

# Chapter 5

## Training of defence security officials

### Adequacy of training

5.1 When referring the bill for inquiry, the Senate Standing Committee for the Selection of Bills identified two issues dealing with training for the committee's consideration including 'whether defence personnel are adequately trained and equipped to safely detain civilians in accordance with the bill'.<sup>1</sup>

5.2 Indeed, the importance of training was one of the dominant messages coming from the submissions. Victoria Police was firmly of the view that authorised officers and contracted defence security guards would require specialist training to ensure the appropriate exercise of search and related powers. It noted that they would need this training, 'to deal with statutory powers of arrest, detention, search of persons as well as search and seizure of property for both safety and evidence purposes'.<sup>2</sup> Similarly, the Tasmania Police referred to Defence's 'obligation to provide training for security officers at an appropriate level in relation to any legislative authorities, especially stop, search and detention issues for people and the use of lethal force'.<sup>3</sup> The Senate Standing Committee for the Scrutiny of Bills also raised questions in relation to the powers of defence security officials, including contracted security guards, to restrain and detain. It took the view that the bill 'does not deal with the adequacy of the training of defence security officials to ensure these 'police powers' are exercised safely and appropriately'.<sup>4</sup>

5.3 Clearly, training is important to ensure that defence security officials carry out their duties appropriately. Training is especially important for officers authorised to use lethal force. Thus, although the New South Wales Police did not have any major concerns in relation to the bill, it did comment on training requirements for staff authorised to use lethal force.<sup>5</sup>

5.4 In response to the concerns about the training of security officials, Defence held that:

Under the provisions of the amendments, all Defence security officials must satisfy stringent training and qualification requirements before they can

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- 1 Senate Standing Committee for the Selection of Bills, *Report No. 11 of 2010*, 30 September 2010, Appendix 11.
  - 2 Victoria Police, *Submission 3A*, p. 1.
  - 3 Commissioner of Police, Tasmania, *Submission 10*, p. 1.
  - 4 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 8 of 2010*, 27 October 2010, p. 34.
  - 5 NSW Department of Premier and Cabinet, *Submission 7*, p. 1.

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.<sup>6</sup>

5.5 The bill stipulates that the Minister must, by legislative instrument determine the training and qualification requirements for—contracted defence security guards; security authorised members of the Defence Force; defence security screening employees and those that apply to security authorised members of the Defence Force in relation to the use of dogs.<sup>7</sup>

5.6 In the case of contracted defence security guards and defence security screening employees; the Minister may by writing delegate this power to the Secretary or an APS employee holding or performing the duties of a SES band 3 position, an equivalent or higher position. For security authorised members of the Defence Force; the Minister may delegate this power by writing to an ADF officer of three star rank or higher. According to the Explanatory Memorandum:

This will allow developments in training associated with the use of force, to be more readily incorporated into the training requirements for security authorised members of the Defence Force.<sup>8</sup>

### **Training requirements in legislative instruments**

5.7 While the Senate Standing Committee for the Scrutiny of Bills highlighted that the bill does not deal with the adequacy of training to ensure that conferred powers are exercised 'safely and appropriately' it also questioned whether 'appropriate parameters' for training requirements should be included in the bill.<sup>9</sup> It questioned why training and qualifications in relation to security authorised members of the Defence Force were not dealt with in the primary legislation. Its concern was that there are no provisions which allow it to assess with confidence 'the question of whether officers entitled to use lethal force will have received appropriate training and instruction'.<sup>10</sup> The Senate Standing Committee for the Selection of Bills also questioned whether it was appropriate to leave training requirements for officers authorised to exercise deadly force to be specified in legislative instrument.<sup>11</sup>

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6 Department of Defence, *Submission 8*, p. 4.

7 Subsections 71B(4), 71C(4) and 71D(4) and paragraph 71C(5)(b).

8 *Explanatory Memorandum*, Defence Legislation Amendment (Security of Defence Premises) Bill 2010, p. 9.

