

DEPARTMENTAL SUBMISSION TO
THE SENATE FOREIGN AFFAIRS, DEFENCE AND TRADE
LEGISLATION COMMITTEE ON

THE DEFENCE LEGISLATION AMENDMENT (SECURITY OF
DEFENCE PREMISES) BILL 2010

Department of Defence
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1 BACKGROUND

- 1.1 On 29 September 2010, the Hon Stephen Smith MP, Minister for Defence, introduced into the House of Representatives the *Defence Legislation Amendment (Security of Defence Premises) Bill 2010* (the Bill).
- 1.2 The Bill was referred to the Senate Foreign Affairs, Defence and Trade Legislation Committee on 30 September 2010, with a reporting date of 16 November 2010. In referring the Bill, the Selection of Bills Committee noted that the principle issues for consideration include:
 - (a) whether it is appropriate to leave training requirements for officers authorised to exercise deadly force to be specified in a legislative instrument;
 - (b) whether the Bill ought to provide for people entering Defence premises to be notified that they may be subject to a non-consensual search and may be guilty of an offence if they do not cooperate; and
 - (c) whether Defence personnel are adequately trained and equipped to safely detain civilians in accordance with the Bill.

Technical clarifications

- 1.3 Policy approval for the *Defence Legislation Amendment (Security of Defence Premises) Bill 2010* (the Bill) was previously given on 22 June 2010 by the Hon Anthony Byrne MP on behalf of the then Prime Minister.
- 1.4 The Bill was subsequently introduced into the Senate on 24 June 2010 by Senator the Hon John Faulkner, the then Minister for Defence, but lapsed when Parliament was prorogued on 19 July 2010, necessitating its reintroduction on 29 September 2010.
- 1.5 Since its previous introduction in the Senate, two minor technical clarifications have been included in the Bill. These clarifications do not alter the substance or intent of the provisions. Rather they clarify the safeguards that apply to the use of force where a person is fleeing and the requirement for the Secretary of Defence's approval of identity cards for Defence security officials to be in writing.

2 PURPOSE

2.1 The purpose of this submission is:

- (a) to respond to the principles issues that were identified for Committee consideration; and
- (b) to provide an overview of the Bill including:
 - (i) an explanation of the underlying requirement for the principle measures;
 - (ii) a summary of and roadmap to the Bill's provisions to facilitate the Committee's review; and
 - (iii) an outline of the Department of Defence's (the Department) planned approach to finalising implementation issues.

2.2 The main body of the submission has been structured in four separate sections addressing the areas identified above.

3 PRINCIPLE ISSUES FOR COMMITTEE CONSIDERATION

Specifying training for the exercise of deadly force in a legislative instrument

3.1 In re-referring the Bill, the Selection of Bills Committee identified the following issue for consideration:

"Whether it is appropriate to leave training requirements for officers authorised to exercise deadly force to be specified in a legislative instrument".

3.2 The Department's position is that it is appropriate from a legal policy perspective that the training requirements for appropriately authorised Defence Force members, who may be required to exercise potentially lethal force in the context of base security, to be specified in a legislative instrument. As a legislative instrument is subject to tabling and potential disallowance in both houses of Parliament, the use of this mechanism affords significant protection. It ensures that the Parliament, at all times, has control over the nature and level of training and qualification requirements that will be imposed on people who will be authorised to exercise powers under this Bill. This affords a far greater level of protection than having the training and qualification requirement set out in departmental administrative guidance.

3.3 The use of a legislative instrument also enables the training and qualification requirements to be updated rapidly, for example in response to the availability of new technologies and equipments, without incurring the delays that would arise if these requirements were stipulated within the Bill itself.

Notification of non-consensual search

- 3.4 A further issue that was identified by the Selection of Bills Committee for consideration was:

“Whether the Bill ought to provide for people entering Defence premises to be notified that they may be subject to a non-consensual search and may be guilty of an offence if they do not cooperate”.

