

**SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL
LEGISLATION COMMITTEE INQUIRY INTO
THE DEFENCE LEGISLATION AMENDMENT (AID TO CIVILIAN
AUTHORITIES) BILL 2005**

Introduction

1. This submission, to the inquiry conducted by the Senate Legal and Constitutional Legislation Committee into the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005, is provided by the Australia Defence Association (ADA) at the request of the Committee. The submission is formatted with numbered paragraphs to assist with any follow-up questions.

2. Founded in Perth in 1975 by a retired RAAF Chief, a leading trade unionist and the director of a business peak body, the ADA has long been the only truly independent, non-partisan and community-based public interest guardian organisation covering defence and wider national security issues.

3. The policies and activities of the ADA are supervised by a board of directors elected by the membership. This submission has been approved by the ADA Board of Directors and was prepared by a group of retired defence specialists and other experts convened for the purpose. Not all these contributors are ADA members.

4. The ADA believes that Australia needs a whole-of-government approach to our external defence and domestic security. The Association seeks the development and implementation of national security structures, processes and policies encompassing:

- a. an accountable, integrated, responsive and flexible structure for making national security decisions;
- b. robust means of continually assessing Australia's strategic and domestic security situations;
- c. the allocation of adequate national resources to national security according to such assessments;
- d. the implementation of a defence strategy based on the protection of identifiable and enduring national interests;
- e. the development and maintenance of adequate forces-in-being capable of executing such a strategy; and
- f. the development and maintenance of manufacturing and service industries capable of sustaining defence force capability development and operations.

5. On a national basis the ADA maintains a comprehensive website at >www.ada.asn.au< and publishes a quarterly journal, *Defender*, and a monthly bulletin, *Defence Brief*. The Association is frequently consulted by the media and regularly contributes to public, academic and professional debates on defence and wider national security matters.

Proposed Legislation

6. The Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005 is intended to amend Part IIIAAA of the *Defence Act 1903*. The intention is to enhance and clarify the Australian Defence Force's (ADF) ability to support domestic security arrangements and to provide appropriate powers and protections for ADF personnel when 'called out' to undertake such support operations.

7. The amendments prescribe, broaden or clarify powers previously included in the Defence Act or which rely on precedents and interpretations of common law. They also cover matters of principle and practical implementation long incorporated in British and Australian training and procedural manuals and instructions for 'Aid to the Civil Power', chiefly in situations where the defence force may be required to assist the police in suppressing riots or resolving siege-hostage incidents stemming from acts of terrorism.

8. The powers covered by the amendments include those governing the use of force in specified circumstances, and those governing associated potential actions such as search and seizure. Other more procedural amendments relate to:

- a. the use of defence force reservists in domestic security operations (but retain the current prohibition of doing so during the resolution of industrial disputes);
- b. notification requirements for 'call out';
- c. expedited 'call out' procedures for sudden and extraordinary emergencies;
- d. identification of ADF personnel when 'called out';
- e. the criminal laws and procedures applicable to ADF personnel when 'called out';
- f. ADF powers to protect designated critical infrastructure; and
- g. ADF powers to respond to domestic security incidents or threats in offshore areas or the air.

Background

9. Part IIIAAA of the Defence Act 1903 was enacted in September 2000 to clarify certain aspects of contingency defence force aid-to-the-civil-power support to the Olympic Games in Sydney. This section of the Act predated the terrorist attacks in New York and Washington on 11 September 2001 and Australia's participation in the subsequent international campaign against trans-national Islamist terrorism. This specific legislation has not been used but has been tested in various whole-of-government counter-terrorist and crisis management exercises involving the Commonwealth and the states and territories.

10. The amendments proposed in the 2005 Bill largely come from a statutory review of Part IIIAAA of the Defence Act undertaken in late 2003 by Mr Anthony Blunn (former Secretary of the Attorney-General's Department), General John Baker (a retired Chief of the Defence Force), and Commissioner John Johnson (a former senior officer of the Australian Federal Police (AFP) and a retired Chief of the Tasmania Police Force). This review included consultations with the Attorney-General's Department (including the Protective Security Co-ordination Centre), ASIO, the ADF and the federal and state police forces.

