

# The increasing convergence of the role and function of the ADF and civil police

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One of the characterising features of the early 21<sup>st</sup> century, both in Australia and among English-speaking democracies, is the phenomenon of the military becoming increasingly involved in areas traditionally considered the responsibility of police, while elements of the police are simultaneously becoming more militaristic.<sup>1</sup> Historically, a close ideological and operational alliance between the police and military has been associated with repressive regimes.<sup>2</sup>

There are also residual concerns about the use of the ADF for domestic security purposes. At its core is the question of whether the government can be trusted to use the ADF legally and wisely and, indeed, whether the ADF can be trusted to respect civil liberties.<sup>3</sup> These concerns find their foundation in the well-established but often ill-defined tradition in Western democracies that governments must be constrained in their use of the armed forces by constitutions, laws, conventions, the judiciary and parliament.<sup>4</sup>

Conversely, we expect the police to protect us from crime, arrest drug dealers, investigate serious crime, stop armed robbers, and keep the peace at demonstrations. Frequently, there are public outcries when a suspect is shot dead by police before he or she can be tried. The public is disturbed at seeing police wearing riot gear at demonstrations. When police begin using paramilitary tactics and techniques, the essential nature of their role is redefined, switching from protection and peacekeeping to active aggression.

This convergence in roles has coincided with the erosion of a number of geopolitical, economic and social-order assumptions. Principal among these shifts has been the rise of global terrorism and the ushering in of the so-called fourth-generation warfare paradigm.<sup>5</sup> Arguably, counter-terrorism has provided a vehicle for the militarisation of the police and the integration of the military into 'internal security'.

This article will contend that this convergence is socially and politically undesirable, as well as legally questionable as it undermines the legitimate mandate of the ADF and the division of powers under the Australian Constitution.<sup>6</sup> To support this argument, it will demonstrate that the *Defence Act 1903*, together with its subsequent amendments, is an appropriate and proportionate power conferred to the ADF when responding to a domestic security incident, and that it is the ADF—not the police—which possesses a stronger legal, political and social mandate to respond to this type of incident.<sup>7</sup>

## Modern warfare: business as usual?

The ending of the Thirty Years' War in Europe in 1648, also known as the 'Peace of Westphalia', arguably constituted a paradigm shift in the development of the present state system.<sup>8</sup> The key notion is said to be the principle of the sovereign equality of states, which has been at the core of international law ever since. From this concept ultimately flowed the law of armed conflict, which codified the footing on which armed forces ought to prosecute warfare.

Since that time, warfare has obviously undergone a number of generational transformations. These have not been discrete events but rather a continuum, with ideas and technology driving the change, although the central feature has been the premise that states fight states.<sup>9</sup> The most notable features of the latest and so-called 'fourth generation' of warfare are that the state is losing its monopoly on war and that state militaries are increasingly fighting non-state opponents, colloquially known in Western democracies as terrorists.

### The development of the law of armed conflict

The modern footing for the law of armed conflict flows from two distinct but intertwined historic streams: the Geneva Conventions and The Hague Conventions. Both outline acceptable practices while engaged in war and armed conflict. The Geneva Conventions are a series of international treaties concluded in Geneva between 1864 and 1949, aimed at limiting the prosecution of warfare and, specifically, the

amelioration of the effects of war on soldiers, civilians and their property. The Hague Conventions are concerned with the rights and duties of belligerents, and the means that parties may rely on to employ violence.

Relevantly, The Hague Conventions define the distinction between civilians and combatants.<sup>10</sup> Rule 1 stipulates that 'attacks may only be directed against combatants... [and] must not be directed against civilians'. Rule 3 defines a 'combatant' as 'all members of the armed forces of a party to the conflict ... except medical and religious personnel'. These definitions, and indeed both conventions, are arguably premised on the assumption that the purpose of warfare is to overcome an enemy state, which includes the defeat or nullification of its combatants.<sup>11</sup>

However, the principle of distinction and the definition of a combatant have less utility in a modern context, where the idea of symmetrical conflicts fought between near peers is not the normal practice. More commonly, armed conflicts take place within a sovereign territory between governmental forces and non-state actors whose aim is to advance a political, religious or ideological cause.<sup>12</sup> This represents a significant departure from the traditional footing of the prosecution of warfare, which typically has related to the defence or redefining of territorial boundaries between two or more states.