- 3.5 To ensure that people entering Defence premises are aware of the requirements, obligations and consequences arising from the search regime in the Bill, the Department intends to implement a number of administrative measures. Given the diverse nature and composition of Defence premises, the definition of which includes movable assets such as aircraft, vessels and vehicles, the selection and implementation of these measures will be tailored to the particular circumstances of each Defence premise. Measures will include:

- (a) prominently displaying signs at the entrance to Defence bases or facilities notifying people that they, their carried items and vehicles may be subject to consensual and non-consensual searches;
- (b) conducting a comprehensive awareness campaign, prior to the introduction of the Bill's measures, to ensure all Defence personnel and contractors are aware of the Bill's provisions and their rights and responsibilities in relation to consensual and non-consensual searches;
- (c) incorporating appropriate advice on the Bill's provisions in recruitment material for all advertised Defence vacancies and tenders to ensure prospective employees and contractors are aware of Defence's expectations and security requirements;
- (d) addressing the Bill's provisions during staff and contractor induction training and in regular, mandatory security awareness training; and
- (e) requiring Defence Force members and public servants who are hosting or escorting visitors on Defence premises to notify visitors of search requirements.

- 3.6 Finally, Defence would highlight that the amendments require Defence security officials to notify people, before making a request or requirement under the Bill's provisions, of the effect of refusing or hindering the request or requirement (s72B).

Adequately trained and equipped personnel to detain civilians

- 3.7 The final issue that was identified by the Selection of Bills Committee for consideration was:

"Whether defence personnel are adequately trained and equipped to safely detain civilians in accordance with the Bill".

- 3.8 The amendments make provision for Defence security officials to restrain and detain a person for the purposes of placing them in the custody of the police or a protective service officer at the earliest practicable time (s72J). This power can only be exercised if the person is located on Defence premises and either refuses or fails to comply with an identification or search requirement or, as a result of complying, the Defence security official reasonably believes the person is not authorised to be on the premises, constitutes a threat to safety or has (or may) commit a criminal offence.
- 3.9 Under the provisions of the amendments, all Defence security officials must satisfy stringent training and qualification requirements before they can exercise any of the powers contained in this Bill, including the power to restrain and detain people. These training and qualification requirements, which will be specified in a legislative instrument, must be determined by the Minister for Defence or his delegate. In respect to the protections afforded by the use of a legislative instrument, the earlier comments at Paragraphs 3.2 and 3.3 are relevant to this issue.
- 3.10 Defence is currently consulting with other Federal agencies, such as the Australian Federal Police and the Australian Customs and Border Protection Service, to assist in identifying the appropriate training and qualification requirements for Defence security officials.
- 3.11 Finally, it should be noted that the ability to restrain and detain people is a fundamental component of the proposed search regime detailed in Divisions 3 and 4 of the Bill. Without the ability to restrain and detain people for the purposes of placing them in police custody, Defence will be unable to mitigate the risk of dangerous, restricted or classified items and information being improperly removed from Defence premises. For further discussion of this issue, see Paragraphs 4.8 to 4.13 below.

4 THE REQUIREMENT

- 4.1 Defence must continue to meet the challenges created by the changeable nature of security threats, to ensure the continued security and safety of Defence premises, personnel and assets within Australia. The threat from terrorism is real, persistent and evolving and Defence personnel and premises are potentially attractive targets for terrorist groups.
- 4.2 To meet these challenges, Defence maintains a framework of protective security measures to safeguard its personnel and premises. This framework consists of a range of physical and personnel security measures, coupled with intelligence, to provide a layered response to mitigate threats.

