them over to the police;<sup>26</sup>
- Search persons and vehicles for dangerous things;<sup>27</sup>
- Erect barriers to cordon off certain areas;<sup>28</sup>
- Issue orders to civilians regarding their movements<sup>29</sup>

The Bill also provides ADF personnel with a large array of additional powers. With respect to off-shore interventions ADF members may, *inter alia*, destroy or give orders for someone else to destroy a vessel or aircraft, capture a vessel or aircraft, board a vessel or aircraft, search persons or places for dangerous things, require persons to produce things or answer questions, require person to operate a facility, vessel, equipment etc.<sup>30</sup> With respect to threats to critical infrastructure ADF members may, *inter alia*, detain persons, control the movement of persons or transport, search persons or things for dangerous articles etc.<sup>31</sup> With respect to aviation incidents ADF members may, *inter alia*, use force against an aircraft including to destroy it even where the aircraft is airborne.<sup>32</sup> With respect to recapturing a building, the Bill additionally permits ADF members to seize any thing, dangerous or otherwise, connected with the domestic violence in question.<sup>33</sup> Furthermore, the Bill removes the prohibition on the use of the Emergency and Reserve Forces under call-out orders.<sup>34</sup> The

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<sup>25</sup> s 51I, *The 2000 Amendment Act*

<sup>26</sup> s 51I(1), *ibid*

<sup>27</sup> ss 51O and 51P, *ibid*

<sup>28</sup> s 51R(2), *ibid*

<sup>29</sup> s 51R, *ibid*

<sup>30</sup> Proposed ss 51SE, 51SO, 51SP *The Bill*

<sup>31</sup> Proposed s 51IB, *ibid*

<sup>32</sup> Proposed s 51ST, *ibid*

<sup>33</sup> Proposed s 51I(1), *ibid*

<sup>34</sup> Proposed s 51G, *ibid*



impact of this is that all of these powers may be exercised by a broader category of personnel.

It is our submission that these extraordinary powers are excessive and unjustified given the current level of terrorist threat in Australia. Furthermore, it is worrying that these powers are afforded without adequate mechanisms for accountability and transparency.

The 'rules of engagement' relating to military call-outs are not a matter of public knowledge. The protocol and directions provided to ADF members exercising the wide range of powers under a call-out should be open to public scrutiny. Given the breadth of the powers, how they are exercised must be closely monitored and the way they are exercised should be able to be the subject of public discussion. We are concerned that where matters of 'national security' are at issue, there is presumption that those responsible for maintaining and protecting that security should be solely able to determine what is required to perform that task and what sacrifices may or may not be justifiable. Given the broad powers afforded to ADF personnel in callouts and the potential use of force against civilians (discussed below) these decisions may have dire consequences or may constitute serious incursions on civil liberties. It is therefore extremely important that the way these powers are applied be open to public commentary and debate.

We are concerned that the Bill seeks to introduce a number of provisions which abrogate accountability for the actions of ADF members under a call-out.

The proposed section 51WA of the Bill provides ADF personnel with immunity from prosecution under State or Territory criminal law for criminal acts committed under a call-out order. Any criminal act committed by an ADF member under a call-out order falls within the Jervis Bay Territory jurisdiction and is afforded a

military trial.<sup>35</sup> Such matters are prosecuted by the Commonwealth Department of Public Prosecutions, which ultimately may be directed in its activities by the Attorney-General. This raises doubts about the impartiality of decisions to prosecute military personnel in situations, given that it will have been the government and quite possibly the Attorney-General who issued the call-out during which the crime was committed. The secrecy surrounding military prosecutions is also a concern in this respect. Given the extremely broad powers afforded ADF personnel during a call-out and the extraordinary nature of the call-out powers themselves, it is imperative that any criminal activity taking place in the context of a call-out be publicly known. In our view, any undesirable or even fatal consequences of the call-out powers should be a matter of public debate so that the implications and operation of the legislation may be properly evaluated.