If these definitions and assumptions are outdated, is it not time they were reviewed? As Françoise Bouchet Saulnier has said, 'law is always late for war'.<sup>13</sup> Proactively considering the assumptions that underlie and inform the legitimate use of the ADF in combating non-state actors, including on Australian territory, is a critical legal, political and social discussion. The associated question is whether state-level police forces are best suited, equipped and trained to fight non-state actors.

## Domestic social and political framework

### The role of the ADF

The ADF's traditional role has been the conduct of conventional military operations, together with peace-keeping and disaster-relief type

operations within the region, with domestic security the responsibility of the relevant federal, state and territory police and intelligence agencies. However, the Hilton bombing in Sydney in 1978 ushered a paradigm shift in political and social thinking towards domestic security and the role the police and military play in maintaining peace and security within Australia.<sup>14</sup> From this vantage point, one can look back and view the academic, political and social discussion and legal reforms that flowed from this pivotal event.

The vast majority of commentary relates to mooted changes to the *Defence Act 1903* in order to clarify or broaden when and how the military might be used internally.<sup>15</sup> Other areas of significant commentary relate to concerns over the steady militarisation of the police.<sup>16</sup> A common theme has been that if the ADF were to be given wider powers to respond to a domestic security incident, those powers may be abused.<sup>17</sup> Often cited has been a concern that the ADF may be used to counter the threat posed by the activities of dissidents, which would repudiate the basic democratic right to freedom of political expression.<sup>18</sup>

Many of these concerns flow from the publication in the early 1980s of the Australian Army's Manual of Land Warfare relating to 'Aid to the civil power'.<sup>19</sup> It outlined a very broad role for the military in areas normally considered covered by police law enforcement. The 'threats' identified in the pamphlet also encompassed many forms of legitimate political dissent. What tends to be overlooked, however, is that the provisions of Part IIIAAA of the *Defence Act 1903* expressly prohibit the employment of the ADF to stop or restrict any protest, dissent, assembly or industrial action, except where there is a reasonable likelihood of the death of, or serious injury to, persons or serious damage to property.

Nevertheless, the reality is that the ADF has a wide range of capabilities that could be deployed rapidly and efficiently to respond to virtually any internal incident. The ADF also has a strong culture of obedience to political direction and discipline in command.<sup>20</sup> Furthermore, over the past three decades of high operational tempo, the ADF has gained a wealth of experience in security operations in a number of countries, which has well equipped the ADF and

its personnel with the tactics, techniques and procedures to respond to a range of domestic security incidents.

Regardless, there are deeply held, imperfectly understood reservations within Australian society about the employment of the ADF in response to a domestic security incident.<sup>21</sup> In Justice Robert Hope's report (the *Protective Security Review*, 1979) written in response to the Hilton bombing, he observed:

Use of the military other than for external defence, is a critical and controversial issue in the political life of a country and the civil liberties of its citizens. [Quoting the 19<sup>th</sup> century Irish statesman Edmund Burke, he contended that] 'An armed disciplined body is in its essence dangerous to Liberty: undisciplined, it is ruinous to Society'. Given that there must be a permanent Defence Force, it is critical that it be employed only for proper purposes and that it be subject to proper control.<sup>22</sup>

These reservations seem to be rooted in the concern that left unchecked, the executive might use control over the ADF to reinforce its political will, and take actions that are difficult to call to account in a court of law. There has also been significant judicial consideration of the potential danger to a constitutional democracy of unchecked executive power, with High Court Justice Sir Owen Dixon asserting in the *Communist Party Case* in 1951 that:

History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected.<sup>23</sup>

## The role of the police

While reservations within Australian society about the employment of the ADF in response to a domestic security incident have stimulated considerable commentary and legal opinion, there has been far less discussion or criticism regarding the increasing militarisation of the police in Australia. Indeed, following the Bali bombing in 2002, Aldo Borgu, for example, writing for the Australian Strategic Policy Institute, advocated that the entire counter-terrorism

capability within the ADF should be moved to federal and state police forces, arguing that:

Federal and State police forces ... will almost always be able to get to a terrorist scene more quickly than the ADF, and are on a surer legal footing to undertake such operations. NSW and Victoria have made important steps to further develop their own counter-terrorist and response capabilities. But this approach needs to be mirrored across all States and Territories. This would free up the ADF Special Forces to focus on their overseas missions.<sup>24</sup>

Yet the development of these paramilitary units raises a number of questions that do not seem to enter political debate, let alone public consciousness. For example, why have these units been established; what are the implications to the civilian police force of military-style training and collaboration with the ADF when it filters down to general duties police officers; how does this blurring of the distinction between civil and military forces influence police culture, and why are both forms of militarisation needed?

