

# CHAPTER 1

## INTRODUCTION

### **Introduction and referral of Bill**

1.1 On 7 December 2005, the Defence Amendment (Aid to Civilian Authorities) Bill 2005 was introduced into the Senate. On 8 December 2005 the Bill was referred to the Legal and Constitutional Legislation Committee for Inquiry and report by 7 February 2006.

### **Conduct of the inquiry**

1.2 The inquiry was advertised in *The Australian* newspaper on 14 December 2005, and the Committee also wrote to 56 organisations and individuals. Interested persons were invited to provide submissions by 16 January 2006. Details of the inquiry, the Bill, and associated documents were placed on the Committee's website.

1.3 The Committee received 17 submissions with six supplementary submissions. A list of submissions is at Appendix 1.

1.4 The Committee held one public hearing on 31 January 2006 at the New South Wales Parliament House in Sydney. A list of witnesses who appeared at the hearing is at Appendix 2 and copies of the Hansard transcript are available through the Internet at <http://aph.gov.au/hansard>.

1.5 The Committee thanks those organisations and individuals who made submissions and gave evidence at the public hearings, particularly in view of the short timeframes involved.

### **The Bill**

1.6 The Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005 seeks to amend Part IIIAAA of the *Defence Act 1903* (the Act). The proposed amendments cover nine principal areas, and relate to: the use of reserves in domestic security operations; Australian Defence Force (ADF) call-out notification requirements; expedited call-out procedures for sudden and extraordinary emergencies; identification of called-out ADF personnel; criminal laws and procedures applicable to called out ADF personnel; ADF powers to protect designated critical infrastructure and respond to domestic security incidents or threats in offshore areas or in the air.

1.7 A detailed examination of the main provisions of the Bill is in Chapter 2.

## Note on references

1.8 References in this report are to individual submissions as received by the Committee, not to a bound volume. References to the Committee Hansard are to the proof Hansard: page numbers may vary between the proof and the official Hansard transcript.

## Background to the Bill

1.9 The Bill must be viewed in the light of the Australian constitutional arrangements, as well as recent legislative responses which reflect the changing security environment.

### *Constitutional powers and defence aid to the civilian authority*

1.10 The ADF was created for the purpose of the defence of Australia against external threats. The establishment of the ADF is supported by section 51(vi) of the Australian Constitution, which grants the Commonwealth government powers over the 'naval and military defence of the Commonwealth and of the several States'.

1.11 Within the Australian constitutional framework, policing is essentially a responsibility of the state governments.<sup>1</sup> Using Commonwealth military forces within Australia against domestic threats has therefore always presented constitutional difficulties.<sup>2</sup> On the relatively few occasions in which it has occurred, the deployment of the military has essentially been based on two constitutional grounds.

1.12 The first is section 119 of the Constitution:

#### **Protection of states from domestic violence**

The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.

1.13 The second, and more general, basis for the use of military forces is section 61 of the Constitution, which grants a general executive power for the 'execution and maintenance of this Constitution and of the laws of the Commonwealth'.

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1 For a more detailed discussion of this constitutional issue, see Elizabeth Ward, *Call out the troops: an examination of the legal basis for Australian Defence Force involvement in 'non-defence' matters*, Parliamentary Library Research Paper 8, 1997-98.

2 Note the distinction between 'defence aid to the civilian authority', which refers to the instances in which defence personnel may use force, and the more general 'defence aid to the civilian community', which covers non-force (and much more usual) situations including disaster relief, participation in community activities or technical assistance to State or Territory governments. See Senate Foreign Affairs Defence and Trade Legislation Committee, Report on the Defence Legislation Amendment (Aid to the Civilian Authority) Bill 2000, p. 1. For a full listing of all instances in which the Defence force has been called out, see Appendix 3.

1.14 As Mr James of the Australian Defence Association told the Committee, these powers have only been used three times since Federation to authorise military call-outs for aid to the civilian authorities that involve the use of force: the Victorian Police Strike in the 1920's; the Commonwealth Heads of Government Regional Meeting in Bowral in February 1978 and the Territory of Papua New Guinea in 1970.<sup>3</sup>

### ***Catalysts: Counter-terrorism: 1978 – 2000***

1.15 In 1978, defence forces were called out to secure the NSW Southern Highlands town of Bowral, where the Heads of Government were meeting following the bombing of the Hilton Hotel in Sydney.