ADF personnel acting under a call-out order who are charged with a criminal offence, are also now able to raise the defence of 'superior orders'. Broadly, where the ADF member was under an obligation to follow an order, the order was not manifestly unjust and actions taken to comply with the order were reasonable and necessary, that member may have a defence to any criminal act perpetrated.<sup>36</sup>

These provisions relating to the criminal prosecution of ADF personnel act to significantly impede the community's capacity to make ADF members accountable for their actions during a call-out. This lack of accountability not only means that the response to criminal acts by ADF personnel may be inadequate, but furthermore this lack of accountability may also make the occurrence of criminal acts more likely.

While the Federation is generally opposed to the passage of this Bill, specifically the provisions relating to the prosecution of ADF members and defences to

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<sup>35</sup> Proposed s 51WA, *ibid*

<sup>36</sup> Proposed s 51WB, *ibid*

criminal acts should be removed if it is to be passed. Furthermore, we recommend that the Rules of Engagement relating to call-outs be made public and/or determined in consultation with the public.

## **Use of Force**

The Federation is gravely concerned that the Bill authorises the ADF to use force against civilians when acting under a call-out order. In our view, military personnel should not be permitted to use force to use force against civilians under any circumstances.

In this respect the Bill and the 2000 Amendment Act provide ADF members with inordinately excessive powers. This is particularly evident when their capacity for force is compared with that of the police. While law enforcement officials do carry weaponry, the use of force by military personnel against civilians is particularly concerning. Soldiers are trained to conduct warfare - that is, to kill and to be killed. Further, the weaponry at the disposal of military personnel is, in general terms, more powerful than that used by ordinary police. In the military context the notion of incidental or collateral damage may also be more widely accepted. While this may be appropriate in the context of warfare, there is a risk that this principle may also be applied by ADF members against civilians with dire results. In light of these considerations, the authorisation of ADF personnel to use force against civilians is a deeply disturbing aspect of the Bill and a departure from what should be expected of a modern democratic society.

Military use of force against civilians is particularly concerning with respect to the defence of 'critical infrastructure'. As noted above, the proposed section of the Bill provides that the military may use force, including force that causes grievous bodily harm or death, in order to protect against threats to the designated critical infrastructure.<sup>37</sup> In our view, the use of force by the military against civilians is

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<sup>37</sup> Proposed s 51T(2A), *ibid*

unacceptable. If, however, it is accepted that this use of force is necessary, we submit that such force should only be used to protect the life of other persons. In allowing for the use of potentially lethal force to protect physical facilities, supply chains, information technologies and communication networks, this Bill is a grossly disproportionate response to terrorist activity. We are also deeply concerned that the Bill appears to draw a comparison between the worth of human life and critical facilities that favour the facilities over the lives and physical well-being of individuals.

The Federation is fundamentally opposed to any legislatively sanctioned use of force by military personnel against civilians. In fact, where there is a call-out power, we would recommend that military personnel involved be unarmed. As this Bill clearly permits the use of force against civilians under certain circumstance, we oppose the passage of the Bill.

## **Conclusion**

If the Committee is minded to recommend passage of this Bill, in our view it is imperative that a sunset provision be inserted. As clearly indicated in the Explanatory Memorandum, this Bill is a legislative response to a specific set of international events and circumstances. Given the extraordinary nature of the powers provided for by the Bill, such legislation should only be in force only for as long as the circumstances that prompted its enactment exist. It is our view that a three year sunset clause, with provision for proper public and independent review, must be included if this Bill is passed. We believe that a lengthier period of operation without review risks these laws lapsing into being a permanent and accepted part of our legal landscape. While a further review in three years may seem onerous, in our submission extraordinary laws such as these warrant frequent and regular re-examination, regardless of how onerous this task may be. This will be all the more important where the lack of transparency and accountability which characterises the Bill is allowed to remain.

Notwithstanding this recommendation, in light of all of the concerns we have raised above, we strongly urge the Committee to recommend that this Bill should not be passed. Alternatively, should the Committee be minded to recommend passage of the Bill, we submit that it should be substantially amended to address the many issues we have raised.