Originally established to combat terrorism, paramilitary police units have been used in a wide variety of policing operations, including dealing with dissent and social and industrial protest.<sup>25</sup> Often not mentioned is that paramilitary police units have been used in some highly controversial political circumstances against trade unions and their members. As such, some might argue that it is the paramilitary police units, rather than the ADF, that the public ought to fear, not least because their existence may herald an increasingly militarised approach to everyday policing.

Perhaps the most alarming aspect regarding the development of paramilitary police forces is that they train with and adopt many of the practices of ADF Special Forces. This style of training provides paramilitary police units with the ability to survive armed confrontations by taking aggressive counter-action, unlike their general duties counterparts who are trained to avoid such confrontations where possible. In a Victoria Police Force review conducted in the late 1990s, its Special Operations Group was found to be responsible for 30 per cent of the deaths by shooting during the review period.<sup>26</sup> At a coronial inquest into one such death, it was contended that:

The policy of the Victoria Police Force and its SOG [Special Operations Group] accepts ... the use of force, forced entry, consequential firearms confrontation, consequential instinctive use of police firearms with legal justification, consequential personal risk to police members being exposed to a person with a gun, and consequently and ultimately condones shooting by police members with legal justification.<sup>27</sup>

This and similar policy in other states has resulted in the deaths of several innocent victims. In one incident in NSW in 1989, a man was shot dead in his bed by paramilitary police during an early morning raid on his home. In a subsequent Royal Commission, it was found that the death occurred because the police officer in question 'had not been trained to cope with an unarmed, near-naked man who reacted angrily when woken from his sleep by armed men bursting into his house'.<sup>28</sup> No charges were laid. There has also been criticism levelled at the NSW Police's handling of the Lindt café siege that resulted in the death of three civilians.

In addition, there are concerning second- and third-order effects that increased militarisation may have on civilian police culture. These include the potential impact and pervading influence of military-style practices on everyday policing practices, including the suggestion of increased police aggression in handling non-life-threatening confrontations. Aside from the serious social and cultural questions around the desirability of the normalisation of paramilitary tactics and attitudes in everyday policing, there may also be an argument as to the constitutional legitimacy of these policing units within Australian states and territories.<sup>29</sup>

## Legal framework

### The civil police/military divide

In Australia's federal system, the primary responsibility for maintaining internal law-and-order lies with the states; no express legislative head of power confers any such general power on the Commonwealth.<sup>30</sup> Importantly, upon federation, constitutional arrangements required the states not to raise or maintain any navel or military force without the consent of the Commonwealth Parliament. Conversely, the Commonwealth

took over responsibility of protecting 'every state against invasion' and, at the request of the executive government of the state, 'against domestic violence'.

Relevantly, neither 'military force' nor 'domestic violence' are defined in the Constitution, nor are they defined in the *Defence Act 1903* or its regulations. No judicial definition exists either. The expression 'domestic violence' seems to have been borrowed from article IV of the US Constitution, which specifies that the US shall protect each state, on the application of its legislature, against 'domestic violence'. The statutory embodiment of this provision in US legislation uses the more specific term 'insurrection', suggesting that a serious level of rebellion must be involved.<sup>31</sup> However, it seems unlikely that the framers of Australia's Constitution would have been contemplating the need for the states to train and arm their police forces to quell a serious level of rebellion.

Consideration must also be given to the legitimacy of the states militarising elements of their police forces. While the Constitution prohibits the states from raising and maintaining a military force, there is no case law on whether the militarisation of state and territory police forces is prohibited and accordingly unlawful. Yet all states and territories in Australia now have their own 'paramilitary' policing units which share startling similarities with elements of the ADF.<sup>32</sup> Most also have close training and liaison arrangements with the ADF. Indeed, the selection processes, culture, organisational hierarchy, weapons, vehicles, tactics, techniques and procedures relied on by paramilitary policing units typically render them all but indistinguishable from their ADF counterparts.