- 4.3 In response to the changing threat environment, in particular the increased risk of terrorism, Defence conducted a review of its protective security arrangements in 2009 and has subsequently introduced a number of policy and physical security initiatives to complement pre-existing security arrangements at Defence premises. These initiatives include strengthened security policy and arrangements relating to access control, incident response and contractor guarding, together with physical measures such as improvements in perimeter fencing, security lighting, alarm systems and increased security patrols. These improvements reflect the fundamental importance that the Department of Defence places on the safety and security of Australian Defence Force members, Defence employees and the Australian public.
- 4.4 A key element of these security initiatives was the development of the legislative amendments to the *Defence Act 1903* to support enhanced security measures. The Bill, currently before the Committee, represents the first phase of legislative amendments and provides provisions of common application across Defence to deal effectively with the security of Defence premises, assets and personnel. A second phase will consider the requirement to implement proposals that raise more complex legal and practical issues, such as powers for the protection of naval vessels while underway.
- 4.5 The amendments contained in the Bill will:
- (a) clarify the legal issues surrounding the use of reasonable and necessary force by Defence Force members to protect themselves (or others) from death or serious injury in the event of an attack on Defence premises;
 - (b) introduce a statutory regime of search, seizure and related powers to be exercised by the three identified classes of Defence Security Officials who will perform a security role at Defence premises; and
 - (c) update the trespass offence and related arrest powers to ensure they are recognised as an integral part of the security regime.

Use of reasonable and necessary force

- 4.6 A key rationale behind the development of the Bill is the requirement to clarify the legal issues surrounding Defence Force members acting in self defence in the event of a no-warning attack on Defence premises.
- 4.7 Australian law recognises the right to protect yourself and others who are threatened. This currently provides a legal basis for Defence Force members to use reasonable and necessary force to protect themselves, or others, in the event of an attack on Defence premises. This Bill however, will provide certainty as to the scope of actions that authorised and appropriately trained Defence Force members could take, rather than having to refer to the various Commonwealth, State and Territory legislative provisions that provide a defence of self-defence.

Search and seizure powers

- 4.8 Large numbers of people regularly flow in and out of Defence premises on a daily basis, including Defence Force members, APS employees of the Department of Defence, Defence contractors and visitors.
- 4.9 Currently, a Defence Force member or an APS employee could not be denied access to Defence premises because of a refusal to consent to a search, nor could they be detained on exit unless there was a reasonable suspicion that the individual had committed an offence.
- 4.10 While access by contractors can be made conditional, at present the ability to conduct a search in relation to a contractor is dependent on the terms of their contract.
- 4.11 Visitors can be subject to consensual searches on entry, but any attempt to conduct a search on exit is dependent on consent being given to that action, unless there is a reasonable suspicion that the individual has committed an offence.
- 4.12 The present lack of explicit search, seizure and related powers significantly impedes Defence's ability to reduce the risk of unauthorised items being brought onto Defence premises and dangerous, restricted or classified items and information being improperly removed. The potential risks, including public safety risk, arising from the current absence of explicit search powers are illustrated by the Della-Vedova case, which involved the theft, from Defence premises, and illicit sale of rocket launchers by a Defence Force member.
- 4.13 To overcome the security risks posed by the current absence of explicit search powers, the Bill will introduce a statutory regime of search, seizure and related powers to be exercised by Defence security officials on Defence premises.

Trespass

- 4.14 One of the most fundamental means to improve security at Defence premises is to deter unauthorised access to these sites.
- 4.15 At present, the trespass provision in sub-section 82(3) of the Act only imposes a maximum penalty of \$40 for the offence of trespass on a 'defence installation'. This penalty is not sufficient to act as an effective deterrent, nor does it reflect the potential threat posed to security. Consequently the Bill will update the trespass offence and impose an increased maximum penalty.
- 4.16 Defence is the largest Commonwealth landowner and one of the largest landowners in Australia. The Department manages an estate comprised of in excess of three million hectares of land, around 88 major bases or Defence premises, approximately 370 owned properties and a further 350 under lease.

- 4.17 The magnitude of Defence's holdings poses a major challenge to detecting trespassers, particularly if detection was to rely exclusively on the use of manned patrols. Consequently, to support the enforcement of the new trespass offence, the Bill introduces measures to support the increased use of optical surveillance devices by Defence for the purpose of monitoring security at Defence premises and the safety of people on those premises.
- 4.18 Finally, the Bill will support controlled access to Defence sites and the enforcement of the trespass provision by introducing statutory identification powers that will be exercised by Defence security officials.

