

Appendix 2

Supplementary submission—Department of Defence

**SUPPLEMENTARY 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
January 2011**

TABLE OF CONTENTS

	Page
Section 1: Response to the House debate, 25 October 2010 and the Bills Digest No 29 of 2010-11, dated 29 October 2010	1
Section 2: Response to the Senate Standing Committee for the Scrutiny of Bills, regarding issues in Alert Digest 8/10 of 27 October 2010	3
Section 3: Response to other submissions lodged with the Senate Foreign Affairs, Defence and Trade Legislation Committee	8

Section 1: Response to the House debate, 25 October 2010 and the Bills Digest No. 29 of 2010-11, dated 29 October 2010

Issue - In what circumstances and manner may Australian Defence Force members use lethal force under the provisions contained in this Bill.

- 1.1 Detailed information on the Department's protective security arrangements, including the proposed rules of engagement for authorised Australian Defence Force (ADF) members using reasonable and necessary force in the event of an attack on a Defence base, are not publicly released for security reasons. However, in accordance with this legislation, potentially lethal force will only be used by authorised ADF members to protect people on a base from death or serious injury in the event of an attack that is imminent or occurring. Authorised ADF members will only draw weapons and ammunition on the order of the senior ADF officer on base, or in accordance with the base response plan. Provision will be made, as appropriate, for suitably trained and authorised ADF members to have ready but controlled access to weapons and ammunition to allow them to protect life in the event of an attack. The use of force in this context will be supported by training and rehearsals.
- 1.2 The purpose of the provisions addressing the use of lethal force is to protect people. That said, the protection of people would, of course, extend to people working on, or securing assets located on Defence premises, therefore indirectly protecting those assets.

Issue - Use of contracted security guards rather than Australian Defence Force members to provide security at the entrances and perimeters to Defence bases.

- 1.3 The use of ADF members to undertake routine 'static' guarding duties at low threat levels across all Defence sites is not a cost effective use of this highly trained resource. Moreover, noting the significant personnel numbers that would be involved, this would also have an adverse impact on ADF training and operational availability.
- 1.4 At lower threat levels, security at Defence bases will involve a combination of contracted security guards, civil police and, at some sites, Australian Federal Police (AFP) Protective Service Officers. At higher threat levels, ADF members would likely takeover the guarding function at Defence bases given their increased range of powers under the Bill, vis-a-vis contracted security guards, including the power to require identification, conduct non-consensual searches, seize items and, if necessary, take action to make a seized item safe.
- 1.5 All bases will have well-rehearsed arrangements in place to deal with a no-warning attack.

Issue - Costs associated with the implementation of the Bill's measures.

- 1.6 Funding for implementation of the Bill's measures will be met from internal Defence resources that have been allocated to the Base Security Improvement Program. As is the case for the rest of Base Security Improvement Program, the extent of the implementation of the Bill's measures at each site will be informed by security risk assessments, with measures appropriately tailored to each site and the available budget allocation. This will ensure that the cost of implementing measures is proportionate to the anticipated risk reduction that can be achieved at each site and that Defence remains within its approved budget.

Comments in Bills Digest No. 29 of 2010-11

- 1.7 It is noted that the Law and Bills Digest Section of the Parliamentary Library have reported on the Bill. The Bill notes two issues.
- 1.8 The first issue identified in the Digest notes that the Bill does not define the term 'attack'. The term is used in the Bill in relation to the power of an authorised ADF member to use potentially lethal force if there is a threat of death or injury to a person caused by an attack on defence premises, or people on those premises, that is occurring or imminent. In this respect, any attempt to define terms relating to this provision risks limiting the broad protection that this provision currently affords authorised ADF members in protecting people on Defence premises.
- 1.9 The second issue noted by the Bills Digest is that the Bill does not provide protection to an ADF member who exercises greater force than is authorised. In the same context, the Digest notes that the Bill does not contain a provision corresponding to section 51WB in Part IIIAAA of the *Defence Act 1903*; a part that primarily deals with the utilisation of the Defence Force in situations of domestic violence, such as terrorist attacks. Section 51WB provides a defence to a charge if an ADF member has done a criminal act under an order of a superior, provided certain criteria can be made out. The section was inserted into Part IIIAAA as part of a package of measures that allowed action to be taken against aircraft (including passenger aircraft) or ships, which may have been taken over as part of a terrorist action for use against other sites. In these circumstances, such a provision was considered appropriate given the potential for mass innocent casualties flowing from Defence Force action.
- 1.10 That said, section 51WB is not limited on its face to this type of action and applies to any action covered by Part IIIAAA. Consequently, as implied by the Bills Digest, a corresponding provision could be inserted into the base security regime proposed in the Bill. This is not seen as desirable as the base security amendments are more limited and are intended to provide an immediate response to an attack on a base, rather than involving more complex use of force issues that arise in responding to a Part IIIAAA event, such as the need to consider shooting down a passenger aircraft over a major city.