11. The Blunn Review was necessarily focused on counter-terrorism (as are the relevant sections of the existing and proposed legislation), as this is by far the most likely and relevant practical application of 'call out' of the ADF in aid-to-the-civil-power emergencies. The review took into account experiences from numerous whole-of-government counter-terrorist exercises at the federal and state level over the last 25 years, and major international events conducted in Australia such as the 2000 Olympics and the 2002 Commonwealth Heads of Government Meeting. It also noted that the nature and scale of domestic security threats, especially from trans-national and perhaps even domestic terrorism, has evolved considerably over the same period and particularly in the last five years.

12. The review identified major flaws and practical limitations in the existing legislation and procedures, including:

- a. time consuming and complex processes negated its effectiveness in short-notice situations;
- b. the procedures were too heavily oriented to siege-hostage incidents and there were difficulties in easily applying them to the wider range of terrorist scenarios now possible;
- c. no provision for the authorisation of anticipatory operations by the ADF to protect infrastructure or disrupt terrorist planning and preparations;
- d. the level of proscription in Part IIIAAA did not allow for rapidly evolving terrorist scenarios;
- e. undue restrictions were placed on the employment of defence force reservists;
- f. the heavy onus placed on ADF personnel to form beliefs on reasonable grounds before taking certain actions in emergency situations where all the relevant facts might not be available; and
- g. insufficient recognition of the legal position ADF personnel are placed in when they are ordered to use force but can be prosecuted afterwards without this authorisation necessarily be taken into appropriate account by the courts.

Underlying Philosophy

13. The UK, Australia, Canada and New Zealand have broadly similar philosophies, procedures and common-law precedents for using their respective defence forces to assist the civil police in domestic law enforcement during emergencies. These approaches can be summarised as incorporating several key principles:

- a. primacy of the civil power in all cases;
- b. no recognition of the concept of 'martial law' (civil law always remains paramount and military law cannot be extended to civilians);
- c. a marked reluctance to maintain paramilitary police forces;
- d. a marked reluctance to use the defence force for domestic law enforcement and associated emergency management tasks unless absolutely necessary, and generally only in situations where police resources are exhausted, lack the technical expertise needed (bomb disposal, chemical or biological attack containment, etc) or lack the capacity to handle the degree of force required;
- e. strict controls on the circumstances, duration and powers involved, including the principle of using minimum force and for the minimum time;
- f. defence force members do not exercise police powers in the general sense but do retain all their rights, responsibilities and powers as citizens (including those relating to self defence, the protection of others and 'citizen arrests'); and
- g. defence force members in such situations remain accountable for their actions under the law.

14. Within Australia and other Westminster-style democracies defence force operations in aid of the civil power are undertaken most reluctantly by the defence force. As the defence force of a parliamentary democracy the ADF exists primarily to deter and win wars. The principle of minimum force that is central to aid-to-the-civil-power operations in a domestic setting runs contrary to the principles of war incorporated in defence force doctrine and procedures for the successful waging of war in an international setting (except, to an extent, where counter-insurgency operations are involved). This means that extensive specialist training and clear procedures are needed when the ADF is called upon to apply force off the conventional battlefield, inside Australia, and potentially against fellow Australians.

15. Another major source of ADF reluctance to undertake aid-to-the-civil-power operations within Australia stems from its longstanding and widely acknowledged apolitical stance. The ADF defends all Australians equally and its professional ethos is naturally uneasy when the Services are called upon to apply force in domestic security situations.

16. These factors mean that the laws and procedures governing the provision of aid to the civil power must be as clear-cut and unambiguous as possible. This is needed to sustain public confidence in the defence force, particularly as the circumstances which might require such ADF assistance could be contentious among some Australians.