How, therefore, ought one objectively characterise what is a police force, what is a military unit and what is a paramilitary unit? In their pioneering analysis of paramilitary forces, Andrew Scobell and Brad Hammitt asserted that state-sponsored paramilitary units tend to fall between that of the regular police and the military.<sup>33</sup> However, distinguishing between paramilitary police units and elements of the military has proven to be problematic.<sup>34</sup>

On the one hand, it could be argued that police and military have distinctly separate roles. A police force is mostly involved in domestic law

enforcement and peacekeeping, where its primary adversary is the individual criminal or small group of criminals, usually without political objectives. Police also typically operate in pairs or alone, and rarely rely on coordinated, deliberate actions to apprehend their adversary. Conversely, militaries are employed against external adversaries, and typically operate in formed bodies utilising a range of offensive and potentially highly destructive weapons. On the other hand, however, the two organisations share similar cultures and structures, where members of the police force, like the military, usually wear a uniform and have a hierarchical rank structure. It can be argued, therefore, that all police organisations are 'paramilitary' in nature; where they differ is the degree of their militarisation.

Perhaps the strongest argument to support the notion that paramilitary police units are closer to the military than the police—aside from their weapons, tactics, training and techniques—is that they do not deal as individual officers with individual citizens in a legalistic context. Indeed, we do not see paramilitary police units on routine patrols, making arrests or investigating crimes, much like we do not see the military engaged in such tasks. When we do see paramilitary police units in action, they are typically involved in coordinated and synchronised activities relying on detailed planning, orders and rehearsals—much like the military. Consequently, it would seem reasonable to conclude, with one eye on the definitions in the Geneva Conventions, that a paramilitary police unit is objectively a military force, and that Australian states and territories are prohibited by the Constitution from raising and maintaining such forces.

## Domestic security

Section 119 of the Constitution provides that 'the Commonwealth shall protect every state against invasion and ... against domestic violence'. This section clearly contemplates an internal security role for the Commonwealth, and indeed implies that the Commonwealth will provide the necessary means for such protection. However, until recently in Australia's federal history, finding the authority for the ADF's involvement in domestic security was more elusive.

For the first 100 years of federation, the Commonwealth relied on the so-called executive

power in section 61 of the Constitution and the residual prerogative powers of the Crown for the control and disposition of the ADF. In 2000, amendments to the *Defence Act 1903* provided a statutory footing for most potential domestic security actions by the ADF.<sup>35</sup> Further amendments in 2006 provided for members of the ADF to defend property designated as critical infrastructure, even without direct threat to life.<sup>36</sup>

These amendments also provide for the use of lethal force by the ADF to destroy certain aircraft and ships at sea, as well as the powers to cordon and search, both at sea and ashore. The key pre-conditions are that 'domestic violence' must be occurring (or likely to occur) and the relevant state or territory is not able to protect national interests. Importantly also, the amendments provide a degree of protection from liability for ADF members acting under orders in the implementation of such tasks.

Of particular relevance are the powers and protections conferred to individual members of the ADF in dispensing their duty under Part IIIA of the *Defence Act 1903*, particularly section 511, when compared to powers and protections under state or territory laws for civil police in similar domestic law enforcement scenarios. This section provides that a member of the ADF may prevent or put an end to violence; protect persons from acts of violence; detain a person whom they believe on reasonable grounds has committed an offence; control the movement of persons or means of transport; and conduct searches of persons, locations or things and seize things related to domestic violence.

This may be contrasted with the powers provided to officers under the *Australian Federal Police Act 1979*, many of which are analogous to the powers conferred on Defence members under the *Defence Act 1903*.<sup>37</sup> Also, given that many recent deployments of the ADF have been on peace-keeping or nation-building roles, there ought to be little concern over whether the ADF can dispense these duties and obligations with due regard to liberal democratic notions.

## Conclusion

The Australian public's seeming reluctance to support the use of the ADF in domestic security operations may be explained in part by historic examples where the military was employed on home soil, such as in breaking the coal-miners' strike in NSW in 1949. However, the premises on which these concerns are based have little relevance in a modern world where fourth-generation warfare is now the predominate paradigm.

This article has argued that public concern should instead be focused on the largely unchecked and seemingly unconstitutional development of paramilitary police units around Australia. The continued development of paramilitary police units, which train with the ADF, are equipped with weapons and vehicles used by the ADF, and see themselves akin to special-force soldiers, foreshadows a deeply concerning development in civil policing culture, as such practices and attitudes may percolate down to the general duties police officer. Left unchecked, the very concerns that society has towards relying on the ADF in domestic security operations may become reality, as the police, who have vastly more coercive powers, are the very agents to bring these concerns to reality.

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