1.16 Following this, Justice Hope (a former judge of the NSW Supreme Court) was appointed to conduct a review of the call-out process for defence forces assisting civilian authorities. Justice Hope's report noted that assistance to civilian authorities lacked accountability, was anachronistic and unsuited to the then current environment.<sup>4</sup> He recommended legislative amendments to the Defence Act to rectify this.

1.17 It was not until 2000 that some of the recommendations from Justice Hope's review were put into legislation. With the Olympic Games to commence in Sydney in September 2000 there was concern that this could provide an opportunity for large scale terrorist activity. This provided the necessary impetus to establish a legislative framework for domestic call-out that removed any uncertainty relating to the Commonwealth's powers.

1.18 In June 2000, the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000 (the 2000 Bill) was introduced into Parliament. Until the introduction of the 2000 Bill there was no legislative framework that conferred specific powers on members of the defence force called out in respect to domestic violence, nor was there any provision for the Commonwealth to act on its own initiative to use members of the defence force to protect its own interests.<sup>5</sup>

1.19 In the second reading speech for the 2000 Bill, Dr Sharman Stone MP highlighted that the Act was not considered capable of responding to then contemporary needs, noting that the call-out provisions of the Act reflected its 18<sup>th</sup> century English origins, which focused on riot control, and predated the establishment of modern police services. Dr Stone noted the ways in which the Act lacked relevance to the current environment:

This can be seen by the archaic references in this legislation to the presence of magistrates, the blowing of bugles and the reading of proclamations,

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3 Mr James, *Committee Hansard*, 31 January 2005, p. 26.

4 *Protective Security Review*, Australian Government Publishing Service, 1979.

5 Senate Foreign Affairs Defence and Trade Committee, *Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000 Report*, August 2000, p. 2.

requirements that do not assist, or may possibly even inhibit, the resolution of modern-day terrorist incidents.<sup>6</sup>

1.20 Dr Stone observed that the need for a responsive system for call-out has elicited varying responses in other countries. Some countries in Europe have established paramilitary forces (for example, in Germany the GSG 9, the Gendarmerie in France, the Carabinieri in Italy and the National Guard and Coast Guard in the United States.) Other countries such as Canada and New Zealand endow members of their defence forces with the same powers, obligations and protections as are available to their police services.<sup>7</sup>

1.21 Neither option was considered appropriate for Australia. In particular, the federal system would make the second option particularly difficult to administer, as the powers of police differ from state to state.

### ***The 2000 Bill and the insertion of Part IIIAAA***

1.22 The amendments in the 2000 Bill repealed most of the existing section 51 of the Act, and added a new Part IIIAAA.

1.23 Broadly, Part IIIAAA deals with the use of the defence force, including reservists, to protect Commonwealth interests, the states and self-governing territories, against 'domestic violence'. The amendments in the 2000 Bill were designed 'to bring the framework for law enforcement emergencies up to date'.<sup>8</sup>

1.24 Accordingly, the 2000 Bill provided that where the Prime Minister, Attorney-General and the Minister for Defence are satisfied that a State or Territory is unable to protect Commonwealth interests against domestic violence, the Governor-General may authorise, in writing, the Chief of the Defence Force to use the defence force for that purpose.

1.25 In cases where the Government of a State or Territory is unable to protect itself against domestic violence, it may apply to the Commonwealth for that protection: however the authorising Ministers must still be satisfied that the State or Territory is unable to protect itself against the domestic violence.

1.26 Once this threshold had been reached, the 2000 Bill gave to the defence force specific powers relating to the recapture of premises, freeing hostages, detaining or evacuating persons, and powers of search and seizure of dangerous things.<sup>9</sup>

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6 Dr Stone, *House Hansard*, 28 June 2000, pp 18410.

7 Dr Stone, *House Hansard*, 28 June 2000, p. 18410-11.

8 Dr Stone, *House Hansard*, 28 June 2000, pp 18410.

9 *Explanatory memorandum*, Defence Amendment (Aid to Civilian Authorities) Bill 2000.

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*Requirement for review of Part IIIAAA*

1.27 In its report on the 2000 Bill, the Committee recommended that a review of the legislation by a parliamentary Committee take place within six months of any call-out of the defence force or, if there is no call-out, within three years of enactment. The result was the insertion of section 51 XA into the Act which provides that an independent review could be undertaken at the direction of the Minister if there was no parliamentary report. An independent review can also take place even if there was no defence force call-out.

1.28 An independent review of the Act was undertaken by Mr Anthony Blunn AO, General John Baker AC DSM (Retd) and Mr John Johnson AO APM QPM (the Blunn Review). The report was presented to the Minister for Defence on 12 January 2004.