5 SUMMARY OF THE BILL'S PROVISIONS

- 5.1 This section provides an overview of the Bill's principle measures and includes cross-references to the relevant provisions. It is intended to assist Members to locate the various measures within the Bill and the Explanatory Memorandum.
- 5.2 Given the summary level and non-exhaustive nature of information contained in this section, it should not be relied upon exclusively to provide a full understanding of the Bill's various measures. Rather, the section should be read in conjunction with the Bill and Explanatory Memorandum.

Operation of provisions

- 5.3 With the exception of the trespass offence, the operation of the measures contained in the Bill is confined to Defence premises within Australia (see the definition of 'defence premise' at s71A(1)).
- 5.4 Operation of the trespass offence (s72P), extends to include Defence accommodation within Australia (see the definition of 'defence accommodation at s71A(1)).
- 5.5 The Bill will not affect Australian Defence Force operational activities.

Persons exercising powers

- 5.6 With the exception of the arrest power associated with the trespass offence, the exercise of the powers conferred by the Bill is confined to three identified classes of Defence security officials, who will perform security functions at Defence premises, namely:
- (a) contracted defence security guards (s71B);
 - (b) security authorised members of the Defence Force (s71C); and
 - (c) Defence security screening employees (s71D).

- 5.7 In accordance with the existing arrest power at s82(4) of the Act, any member of the Defence Force, the Australian Federal Police, or State and territory police, may arrest a person for the offence of trespass on Defence premises or accommodation. This arrest power has also been extended to Protective Service Officers in the new part.

Use of reasonable and necessary force

Relevant provisions: 71X, 72G, 72H

- 5.8 In recognition of the potential for Defence premises and personnel to be targeted by terrorists, the Bill provides improved certainty as to the scope of action that would be permitted for authorised Defence Force members. It will provide explicit authority for appropriately authorised and trained Defence Force members to take action to protect people from death or serious injury in the event of an attack on Defence premises that is occurring or imminent (s71X).
- 5.9 Further, the amendments provide that an authorised Defence Force member may use up to and including lethal force, if the member believes that this is necessary to prevent death or serious injury to himself, or others, or in the event of an attack on Defence premises (s72H(1)).
- 5.10 In respect of a person who is fleeing, s72H(2) clarifies that an authorised Defence Force member can only use potentially lethal force if the member believes this is necessary to prevent death or serious injury to himself (or others), the person has been called on to surrender and the Defence Force member believes the person cannot be apprehended in any other manner.
- 5.11 Provision 72H is modelled on section 51T of the Act which addresses the use of reasonable and necessary force by Defence Force members when assisting civilian authorities with domestic security incidents and violence under Part IIIAAA of the *Defence Act*.
- 5.12 The amendments provide that all Defence security officials may use reasonable and necessary force against people and things in exercising powers under the new Part (s72G(1)), but make it clear that contracted Defence security guards and Defence security screening employees are not authorised to use lethal force (s72G(2)). However, they would continue to be able to rely upon Commonwealth, State and Territory legislative provisions that provide a defence of self-defence.

Search and seizure powers

Relevant provisions: Divisions 2, 3, 4 and 5

- 5.13 The amendments will establish a statutory regime of search, seizure and related powers to be exercised by three identified classes of Defence security officials (see Paragraph 5.6 above), who will perform security

functions at Defence premises.

Powers exercisable with consent

5.14 All three classes of Defence security officials will be empowered to:

- (a) request evidence of a person's identification and authority to be on Defence premises (s71H(1), s71K);
- (b) conduct a consensual search of a person, vehicle, vessel, aircraft or item on entry to or exit from a Defence premises (s71H(2), s71J(1)); and
- (c) in defined circumstances, refuse a person entry to, or free exit from the Defence premises and, if the person is on Defence premises, potentially restrain and detain the person for the purposes of placing them in the custody of the police (s71H(3) & (4), s71J(2) & (3), s71K(3)).