9 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 8 of 2010*, 27 October 2010, p. 34.

10 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 8 of 2010*, 27 October 2010, p. 35.

11 Senate Standing Committee for the Selection of Bills Committee, *Report No. 11 of 2010*, 30 September 2010, Appendix 11.

5.8 The New South Wales Department of Premier and Cabinet, however, cautioned that if training requirements are embedded in the bill, there may be concerns that 'if an officer uses the requisite powers without having completed all of the training requirements then he or she may be acting unlawfully'.<sup>12</sup> The submission acknowledged, however, that the majority of these powers already exist in any event. Indeed, in such an event where force is used in a self-defence capacity, such officials would continue to be able to rely upon the federal and state or territory legislative provisions that provide a defence of self-defence.

5.9 Given the extraordinary powers involved, the committee acknowledges the concerns raised in relation to the training requirements for officers empowered to use deadly force being specified in legislative instrument rather than the primary legislation. However, it also appreciates that the security environment is fluid and dynamic and that training requirements must be responsive to such changes. In this regard, the need for training requirements in relation to all defence security personnel to adapt in a timely manner is vital to a dynamic security environment in which such officials operate. In its submission, Defence highlighted this consideration:

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.<sup>13</sup>

5.10 The committee recognises that delegation of legislative power would be more amenable to such adaptation. The Legislative Instruments Handbook notes in this regard:

Delegation of legislative power allows matters of a detailed technical nature to be dealt with more efficiently than is possible through the Parliamentary processes. Legislative instruments can be made and amended more quickly and easily than primary legislation. If Parliament did not delegate the power to make legislative instruments, the legislative process would become slower and more congested.<sup>14</sup>

5.11 The committee appreciates that any such legislative instrument would need to be tabled in both Houses of Parliament and be subject to disallowance in accordance with the *Legislative Instruments Act 2003*. Defence argued that this requirement provides significant protection:

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

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12 New South Wales Department of Premier and Cabinet, *Submission 7*, p. 1.

13 Department of Defence, *Submission 8*, p. 2.

14 Attorney-General's Department, *The Legislative Instruments Handbook*, December 2004, p. 8.

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.<sup>15</sup>

5.12 For comparative purposes, the committee looked at a relevant section of the AFP regime in relation to the use of force.

### ***The AFP regime***

5.13 Section 40EA of the *Australian Federal Police Act 1979* states that the Commissioner may declare an AFP employee (other than a member) to be a protective service officer if the Commissioner is satisfied that the employee meets the requirements specified in a determination under section 40EB which in turn states:

The Commissioner may, by written determination, specify either or both of the following for the purposes of section 40EA:

- (a) competency requirements;
- (b) qualification requirements.

5.14 In terms of overriding principles in relation to the application of the use of force, the AFP Commissioner's Order 3 sets out the operational guidelines. In the exercise of his or her powers under section 38, the Commissioner may, by writing, 'issue orders with respect to the general administration of, and the control of the operations of, the Australian Federal Police'. Furthermore, section 39 requires AFP appointees to comply with Commissioner's Orders. The AFP Commissioner's Order 3 sets out the operational guidelines for the use of force for AFP officers. Order 3 is an internally generated guideline which:

...gives effect to the policy of the AFP for the use of reasonable force and its implementation through the establishment and maintenance of appropriate competency standards, the accreditation of trainers, the qualification and re-qualification of AFP employees in the use of force, appropriate reporting mechanisms and management structures for training and monitoring use of force in the AFP.<sup>16</sup>

5.15 The purpose of order 3 is to ensure that the AFP operates to de-escalate potential conflict situations within the use of force continuum. The AFP 'stresses the use of minimum force and maintains the preference at all times to resolve incidents

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15 Department of Defence, *Submission 8*, p. 3.

