AMCRAN

Australian Muslim Civil Rights Advocacy Network

Submission to

Senate Legal and Constitutional Committee

Inquiry into the provisions of the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005

January 2006

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About AMCRAN

The Australian Muslim Civil Rights Advocacy Network (AMCRAN) is dedicated to preventing the erosion of the civil rights of all Australians, and, by drawing on the rich civil rights heritage of the Islamic faith, provides a Muslim perspective in the civil rights arena. It does this through political lobbying, contributions to legislative reform through submissions to government bodies, grassroots community education, and communication with and through the media. It actively collaborates with both Muslim and non-Muslim organisations to achieve its goals.

Since it was established in April 2004, AMCRAN has worked to raise community awareness about the anti-terrorism laws in a number of ways, including the production of a booklet *Terrorism Laws: ASIO, the Police and You,* which explains people's rights and responsibilities under these laws; the delivery of community education sessions; and active encouragement of public participation in the law making and review process.

AMCRAN and its members have participated in a number of parliamentary inquiries with respect to anti-terrorism laws in Australia, including:

- Senate Legal and Constitutional Committee Inquiry into the Provisions of the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill* 2002 (including appearance before the Committee), 2002;
- Senate Legal and Constitutional Committee Inquiry into the *Anti-Terrorism Bill* (No.2) 2004 (including appearance before the Committee), 2004;
- Senate Legal and Constitutional Committee Inquiry into the Provisions of the National Security Information (Criminal Proceedings) Bill 2004 and the National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004, 2004;
- Parliamentary Joint Committee on ASIO, ASIS and DSD Review of Al Qa'ida, Jemaah Islamiyah, the Abu Sayyaf group, the Armed Islamic Group, the Jamiat ul-Ansar, the Salafist Group for Call and Combat as terrorist organizations under section 102.1A of the Criminal Code, 2005;
- Senate Legal and Constitutional Committee Inquiry into the provisions of the National Security Information Legislation Amendment Bill 2005, 2005;
- Parliamentary Joint Committee on ASIO, ASIS and DSD Review of Division 3 Part III of the ASIO Act 1979 - Questioning and Detention Powers (including appearance before the Committee), 2005;
- Senate Legal and Constitutional Committee Inquiry into the provisions of the *Anti-Terrorism Bill (No. 2)* 2005 (including appearance before the Committee), 2005;
- Security Legislation Review Committee Review of Security Review of the operation, effectiveness and implications of the amendments made by the *Security Legislation Amendment (Terrorism) Act* 2002, *Suppression of the Financing of Terrorism Act* 2002, *Criminal Code Amendment (Suppression of Terrorist Bombings) Act* 2002, *Border Security Legislation Amendment Act* 2002, *Telecommunications Interception Legislation Amendment Act* 2002, and *Criminal Code Amendment (Terrorism) Act* 2003.

General Comments

We would like to thank the Senate and Legal Constitutional Committee for the opportunity to make submissions relating to the proposed *Defence Legislation Amendment (Aid to Civilian Authorities) Bill* 2005 (The Bill). This submission has been prepared by Mr Zaid Khan.

It is AMCRAN's view that the Bill should be rejected. It is our contention that the existing legal framework is sufficient, and further, that there has been a serious lack of public debate as to the necessity of this Bill. The Explanatory Memorandum states that "a number of amendments [in the Bill] give effect to Government initiatives to improve responsiveness of the Australian Defence Force (ADF) to domestic security incidents in the current threat environment", and further, that they "permit the utilisation of the ADF to protect States and self-governing Territories against domestic violence and to protect Commonwealth interests". However, the Government has not adequately expounded its justification for such hasty and redundant legislation, if at all. Why is it necessary for the ADF to respond to "domestic security incidents"? Has there been any demonstrable failure on the part of our domestic law enforcement bodies so as to justify this Bill? Further, what is meant by "domestic violence" and what exactly constitutes "Commonwealth interests"? These are vague terms that are not adequately defined in the EM or the proposed legislation itself.

Constitutional matters

Currently, extraordinary circumstances and emergencies are provided for within the Constitution whereby the Australian Defence Force (ADF) may be called to protect States along with the necessary procedures, safeguards and checks commensurate with such a request.