5.15 The circumstances where these latter powers (i.e. as detailed in subparagraph 5.14(c)) might be invoked include:

- (a) when a person refuses an identification or search request made by a Defence security official (s71H(3)(a), s71J(2)(a), s71K(3)(a)); or
- (b) when, as a result of complying with a request, a Defence security official reasonably believes that the person is a trespasser, has or may commit a criminal offence in relation to the premises, or constitutes a threat to the safety of people on the Defence premises (s71H(3)(b), s71J(2)(b), s71K(3)(b)).

5.16 Special provisions have been authorised for declared explosive ordnance depots (s71L), given the inherent risk to public safety posed by the unlawful removal of weapons, munitions and explosive ordnance from these sites (*Division 2, Subdivision B*).

5.17 On declared explosive ordnance depots, contracted security guards will be empowered to conduct a consensual search of a person, vehicle, vessel, aircraft or thing anywhere on the depot, without the need for a reasonable belief that an individual poses a threat to safety or may commit a criminal offence (s71M, s71N).

Powers exercisable without consent

5.18 Authorised Defence Force members or, where such members are not available, Defence security screening employees (s72A) will be further empowered to:

- (a) require evidence of a person's identification and authority to be on the premises (s71R, s71T) ;

- (b) conduct a non-consensual search of a person, vehicle, vessel, aircraft or item on entry to or exit from a Defence premises (s71R, s71S);
- (c) conduct a non-consensual search of a person, vehicle, vessel, aircraft or item on a Defence premises, if the official reasonably believes that the person/item is not authorised to be there, constitutes a threat to the safety of people on the Defence premises, or relates to the commission of a criminal offence (s71T, s71U);
- (d) seize items that constitute a threat to safety or relate to the commission of a criminal offence on the premises (S72); and
- (e) in defined circumstances, remove people from Defence premises (s71R(4), S71T(4)).

5.19 The powers of security authorised Defence Force members will extend to include, where reasonable and necessary, taking any action required to make a seized item safe or prevent its use (s72(2)(a)).

5.20 For the purposes of the non-consensual identification and search powers, the amendments create offences for refusing or failing to provide evidence or identification (s71V), or for hindering and obstructing a search (s71W).

Safeguards

5.21 The statutory regime incorporates a range of safeguards relating to the exercise of these powers. These safeguards require that Defence security officials exercising these powers must:

- (a) have been authorised by the Minister for Defence (s71B(2), s71C(2), s71D(2));
- (b) have satisfied a minimum level of training and qualifications requirements as determined by the Minister for Defence or his delegate (s71B(4) & (5), s71C(4) & (5), s71D(4) & (5), s71F);
- (c) carry an identity card and, unless there is a threat to safety, produce their identity card for inspection prior to exercising their powers (s71E(6), s72B);
- (d) surrender their identity card within seven (7) days of ceasing to be a security official (s71E(3) & (4));
- (e) not stop or restrict any protest, dissent, assembly or industrial action (s72L);
- (f) when exercising a power on the basis that the official reasonably believes a person has or may commit a criminal offence, inform the person of the offence (s72C);

- (g) not subject a person to greater indignity than is reasonable and necessary (s72G(3));
- (h) if practicable, only search a person of the same gender (s72D);
- (i) only use such force against a person or thing that is reasonable and necessary (s72G);
- (j) only restrain and detain for the purposes of handing a person over to the police (s72J); and
- (k) in respect of seized items, provide the person with a receipt (if it is practicable) and, if there is a reasonable belief that the item relates to a criminal offence, give the item to the police (s72(2)).

5.22 In addition, it will be an offence for any Defence security official to purportedly conduct a consensual search of a person, vehicle, vessel, aircraft or thing, without consent (s71Q).