Section 2: Response to the Senate Standing Committee for the Scrutiny of Bills, regarding issues in Alert Digest 8/10 of 27 October 2010

Issue: Whether the definition of defence premises includes land which may have a Defence purpose, but which is also being used for another purpose (such as an immigration facility) and generally whether it is appropriate for the amendments to apply to all defence premises.

- 2.1 Land or buildings that may have a Defence purpose, but which are not currently used by the Defence Force or the Department of Defence do not meet the definition of defence premises included in the Bill. So, for example, the provisions in the Bill would not apply to an immigration facility that is located on a former Defence base that is not currently used by the Defence Force or the Department. Similarly, if a portion of an operational base was set aside for a use that is unrelated to the Defence Force or the Department, the provisions of the Bill would not apply to that portion of the base. The Department will amend the Explanatory Memorandum to include a statement to this affect.
- 2.2 Defence facilities, assets and personnel are potentially attractive targets for terrorist groups. In addition, many Defence facilities house dangerous, restricted or classified items. To ensure that the Department can appropriately safeguard Defence facilities, assets and personnel and prevent the unlawful removal of dangerous or classified items, Defence requires the ability to exercise the powers contained in the Bill at all of its premises. In practice, the exercise of the powers contained in the Bill and the proposed use of the various classes of Defence security officials will be dependent on the nature of the site and the assessed level of the security threat, typically determined on the basis of intelligence.

Issue: Whether consideration has been given to adequately warning persons entering Defence premises that they may be subject to non-consensual searches.

- 2.3 The Department intends to implement a number of administrative measures to ensure that people entering Defence premises are aware of the requirements, obligations and consequences arising from the search regime in the Bill. 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.

2.4 Further, Defence would highlight that section 72B of the amendments require Defence security officials to notify people, before making a request or requirement under the Bill's provisions, of the affect of refusing or hindering the request or requirement.

Issue: Concerns about the adequacy of the training of Defence security officials to ensure the restrain and detain powers are exercised safely and appropriately, and whether appropriate parameters for training requirements can be included in the Bill.

- 2.5 The Bill makes provision for Defence security officials to restrain and detain a person for the purposes of placing them in the custody of police or a protective security officer at the earliest practicable time. 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.
- 2.6 The ability to restrain and detain people is a fundamental component of the proposed search regime detailed in 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 or classified items being improperly removed from Defence premises.
- 2.7 Under the Bill, all Defence security officials must satisfy training and qualification requirements before they can exercise any of the powers contained in the 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 and will be stringent.
- 2.8 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.

- 2.9 The training requirement for contracted security guards under this Bill, and as determined by the Minister for Defence, will build upon and enhance the existing training regime as mandated in Defence security policy. Current Defence policy demands that contracted security guards meet a number of requirements that includes the successful completion of a Certificate II in Security Operations and the provision of services in accordance with relevant legislation, including general criminal legislation which controls the use of force. Additional mandatory requirements state that Defence contracted security guards:
- (a) must be licensed to carry out the required security function by the relevant State or Territory in which the Defence facility is located;
 - (b) must hold a minimum security clearance of CONFIDENTIAL;
 - (c) must provide services in accordance with any relevant enactment or direction by the regulatory authority in each State and Territory and Australian Standard (AS) 4421 Guards and Patrols; and
 - (d) must possess a current drivers licence and a first aid qualification or competency.
- 2.10 In addition, contracted security guards must complete a Defence-endorsed training package covering the following topics:
- (a) Defence security policy and relevant laws;
 - (b) Defence protocols such as rank structure and customer service;
 - (c) Defence security environment and awareness;
 - (d) Defence policing; and
 - (e) the Defence security alert system.
- 2.11 Australian Public Service employees who are to be appointed as Defence security screening employees and security authorised Defence Force members will be required to undergo comparable training to contracted security guards, appropriately augmented to address the additional powers available to these two categories of Defence security officials.
- 2.12 The Department's position is that it is appropriate from a legal policy perspective that the training and qualification requirements for Defence security officials, including training requirements for the restrain and detain powers, 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.

- 2.13 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 equipment, without incurring the delays that would arise if these requirements were stipulated within the Bill itself.

Issue: Justification for the provisions allowing and limiting the use of deadly force, together with concerns about of the adequacy of the training and qualification requirements and whether parameters for these can be included within the primary legislation.

- 2.14 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.