1.29 The Blunn Review noted that Part IIIAAA recognised only a narrow set of circumstances in which domestic violence might be likely to occur.<sup>10</sup> While suited to the environment at the time the 2000 Bill was passed, Part IIIAAA is unsuited to the current security environment and does not reflect the 2002 Commonwealth Heads of Government Meeting arrangements for Terrorism and Transnational Crime.

1.30 The Blunn Review also observed that experience in application of the Part had been gained exclusively through planning and exercise activities, and even this limited experience revealed flaws which could inhibit the resolution of anticipated crises.

1.31 Other shortcomings of existing Part IIIAAA noted in the report were:

- while recognising the importance of proper process, there is a lack of focus on outcomes;
- the processes themselves are time consuming;
- Part IIIAAA is fundamentally based on siege/hostage concepts and therefore does not cater for the wide range of possible terrorist scenarios, including that of a fast moving terrorist incident;
- there is no provision for anticipatory operations by the ADF which may be required to protect Commonwealth assets;
- issues about the use of the reserve; and
- issues surrounding the reasonableness of actions in a military context and the consequent legal responsibility borne by the military.

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<sup>10</sup> Blunn, Anthony (AO), Baker, General John (Retd) (AC DSM), Johnson, John (AO APM QPM), *Statutory Review of Part IIIAAA of the Defence Act 1903 (Aid to Civilian Authorities)*, AGPS, Canberra, 2004.

1.32 The overall shortcomings of the Act concerned the largely static nature of the situations that the Act was designed to address. In its submission to the current inquiry, the Department of Defence noted that:

... it was clear that the current legislative basis for ADF operations in support of domestic security does not reflect: the evolving threat environment; recent security initiatives such as the establishment in March 2005 of the Joint Offshore Protection Command; or the potential range of tasks faced by both Permanent and Reserve forces in periods of heightened alert.

1.33 The Department of Defence observed that the threat environment is evolving, and situations undreamt of even a short time ago are now feasible. As noted by both the Blunn Review and the Department of Defence:

- terrorist techniques now commonly use innocent bystanders as targets rather than simply as hostages;
- mass civilian casualties may be a terrorist objective;
- suicide is commonly used by terrorists;
- warning times of impending action may be very short or non-existent;
- deterrence is not a realistic concept against terrorist groups or individuals welcoming martyrdom in support of their cause;
- much greater reliance must be placed on intelligence, surveillance and border controls to provide adequate warning and a first line defence;
- there is likely to be greater call for anticipatory action possibly involving the ADF to secure potential targets indicated in intelligence assessments;
- the approval process for the authorisation of military assistance to the civilian authority (after call-out) must be available at very short notice or 'delegated' at the time of call-out in limited circumstances such as APEC or the Melbourne Commonwealth Games;
- incidents may go beyond a single site and consist of series of situations or involve rapid movement rather than a static stronghold;
- the use of chemical, biological, radiological or nuclear agents in urban environments can not be ruled out;
- a terrorist incident at one site might prompt the need for concurrent protection of other targets across Australia.<sup>11</sup>

1.34 The speed of events and their potential proximity to large population centres has made the proposals in the Bill a matter of urgency. However, in introducing the Bill, Senator Coonan, representing the Minister for Defence, Senator Hill, emphasised that:

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11 Department of Defence, *Submission 6*, p. 5.

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The amended Bill does not constitute a change to the fundamental principles underlying Part IIIAAA. ... while the current threat environment is likely to remain dynamic, the use of the ADF in domestic security operations remains one of last resort. Equally, the primacy of the State and Territory authorities and retention of the military chain of command are central to this bill.<sup>12</sup>

1.35 The Committee notes that the current need to update the legislative basis for Australia's counter-terrorist response beyond the provisions enacted in 2000, has been given added urgency by the terrorist bombings in New York, Madrid, London and twice in Bali. However, as the Explanatory Memorandum states, the principles underlying Part IIIAAA remain the same:

- the ADF should only be called out as a last resort where civilian authorities are unable to deal with an incident;
- where the ADF is called out the civilian authority remains paramount;
- ADF members remain under military command;
- if called out ADF members can only use force that is reasonable and necessary in the circumstances; and
- ADF personnel remain subject to the law and are accountable for their actions.

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12 Senator the Hon. Helen Coonan, *Senate Hansard*, 7 December 2005, p. 26.