16 Australian Federal Police, Submission No. 278 to the Senate Select Committee on Mental Health Inquiry into the Provision of Mental Health Services in Australia, 2006, [http://www.afp.gov.au/senate/committee/mentalhealth\\_ctte/submissions/sub278.pdf](http://www.afp.gov.au/senate/committee/mentalhealth_ctte/submissions/sub278.pdf) (accessed 3 November 2010).

without force.<sup>17</sup> The order, which is a confidential document, notes that the 'use of reasonable force underpins all AFP conflict management strategies and the AFP's use of force model'.<sup>18</sup> It determines that the use of reasonable force is the 'minimum force reasonably necessary in the circumstances of any particular case'.

5.16 Whilst setting out the basis on which equipment and munitions can be used and emphasising the importance of non-violent options including negotiation, the code requires officers to submit an AFP Use of Force Report following its application and detailing the circumstances and manner in which force was applied.<sup>19</sup>

### *Committee view*

5.17 The committee underscores the importance of training in relation to defence security officials and emphasises that training undertaken by such officials should be informed by the AFP and state police regimes. Given the fluidity of the security environment in which they are expected to operate, the training regime for defence security officials must be both robust and responsive. To this end, the committee reaffirms the importance of ongoing consultation between Defence and the AFP and other federal agencies as well as regular joint exercises.

5.18 The committee considers that determining training requirements in legislative instrument is appropriate to the extent that flexibility is required to enable timely modifications to the training requirements in response to the changing nature of security threats. It notes, moreover, that any such modifications would attract parliamentary scrutiny to ensure that provisions therein are balanced.

5.19 The committee recognises the importance of the principle of proportionality on which all training should be based especially when officers are empowered to use lethal force. It encourages the ADF to consider inclusion of the principle in delegated legislation. In this regard, the committee notes the AFP Commissioner's Order and encourages the ADF to give consideration to it.

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17 Australian Federal Police evidence to ACT Legislative Assembly Standing Committee on Legal Affairs, *Police Powers of Crowd Control*, Report 6, May 1997, p. 42, <http://www.parliament.act.gov.au/downloads/reports/06%20police%20powers%20final.pdf> (accessed 3 November 2010).

18 Commissioner's Order 3 cited in ACT Legislative Assembly Standing Committee on Legal Affairs, *Police Powers of Crowd Control*, Report 6, May 1997, p. 35, <http://www.parliament.act.gov.au/downloads/reports/06%20police%20powers%20final.pdf> (accessed 3 November 2010).

19 Australian Federal Police evidence to ACT Legislative Assembly Standing Committee on Legal Affairs, *Police Powers of Crowd Control*, Report 6, May 1997, p. 35, <http://www.parliament.act.gov.au/downloads/reports/06%20police%20powers%20final.pdf> (accessed 3 November 2010).

**Recommendation 2**

**5.20 The committee recommends that the Australian Defence Force give consideration to the utility of the inclusion of the 'reasonable and necessary' principle in delegated legislation.**

**Committee conclusion**

5.21 The committee recognises that the bill provides a range of powers to defence security officials to enhance security of Defence bases, facilities, assets, and personnel within Australia. Notwithstanding its recommendation that training be consistent with the 'reasonable and necessary' principle, the committee is satisfied that the safeguards on the powers conferred on defence security officials are adequate to ensure that such powers are utilised appropriately.

**Recommendation 3**

**5.22 The committee recommends that the Senate pass the bill.**

5.23 Whilst noting that the bill introduces new provisions in relation to defence personnel including the power to exercise lethal force, to search and seize, restrain and detain, the committee appreciates that security threats are dynamic in nature. To ensure that such provisions are adequately responsive to ever-changing security risks and meet their objectives, the committee proposes to review the operation of the bill three years after enactment, having specific regard to matters considered in this report and any other concerns raised during its lifetime.

**Recommendation 4**

**5.24 That the Senate Standing Committee on Foreign Affairs, Defence and Trade review the operation of enacted provisions of the bill in early 2014.**

SENATOR MARK BISHOP  
CHAIR