Practical application of powers

5.23 In practice, the exercise of these powers and the proposed use of the various classes of Defence security official will be dependent on the nature of the site and the assessed level of the security threat. So, for example, in practice:

- (a) The consensual identification and search powers will generally be exercised by contracted security guards, on a random basis, on entry to and exit from Defence premises at low to medium threat levels; and
- (b) The non-consensual identification, search and seizure powers will be exercised by security authorised members of the Defence Force (or where they are unavailable, by Defence security screening APS employees) during higher threat levels on all Defence premises and, on a random basis, at sites with significant holdings of highly classified information, weapons, munitions and/or ordnance.

5.24 To improve deterrence and detection, searches may be conducted using equipment, including electronic equipment, and, if the search is undertaken by an authorised Defence Force member, using detector dogs (s72E, s72M).

Trespass

Relevant Provisions: s72P, s72Q

5.25 The amendments in the Bill update and consolidate the existing trespass offence and arrest power in the *Defence Act 1903* to ensure it is recognised as an integral part of the proposed security regime.

- 5.26 The amendments preserve the areas that are presently covered by the trespass offence at s82 of the Act, including Defence aircraft and buildings used for accommodating any part of the Defence Force, and clarify that Defence has the power to deal with trespassers on naval vessels (s72P and refer to definition of 'defence premise' at s71A(1)). In addition, in line with current Commonwealth criminal law policy, the amendments impose a new maximum penalty of 50 penalty points, equivalent to \$5,500, for the offence of trespassing on Defence premises or Defence accommodation (s72P).
- 5.27 To support the enforcement of the trespass offence, Defence intends to increase the use of optical surveillance on Defence premises, including vessels and aircraft, to improve the Department's capacity to detect and apprehend potential trespassers. This might include video surveillance, such as Closed Circuit Television (CCTV).
- 5.28 As the purpose of any surveillance activity undertaken by Defence would be to identify and deal with potential security threats, the Commonwealth needs to be able to rely on any images captured to assist intelligence agencies, and as evidence to support any action by law enforcement agencies.
- 5.29 Consequently, the amendments will insert new provisions that:
- (a) authorise the Department, or the Defence Force or contracted security guards to collect information, including personal information, using optical surveillance devices (s72Q(1)); and
 - (b) authorise the Department or Defence Force to disclose information, including personal information, captured by those devices to intelligence and law enforcement agencies (s72Q(2) & (3)).

6 IMPLEMENTATION

6.1 Defence has established a Working Group, which includes inter-departmental representation, to finalise the policy and procedural arrangements to support the implementation of the Bill's measures. Specifically, the Working Group includes representation from the Australian Federal Police and the Australian Customs and Border Protection Service to allow Defence to draw on the experience these agencies have with implementing and managing comparable legislative powers.

6.2 In addition, Defence has initiated consultation with the States and Territories, through the Legal Issues Sub-Committee of the National Counter Terrorism Committee, on potential implementation issues. Consultation with relevant State and Territory agencies will continue and will inform final implementation arrangements and procedures.

6.3 Finally, Defence has and will continue to consult with union representatives on implementation issues through Defence's National Workplace Relations Committee.

7 CONCLUSION

- 7.1 Security at Defence premises is constantly under review. It is appropriate that the Department of Defence continues to introduce initiatives to enhance security in response to the changing nature of security threats.
- 7.2 This Bill provides a range of powers for designated Defence security officials to allow the Australian Defence Force and the Department of Defence to deter, detect and respond to incidents that threaten the security of Defence premises, assets and personnel within Australia. It acknowledges the contemporary security environment, including the threat posed by terrorism, and clarifies the authority of appropriately authorised Defence Force members to protect themselves or others from death or serious injury in the event of an attack on a Defence premises. It provides a statutory regime of search and seizure powers to reduce the risk of dangerous items entering Defence premises, or weapons or classified material being improperly removed. Finally, it further strengthens the Department's ability to detect and deal with trespassers.
- 7.3 The Bill reflects Defence's commitment to provide an appropriately secure work environment for Defence Force members, Defence employees and contractors.