In the event of being overwhelmed with the scale or nature of an emergency, s 119 of the Constitution allows for the States to request the assistance of the ADF. However, the Bill attempts to override the necessity for State consent by vesting full power

within the Prime Minister to act in a "sudden and extraordinary emergency" without any reference to any other member of the Government.[1]

Further, Item 14 of Schedule 6 of the Bill makes it clear that any order made by ministers (either the Prime Minister or the Defence Minister and Attorney General) to call out the troops is not subject to Parliamentary disallowance or control. Such a process is not only constitutionally dubious but also contradicts internationally accepted emergency legislation protocol that requires a "present" emergency (as opposed to the "likely to occur" emergency), sufficient justification as to how the particular legislation will counter the emergency, and an evaluation as to whether the provisions are proportionate to the emergency. None of these criteria have been met. It would be improper to introduce this Bill that is so fraught with such clear difficulties, both Constitutionally and otherwise.

Existing domestic powers are adequate

It is submitted by AMCRAN that the existing powers of the State and Federal police are sufficient to deal with any potential emergency. Both organisations are sufficiently resourced and specifically trained to deal with civilian emergencies within a domestic context. Moreover, since the Sydney Olympics of 2000 and the events of September 11, 2001 there has been the creation of numerous specialist units within the State police forces to deal with sudden emergencies. There has been no explanation as to why these current expansive resources are insufficient.

Drafting is vague and imprecise

The Bill is couched in language that is vague and imprecise. It is a fundamental understanding of any legal system that ill-defined laws leave open the possibility of arbitrary and discriminatory application. The term "domestic violence", which acts as the trigger for the operation of the Bill, illustrates this point. The phrase is derived from s 119 of the Constitution and is now interpreted widely to such a broad extent as

[1] Proposed cl 51SE(5), Item 15, Schedule 1, the Bill.

to encompass more than just terrorism. Strikes, political demonstrations or riots may be within its meaning. This lazy drafting means that any civil protest or strike opposing Government policy or action could find itself facing the ADF.

Use of military and "shoot to kill"

The Bill represents a continuing and disturbing trend in the increased use of the military within a domestic and political context. This paradigm shift in the legal and constitutional power being wielded by the executive abrogates what the founding fathers of the Australian Constitution envisaged as the separation of powers, the rule of law, accountability and transparency of decision-making enshrined within the Constitution itself. This increased para-militarilisation of domestic policing represents a disturbing shift, aligned more with dictatorships and military juntas than liberal free democracies.

Practically, the innate problems with soldiers doing the job of Police are numerous. We ask the Committee to review the experiences of the United Kingdom and its deployment of troops on the streets of Northern Ireland and particularly the events of 30th January 1972 – "Bloody Sunday", in which 14 unarmed civilians were brutally shot dead by British troops called out to assist in a protest march. Events such as these elucidate the dangers in deploying highly armed soldiers trained and equipped to kill into civilian areas.

The authorisation of lethal force is also expanded under the Bill. Schedule 2 Item 5 broadens the circumstances in which ADF personnel may use lethal force to beyond the protection of life or prevention of serious injury to another person. The Bill will permit a shoot-to-kill policy in the protection of "critical infrastructure" i.e. property. Currently Australian law prohibits killing or causing grievous bodily harm as justifiable to protect property (s 10.4 Criminal Code Act 1995), and it is a long-accepted legal principle that must not be deviated from without sufficient justification.

Further, as stated above the drafting of this particular clause is also unacceptably vague. It states that in using force against a person, a member of the ADF must not "subject the person to greater indignity than is reasonable and necessary in the circumstances".[2] However, the word "indignity" is not defined in the Bill, and it is unclear whether or not there is a legal meaning to the term. In its plain English meaning, the word "indignity" is an entirely subjective word and is dependent on the person's own past experiences and personality. For example, to a person who may have come from a country with a long history of hostile occupation may find the mere fact of questioning from a person in military uniform highly degrading.

In addition, the Bill fails to clarify what rules of engagement will govern ADF personnel in this "civilian" context. The ADF "Manual of Land Warfare" is not available to the public and so exercise of ADF personnel power is merely governed by the nebulous phrase "reasonable force".

This lack of transparency and accountability is further compounded by the exclusion of ADF personnel from State criminal jurisdiction.[3] In effect any decision to prosecute a soldier for abuse or misuse of his powers, such as shooting dead a member of the public, will rest in the hands of the Commonwealth Director of Public Prosecutions and ultimately the Attorney-General. Further, it is also proposed to introduce the defence of "following orders".[4] This is an incredible immunity being granted to members of the ADF in a domestic situation, particularly in light of the potent shoot-to-kill provisions for the protection of property.

[2] Proposed cl 51T(2A), Item 5, Schedule 2 of the Bill.
[3] Item 13, Schedule 6 of the Bill.
[4] Proposed cl 51WB, Item 13, Schedule 6 of the Bill.