SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

ELEVENTH REPORT

OF

2000

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MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator T Crossin
Senator J Ferris
Senator B Mason
Senator A Murray

TERMS OF REFERENCE

Extract from **Standing Order 24**

(1)

(a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

ELEVENTH REPORT OF 2000

The Committee presents its Eleventh Report of 2000 to the Senate.

The Committee draws the attention of the Senate to clauses of the following bill which contains provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000

Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000

Introduction

1.1 This bill has been introduced to "modernise the procedures to be followed for call out of the Defence Force, set out safeguards including parliamentary supervision, and specify the powers and obligations of the Defence Force when used to assist police, as a last resort, in the counter terrorist assault role and for related public safety tasks".[1]

1.2 The bill was introduced in the House of Representatives on 28 June 2000, passed the House on that date, and was introduced into the Senate on 14 August 2000. On 28 June the bill was referred to the Senate Foreign Affairs, Defence and Trade Legislation Committee, which tabled a report on 16 August 2000. That report recommended a number of amendments to the bill which have been accepted by the government.[2]

1.3 In general terms, that Committee recommended that:

- the Commonwealth notify a State or Territory of a call out to protect Commonwealth interests as soon as the order was made;
- the proviso under which the Emergency Forces or Reserve Forces could not be called out in connection with an industrial dispute be extended to call outs in any circumstances;
- that only authorising Ministers be empowered to authorise the recapture of premises and the exercise of other powers under proposed section 51I;
- that the accountability requirements under the bill be amended to require the tabling of a call out report in both Houses of the Parliament within 7 days of the cessation of a call out; and
- that the legislation be reviewed by a parliamentary committee within 6 months of any call out, or (if there is no call out) within 3 years of its enactment.

1.4 This Committee dealt with the bill in *Alert Digest No 10 of 2000* in which it made certain comments. The Minister has responded to those comments in a letter

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1 Second Reading Speech, *Hansard*, House of Representatives, p 16959.

2 'Government to alter laws on powers to call out troops', *Canberra Times*, 24 August 2000, p 3.

dated 25 August 2000. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the response are discussed following para 1.30 below.

1.5 The Committee received a briefing on the bill from representatives of the Department of Defence and the Attorney-General's Department on 17 August 2000. A copy of the transcript of this briefing is also attached to this report and various issues raised during the briefing are discussed below at para 1.31 and following. Since the briefing, the Committee has received further advice from the Attorney-General's Office and the Attorney-General's Department. This includes material expanding on the term 'domestic violence', a letter dated 25 August providing further information on self-incrimination under the bill, and an Analysis of the bill against the Committee's Terms of Reference. Copies of this material are also appended to this report.

1.6 The Committee now produces this special report to assist the Senate in its deliberations on the bill. The report first outlines the current statutory position with regard to the call out of the Defence Force and then outlines the changes proposed by the bill. It sets out the issues raised in the Committee's *Alert Digest*, and provides the Minister's response to those issues. It then sets out the issues raised at the Committee's briefing and, finally, sets out the Committee's conclusions.

The Commonwealth Constitution

1.7 As noted above, the bill is concerned with the utilisation of the Defence Force (ADF) to protect Commonwealth interests, and States and Territories, against "domestic violence". Section 68 of the Commonwealth Constitution vests the command in chief of the naval and military forces of the Commonwealth in the Governor-General as the Queen's representative.

1.8 Under section 51(vi) of the Constitution, the Commonwealth has power to make laws for the peace, order and good government of the Commonwealth with respect to the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth. Under section 122, the Commonwealth may make laws for the government of any territory.

1.9 Under section 119 of the Constitution, the Commonwealth is obliged to protect every State against invasion and, on the application of the Executive Government of the State, against "domestic violence". The term "domestic violence" is not defined in the Constitution and has not been considered by the High Court.

The existing provisions

1.10 The power of the ADF to come to the aid of the civilian power is currently contained in section 51 of the *Defence Act 1903 (Cth)*, and the powers exercisable by the ADF in these circumstances are set out in Part V of the Australian Military Regulations and Part IX of the Air Force Regulations, or are matters of general law.

1.11 Section 51 of the *Defence Act 1903* currently provides:

> Where the Governor of a State has proclaimed that domestic violence exists therein, the Governor-General, upon the application of the Executive Government of the State, may, by proclamation, declare that domestic violence exists in that State, and may call out the Permanent Forces and in the event of their numbers being insufficient may also call out such of the Emergency Forces and the Reserve Forces as may be necessary for the protection of that State, and the services of the Forces so called out may be utilized accordingly for the protection of that State against domestic violence. Provided always that the Emergency Forces or the Reserve Forces shall not be called out or utilized in connexion with an industrial dispute".

1.12 This section adopts the words set out in section 119 of the Constitution. It applies specifically to requests for assistance from the States. It requires that the relevant State Governor proclaim that domestic violence exists within a State and that the State Government make an application for assistance to the Governor-General. The Governor-General then has a discretion to declare that domestic violence exists in that State and to call out the Defence Force. Where the Forces are called out, their services "may be utilized accordingly" to protect the State. However, the Emergency Forces or Reserve Forces must not be called out in connection with an industrial dispute. No reference is made to the role of the Permanent Forces in connection with an industrial dispute.