- 2.15 Australian law recognises the right to protect yourself or 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.

- 2.16 The Department's position is that it is appropriate from a legal policy perspective that the training and qualification requirements for Defence security officials, including training requirements for appropriately authorised Defence Force members who may be required to exercise potentially lethal force in the context of base security, 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.

- 2.17 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 equipment, without incurring the delays that would arise if these requirements were stipulated within the Bill itself.

Issue: Whether, and if so why, it is intended that the proposed offence @71W of hindering or obstructing a search be regarded as a strict liability offence.

- 2.18 The Explanatory Memorandum incorrectly states this is a strict liability offence. It will be amended to correct this error.

Issue: Justification of the use of dogs for functions other than to detect explosives or other hazardous materials.

- 2.19 The primary use of dogs is for the protection of people and assets. Apart from their role in the detection of explosives or other hazardous material, dogs may be used by security authorised Defence Force members to deter, detect and, if required, apprehend trespassers for the purposes of placing them in the custody of the police or a protective service officer at the earliest practicable time (ie restrain and detain).
- 2.20 Military working dogs are presently employed at a number of Defence sites, in particular around Air Force bases. They are used to assist with the protection of people and assets over an extended area, which can often be difficult to protect effectively through other means. The presence of military working dogs can also be a very effective deterrent to trespassers and assist in avoiding a situation escalating to a point where injury to personnel or damage to assets may occur.
- 2.21 Defence maintains stringent policies and procedures around the training and use of military working dogs and the training of dog handlers. At all times, military working dog handlers are required to only use such force as is reasonable and necessary and direct their dogs in such a manner as to prevent unreasonable injury to persons or damage to property.
- 2.22 The use of dogs to assist with the conduct of searches or other functions or powers under this Bill is limited to security authorised Defence Force members who are also fully qualified dog handlers.

Section 3: Response to other submissions lodged with the Senate Foreign Affairs, Defence and Trade Legislation Committee

- 3.1 While submissions to the Committee from other organisations were generally supportive, there were some instances when the submissions reflected a misunderstanding of some aspects of the Bill or its intended implementation. The following information is provided to clarify these matters.

Victoria Police – consideration should be given to legislate for Federal and State Police to have the same security powers as Defence Security Officials.

- 3.2 This is a matter for State and/or Federal government consideration and Defence has no position on this matter.

Police Federation of Australia – concerns with Police-style powers being granted to individuals who are not fully trained, sworn officers.

- 3.3 The Bill does not alter the primacy of civil law enforcement authorities in responding to security incidents at Defence premises. The proposed statutory regime incorporates safeguards that ensure that personnel exercising powers under the Bill have been authorised by the Minister for Defence and have satisfied a minimum level of training and qualification requirements as determined by the Minister or his delegate. For further information on training of Defence security officials, please refer to our response to the Senate Standing Committee for the Scrutiny of Bills.

Police Federation of Australia – assurance as to the scope of work of contracted Defence security guards.

- 3.4 Contracted security guards currently perform a range of protective security functions at Defence bases. The powers available to contracted security guards under this Bill have been deliberately limited. Contracted security guards will only be authorised to request evidence of a person's identification, conduct consensual searches and, in defined circumstances, restrain and detain a person for the purposes of placing them in the custody of a law enforcement officer.
- 3.5 In addition, under the Bill contractors, subcontractors or their employees who provide security services at Defence premises must be authorised by the Minister by written instrument to be Defence contracted security guards. The Minister will only be able to authorise as contracted security guards, persons who have met a standard of security training as determined by the Minister by legislative instrument.

Police Federation of Australia – assurance that Defence security guards' functions will be strictly confined to Defence bases and premises and the immediate surrounds of those establishments.

- 3.6 The powers contained in the Bill for all categories of Defence security officials are only exercisable on Defence premises. This is defined as any area of land or other place, a building or other structure, a vehicle, vessel or aircraft, or a prohibited area within the meaning of the *Defence (Special Undertakings) Act 1952*, which is located in Australia and is owned or occupied by the Commonwealth for use by the Defence Force or the Department.

Government of Western Australia, Department of Premier and Cabinet, Office of the Director General – in regard to State or Federal police responding to incidents at Defence facilities, consideration could be given to a waiver of the screening of attending police to facilitate a timely response to an incident.

- 3.7 The powers contained in the Bill are discretionary and in practice the exercise of these powers by Defence security officials will be dependent on the nature of the site and the assessed level of security threat. In the event of a security incident requiring a police response, these arrangements will be altered accordingly if required.
- 3.8 Local emergency services are involved in the preparation of base security response plans to confirm response arrangements and assistance required in the event of a security incident. This would include procedures addressing the issue outlined above.