17. Such laws and procedures should also be fair and reasonable in their treatment of ADF members, particularly given the difficult legal, political, moral and professional conditions involved in their implementation.

18. The ADA has long advocated the constitutional principle that wherever possible the defence force should not be used for domestic law enforcement. The Association's longstanding advocacy of a Coastguard is partly based on the constitutional and professional desirability of reducing the amount of support the ADF, particularly the Navy, is currently required to provide to other Commonwealth agencies for barrier law enforcement activities (customs, Coastwatch, immigration, quarantine, fisheries and conservation).

19. The Association accepts, however, that the in-principle threat or actual use of some ADF assistance to civil authorities in emergencies is likely to be required for the foreseeable future. This especially applies to the ADF helping the federal, state and territory police forces handle possible terrorist actions and, although very unlikely, potential large-scale riots.

Public Reaction

20. Much public discussion and media coverage of the proposed Bill, and the subject of using the defence force to assist civil authorities in general, has been inadequate. Some of the criticisms have been clearly polemical rather than objective. In particular, much discussion has not appeared to understand the clear differences involved between contingencies that may involve the ADF having to apply force and those where it does not. This latter category of defence force support, where the employment of force is not involved, may of course still involve direct self defence of the ADF personnel involved – as it would be for any other Australian citizen.

21. The ADA also understands that the proposed amendments are not directed at situations where the defence force is committed to:

- a. military operations outside Australian territory, territorial waters or airspace;
- b. the operation of emergency services or other assistance (not involving the application of force) in the resolution of industrial disputes within Australia;
- c. defence force assistance (not involving the use of force) to barrier law enforcement activities undertaken by Customs, Coastwatch, immigration, quarantine and conservation authorities;

- d. defence force assistance (not involving the use of force) to resource conservation and associated law enforcement activities undertaken by state and federal fisheries and conservation authorities;
- e. defence force assistance to search and rescue activities undertaken by the relevant state and federal authorities, both within Australia and Australian waters and airspace, and within international waters and airspace allocated as an Australian responsibility under international arrangements;
- f. defence force disaster relief assistance, engineering or medical assistance to remote communities, or other general humanitarian activities within Australia; and
- g. defence force assistance to community activities such as school fetes, agricultural shows and the like throughout Australia.

The ADA notes that these commonsense distinctions have not been understood or made by several critics of the amendments, and that their criticism is necessarily weakened, at best, by the failure to understand such cardinal aspects of the Bill. When university teaching staff remain confused about these matters there is obviously a need for a public information campaign.

22. The proposed amendments do not conflict with the right of legitimate peaceful dissent from government decisions by Australian citizens. Claims and inferences that they do are simply specious and reflect inadequate research into the principles and precedents involved.

Specific Issues

23. ADA consideration of the Bill, while cognisant of the underlying philosophy and long history involved, has concentrated on the practicalities of the proposed legislation. Ten issues were examined.

24. **Call-Out Procedures.** The procedures for 'calling out' the ADF in current legislation require the transmission of written orders and take time. The Bill allows for verbal 'call-out' by the Prime-Minister or two authorising Ministers in emergencies where there is not time for written authorisation. This includes safeguards requiring a written record of events to be subsequently made. This amendment is logical and justified.

25. **Defence of Superior Orders.** The current law has potential inconsistencies and could require different civil courts to determine the existence or degree of defences, such as lawful authority, when trying defence force members on criminal charges resulting from their participation in aid-to-the-civil-power operations. The Bill clarifies such matters and provides a qualified (not absolute) defence of 'superior orders' to ADF personnel undertaking aid-to-the-civil-power duties. The Bill does not exempt ADF personnel from the operation of criminal law or reserve such matters to military law jurisdiction. This amendment is logical and justified.

