

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

INQUIRY INTO THE DEFENCE LEGISLATION AMENDMENT (AID TO CIVILIAN AUTHORITIES) BILL 2005

AUSTRALIAN FEDERAL POLICE SUBMISSION

1. Introduction

1.1 The Australian Federal Police (AFP) welcomes the opportunity to provide the Senate Legal and Constitutional Legislation Committee (the Committee) with information relevant to proposed changes to the *Defence Act 1903* contained within the Defence Legislation Amendment (aid to Civilian Authorities) Bill 2005.

1.2 Defence consulted the AFP throughout the process of developing these legislative amendments.

1.3 The AFP shares the Australian Defence Force (ADF) perspective that, should it become necessary to resort to military force, a streamlined and effective call out procedure will be essential to ensuring a positive outcome. However, given the ADF's lethal capabilities and the circumstances in which they could be used in a counter terrorism operation, legitimate checks need to remain in place.

1.4 The AFP welcomes the proposal to provide a statutory basis for ADF operations outside the territorial limits of the States and Territories. Specifying the powers military forces will have in those areas will clarify and facilitate civil and military interaction, resulting in a more effective response.

1.5 The AFP agrees that the current restrictions on use of force with regard to protection of critical infrastructure are potentially narrow, and that, given the severity of the consequences if such infrastructure were to be attacked, the ADF should have powers to protect it from attack.

1.6 The AFP agrees that the underlying principles of Part IIIAAA will need to remain the same, as identified in the Explanatory Memorandum and repeated below for reference:-

- 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 civil power 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.

2. Overview of AFP Role and Function

2.1 The AFP is the primary instrument of Commonwealth law enforcement. Its role is to enforce Commonwealth criminal law and protect Commonwealth and national interests from crime in Australia and overseas. The AFP is Australia's international law enforcement and policing representative and the chief source of advice to the Government on policing issues.

2.2 The AFP's functions are set out in section 8 of the *Australian Federal Police Act 1979* (AFP Act) and are amplified by a Ministerial Direction issued under Section 37(2) of the AFP Act. These include:

- “preventing, countering and investigating terrorism under Commonwealth legislation”;
- “providing protective security services to high office holders and physical establishments and entities of specific interest to the Commonwealth, witnesses and special events”; and
- “providing for the security of Australian air travellers and the aviation industry through the deployment of Air Security Officers on selected domestic and international flights and through the provision of a preventative and intelligence-driven Counter-Terrorist First Response capacity at major Australian airports.”

2.3 In addition, following the passage of the *Australian Federal Police and Other Legislation Bill 2004*, the AFP incorporated the former Australian Protective Service (APS) into the AFP from 1 July 2004. The specific protective and custodial functions designated for the APS are set out in a separate Ministerial Direction issued pursuant to sections 8A and 8(1)(be) of the AFP Act.

3. AFP Role in Counter Terrorism

3.1 The AFP plays a large part in Australia's international and national counter terrorism arrangements, particularly through a range of governance mechanisms including the National Counter Terrorism Committee (NCTC).

3.2 Central to the AFP's domestic counter terrorism efforts are the eleven Joint Counter Terrorism Teams (JCTTs) stationed throughout Australia, which include State and Territory police representatives. These teams work closely with other domestic agencies, the intelligence community and international partners to identify and investigate any activities in Australia which may be linked to terrorism.

3.3 Internally, the AFP's Intelligence, Forensic and Technical (including the Australia Bomb Data Centre), Protection and Counter-Terrorism portfolios have prominent roles in prevention and response to domestic terrorism activity.

3.4 State and Territory governments and their agencies are responsible for the operational response to a terrorist incident in their jurisdiction. The response is in cooperation with Australian Government agencies as appropriate. Operational responses to terrorist incidents will largely replicate responses to other criminal acts

or disasters. The circumstances of a terrorist incident will determine whether or not it is declared a National Terrorist Situation.

3.5 If a National Terrorist Situation is declared, overall responsibility for policy and broad strategy in relation to that situation transfers to the Australian Government, in close consultation with affected States and Territories. The Police Commissioners, including the Commissioner of the AFP, will determine the command and resourcing of the national police response.

4. AFP - Defence relationship

4.2 The AFP has a broad mandate with regard to counter terrorism, including responsibility for national and international coordination of law enforcement intelligence and the investigation and subsequent prosecution of terrorist activity, threats and incidents. The call-out of the ADF comprises a fairly narrow component of national counter terrorism activity.

4.3 The AFP's relationship with the ADF during a call out is governed by s. 51F of Part IIIAAA of the *Defence Act 1903*, the procedures of the National Counter-Terrorism Handbook and the broader concept of primacy of the civil power. These procedures ensure that international and national intelligence, law enforcement, evidential and forensic expertise is available throughout any response to a terrorist incident.

4.4 The areas where the proposed legislative amendments will have implications for AFP personnel and procedures include:

Aviation security

4.5 The presence of AFP Air Security Officers on selected civilian aircraft, and counter-terrorism first response teams in all major airports, means the AFP plays a major role in civil aviation security. The AFP views the proposed ADF powers to use force against aircraft and to use pre-authorised force in certain situations as a further strengthening of that regime.

4.6 The AFP is supportive of the proposed powers, on the understanding that ADF actions against aircraft, including preparatory actions, will continue to be carried out in consultation with the AFP and that agreed guidelines will be incorporated within the National Counterterrorism Handbook.

Offshore maritime security

4.7 As the primary Commonwealth law enforcement agency, the AFP is responsible for the investigation of criminal incidents, including acts of terrorism, in the offshore area. The AFP, however, often relies on ADF support to respond to incidents in the offshore area. The AFP therefore supports the clarification of ADF powers when called out to assist the civil authorities to deal with a threat in the offshore area.

4.8 Notwithstanding the proposed s.51F (3), which states that the ADF's duties to co-operate and act on written requests from Police do not apply in the offshore area, the AFP understands that the ADF will consult with relevant civil authorities when exercising powers in the offshore area. This can be addressed through reviewing procedures in the National Counterterrorism Handbook where appropriate.

Protection of critical infrastructure

4.9 The AFP Protective Service has a key role in providing security at many installations identified as critical infrastructure. The AFP supports the proposal to make additional powers available to members of the ADF to also protect critical infrastructure during a call-out, noting the potentially grave consequences of any such incidents. As with the offshore and air environment, the AFP recognises the benefit of clarifying the military's powers when acting to protect these assets.

Call out procedures and operational aspects

4.10 The AFP supports the proposals to expedite the call out mechanisms for the ADF, noting that the expedited call out procedure will not impact on the operational role or powers of the ADF, or their responsibility to act under the direction of civil authorities.

Criminal investigations following incidents involving Defence personnel

4.11 The proposal will place called out members of the ADF under the jurisdiction of the Commonwealth Director of Public Prosecutions. The AFP would respond to any investigative referral arising from a domestic security operation.