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Senate Legal and Constitutional Legislation Committee
Inquiry into the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005

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Dear Senate Committee

Thank you for the opportunity to make a submission to the above inquiry. My submission addresses five short matters.

1. International Obligations

In making an authorisation concerning powers in the Australian offshore area or in relation to aviation incidents, the authorising Minister(s) must "have regard to Australia's international obligations" (clauses 51SC and 51ST(8)). While this is a welcome recognition of the importance of international obligations, particularly those relating to the law of the sea and to international humanitarian law, this provision would be strengthened by requiring the Minister to "comply with Australia's international obligations". By definition, Australia is bound by its international "obligations" and no Minister should be empowered to optionally override them through a procedural discretion merely to consider them. In any event, a similar undertaking should be provided concerning authorisations in relation to critical infrastructure under Division 2A.

Further, the provision could be improved by expressly requiring the Minister to comply with (or failing this, to have regard to) Australia's international human rights obligations. Where military aid to the civilian authorities is necessary, Australia will typically face a "public emergency which threatens the life of the nation" under article 4 of the International Covenant on Civil and Political Rights (1966). If this is the case, Australia may derogate (suspend) some human rights, but not certain fundamental rights. To take advantage of the derogation provision, Australia must "immediately inform the other States Parties" by notifying the UN Secretary-General (art 4). Since the use of the military may impair rights such as life or privacy (see, eg, cl 51SO compelling the answering of questions), it is vital that Australia comply with this regime.

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2. Application of the law of the Jervis Bay Territory

The Bill proposes to apply the substantive criminal law of the Jervis Bay Territory to the operations of the Defence Forces under the Bill (cl 51WA). The law of the Jervis Bay Territory is the law of the Australian Capital Territory to the extent that it is not inconsistent with an Ordinance: s 4A(1), *Jervis Bay Territory Acceptance Act* 1915 (Cth). The laws in force under s 4A of this Act may be amended or repealed by an Ordinance: s 4C, *Jervis Bay Territory Acceptance Act* 1915 (Cth). The Governor-General may make an Ordinance "for the peace, order and good government" of the Jervis Bay Territory (s 4F), subject to tabling before the Commonwealth Parliament and disallowance in the Senate: ss 4G-K. Regulations may also be made under an ordinance: s 4L, *Jervis Bay Territory Acceptance Act* 1915 (Cth).

A serious flaw in the Bill is that it makes Defence Force personnel subject to criminal liabilities which may not have been enacted by Parliament, but by an executive ordinance. This is compounded by the Bill's definition of "substantive criminal law" as including "other subjects declared by regulation to be within the ambit of the substantive criminal law of the Jervis Bay Territory": cl 51(1)(e). Criminal law liabilities are the most serious form of sanction in any society. Such liabilities should only be imposed by the Parliament, and should not be delegated to the Governor-General (acting in practice on the advice of Ministers). In the absence of any prohibition on retroactive criminal law and retrospective punishment in the Commonwealth Constitution, it is imperative that Parliament be required to enact criminal laws affecting Defence Force personnel. The more appropriate law to apply to Defence Force personnel in operations under the Bill is the Commonwealth Criminal Code.

While the Commonwealth Director of Public Prosecutions is the most appropriate authority for taking enforcement action, it might be noted that any decision to deploy the Australian military in Australia is likely to be highly politically sensitive. This may result in pressure being brought to bear on the Commonwealth DPP not to prosecute excessive uses of force by Defence Forces personnel, and to defer to the federal government in security matters. 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 ICC.

3. Defence of Superior Orders

The Bill makes available to Defence Force personnel a defence of superior orders in certain circumstances cl 51WB), drawn from the defence found in the Rome Statute of the International Criminal Court, which Australia has substantially enacted into domestic law. However, where the Australian military is assisting civilian authorities to quell *domestic violence*, it is not appropriate to make available a defence designed for the circumstances of *armed conflicts*. Just as there is no defence of superior orders available to police officers in Australia who break the law, so too should there be no such defence available to military personnel, who may be acting against Australian citizens in Australia. There is a danger that such a defence would result in impunity for serious violations of the rights of Australian citizens and residents.

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4. Critical Infrastructure: Use of Force

Clause 51T(2A) requires that in using force, a Defence Force member must not (a) do anything likely to cause death or grievous bodily harm unless the member believes on reasonable grounds that doing so is necessary to protect life or prevent serious injury, or protect critical infrastructure, or (b) subject the person to greater indignity than is reasonable and necessary in the circumstances.

While allowing force in these exceptional circumstances may be necessary, the wording of this clause suggests that it may be permissible to inflict torture or cruel, inhuman or degrading treatment on a person, where this is necessary to protect life, prevent serious injury or protect critical infrastructure, and where this does not amount to subjecting a person to greater indignity than is reasonable and necessary in the circumstances.

Considering the level of international concern about the mistreatment of suspected terrorists and enemy combatants by US armed forces in recent years, it is unfortunate that the text of the Bill implicitly permits torture or other ill-treatment in the defined exceptional circumstances. A new sub-section should be added at the end of this provision explicitly prohibiting torture or cruel, inhuman or degrading treatment or punishment in any circumstances, including public emergencies, in accordance with Australia's obligations under the Convention against Torture and customary international law.

5. Restrictions on the Use of the Military against Protests

Clause 51G requires the Chief of the Defence Force not to stop or restrict any protest, dissent, assembly or industrial action, except where there is a reasonable likelihood of the death of, or serious injury to, persons or serious damage to property. Arguably, in a democratic society, it is only appropriate for the military to intervene in protests to prevent *serious damage to property* in circumstances where such property damage is likely to endanger life or cause serious injury to people, and not where it is solely designed to avert property damage.

Please do not hesitate to contact me if you require further information or clarification.

Yours sincerely

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