26. Role of the Commonwealth Director of Public Prosecutions. The current laws and procedures governing ADF aid-to-the-civil-power support involve various Commonwealth, state and territory jurisdictions. As the ADF is a federal entity, and such support is authorised under federal law, the Bill designates that the laws of the Jervis Bay Territory will apply to ADF personnel in the civil sense, and that the decision to prosecute will be vested solely in the Commonwealth Director of Public Prosecutions (and independent statutory appointment). This amendment is logical and justified.

27. Use of Reserve Forces. Current legal restrictions on the use of defence force reservists in domestic security situations do not match the modern integrated force structure of the ADF, or the fact that much of the Army's full-time combat capacity is not based near Australia's main centres of population. The Bill simply eliminates legal distinctions between full-time and part-time ADF personnel, with the exception that the longstanding prohibition against using reservists for strike-breaking remains unaffected. This amendment makes eminent sense and is long overdue.

28. Identification of ADF Personnel. The Bill proposes that Special Forces and other specialist personnel who may be required to assault a terrorist-held objective do not have to wear a surname name-tag if conducting other tasks, such as cordon and search operations. This stems from the operational security need to protect the identities of such personnel from terrorist reprisals. Such personnel will be identified by numeric means instead in a similar manner to police identity numbers. This amendment is logical and justified.

29. Public Notification. Current legal restrictions require the public broadcast of designated areas during the resolution of domestic security incidents, such as terrorist sieges. The Bill eliminates such broadcasts in limited and specific circumstances where operational security requirements may be prejudiced. This amendment is logical and justified.

30. Mobile Terrorist Incidents. Current legislation covers specific premises and does not cover a terrorist incident, or chain of incidents, that spread beyond those premises. The Bill includes powers to conduct actions that cater for such circumstances. This amendment is logical and justified.

31. Critical Infrastructure Protection. Current laws do not cover the protection of critical infrastructure from attack. The Bill allows for such infrastructure to be designated and protected by the ADF in emergencies. Safeguards require the authorising Minister to be first satisfied that an attack on the designated infrastructure will result in direct or indirect loss of life or serious injury before the ADF can be so used. This amendment is logical and justified.

32. **Aviation Jurisdiction.** Current law does not cover use of the ADF in the air against terrorist threats from the air. As occurred during the Commonwealth Heads of Government Meeting in 2002, the air defence of that meeting was authorised under the longstanding defence powers inherent in crown privilege under Section 61 of the Constitution. While operationally effective, the ADF personnel involved did not have the legal protections they would have had if operating in aid-to-the-civil-power operations on the ground. The Bill eliminates this anomaly by establishing an aviation division within Part IIIAAA. This amendment is logical and justified.

33. **Offshore Jurisdiction.** A similar situation applies to maritime counter-terrorism operations offshore and the Bill also eliminates this anomaly by establishing an offshore division within Part IIIAAA. This amendment is logical and justified.

CONCLUSIONS

34. Any clarification of the legal situation involved in aid-to-the-civil-power operations is generally welcome to members of the defence force, and should be welcomed by their fellow Australians, unless fundamental and inimical extensions of power are involved. In the case of this Bill, the ADA considers the amendments proposed are logical, proportional and justified by the strategic and domestic security circumstances involved.

35. Much public criticism of this Bill has been ill-informed and has not taken the historical and current 'last resort' contexts of such measures into account. Some criticism has been polemical and some has even descended into the realms of extreme conspiracy theory.

36. The intention and proposed operation of the Bill are sound. A slight re-titling of the Bill would assist in explaining its purpose and may help reduce the amount of ill-informed criticism.

37. ADF personnel are Australian citizens too. Given the many difficulties involved, they are entitled to protection and clear guidance when ordered to implement aid-to-the-civil-power support in emergency situations.

RECOMMENDATIONS

38. The Australia Defence Association recommends that the committee especially review the following aspects in compiling their report:

- a. the Bill should be re-titled as "Aid to Civil Authorities Bill 2005"; and
- b. all provisions of the Bill be recommended for enactment.