1.13 While section 51 makes no reference to "domestic violence" occurring within a territory, there is little doubt that the Commonwealth would have power to call out the ADF under section 122 of the Constitution. And while section 51 makes no reference to "domestic violence" directed at the Commonwealth itself, there is little doubt that the Commonwealth has an inherent power to call out the ADF in these circumstances. As Quick and Garran observe:

> If however, domestic violence within a State is of such a character as to interfere with the operations of the Federal Government, or with the rights and privileges of federal citizenship, the Federal Government may clearly, without a summons from the State, interfere to restore order. Thus if a riot in a State interfered with the carriage of the federal mails, or with interstate commerce, or with the right of an elector to record his vote at a federal election, the Federal Government could use all of the force at its disposal, not to protect the State, but to protect itself.

> Were it otherwise, the Federal Government would be dependent on the Governments of the States for the effective exercise of its powers.[3]

1.14 The regulations which accompany section 51 are anachronistic. For example, regulation 405 of the Australian Military Regulations requires the civil authority which has requisitioned the call out to arrange for a magistrate to meet the forces. Regulation 407 states that, if a disturbance amounts to a riot in which 12 or more persons are engaged, it is the duty of the magistrate to read, or in the State of Victoria read or repeat, or (except in the State of Victoria) cause to be read in a loud voice, if circumstances permit, and it has not already been done, a specified proclamation, and to call upon everybody present to assist in the suppression of the riot. Before the proclamation is read, an alarm should, if possible, be sounded on a bugle, "and the magistrate shall go amongst the rioters, or as near as he can safely come to them, and command, or cause to be commanded, in a loud voice, that silence be kept while the proclamation is made".

Use of the current provisions

1.15 The Defence Force has been called out in aid of the civil power on two occasions:[4]

- In 1970-71 the Pacific Island Regiment stationed in Papua New Guinea (and then part of the ADF) was called out to suppress, should the need arise, domestic violence on the island of New Britain – in the event, the troops were not required.

- In 1978 the Defence Force was called out following a bomb blast outside the Hilton Hotel in Sydney where delegates to the Regional Meeting of Commonwealth Heads of Government had gathered – over 1000 troops were deployed for some days to secure the route between Sydney and Bowral, and the streets of Bowral, where the delegates were also to meet, and to 'protect internationally protected persons'. This call out occurred with the concurrence of the NSW Government, but did not follow a specific request under section 119.

1.16 On at least two further occasions, the Commonwealth has utilised the ADF to perform duties to protect Commonwealth interests. In 1983 the RAAF flew over

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3 Quick J & Garran R, *The Annotated Constitution of the Australian Commonwealth*, Angus and Robertson, Sydney, (1901), p 964.

4 The information in this part of the report is taken from Appendix 3 to the Report of the Senate Foreign Affairs, Defence and Trade Legislation Committee on the bill.

South-West Tasmania to photograph work being carried out by the Tasmanian Government 'in contravention of Federal regulations'. And in 1989 troops were deployed at Nurrungar to defend the Nurrungar joint facility.

1.17 The States have requested ADF assistance on five occasions:

- in 1912 the Queensland Government sought assistance, specifically under section 119, fearing widespread violence arising out of a general strike. The Commonwealth government did not accept that conditions warranted that the request be complied with.

- in 1916 the Tasmanian Government sought assistance (without referring to section 119) in anticipation of disturbances on the occasion of a referendum. The Commonwealth did not accede to the request.

- in 1919 the Western Australian Government requested intervention to assist in the event of expected violence during a wharf strike. Then in 1920 and 1921 the Government urged the Commonwealth to send a war ship to Broome as a precaution against riots, and in 1921 requested that the Commonwealth make a force available to deal with an expected riot. All requests were declined.

- in 1923 the Victorian Government requested assistance (without reference to section 119) during a police strike. The Commonwealth did not accede to the request, but did direct that military action be taken to protect Commonwealth interests in Melbourne (providing guards for the GPO, Federal Parliament House, the Commonwealth Treasury buildings and telephone exchanges).

- in 1928 the South Australian Government (without reference to section 119) requested the issue of ammunition and military equipment during a strike by waterside workers.

1.18 Therefore, on only one occasion (in 1912) has a State specifically made a request for assistance under section 119 of the Constitution. Lt Colonel Kelly told the Foreign Affairs, Defence and Trade Committee that the Commonwealth's response to that request was illustrative of the reasoning that had informed the drafting of this bill:

> [The Commonwealth] said that, whilst the Commonwealth government was quite prepared to fulfil its obligations to the states, if ever the occasion should arise, they did not admit the right of any state to call for their assistance under circumstances which are proper to be dealt with by the police forces of the states. They said that the condition of affairs existing in Queensland did not, in

the opinion of the Ministers, warrant the request of the executive governor of Queensland contained in His Excellency's message being complied with.[5]

Deficiencies in the current provisions

1.19 The current provisions are said to be deficient for a number of reasons. They are anachronistic, reflecting 18th century concerns with riot control, and inappropriate to deal with the more sophisticated threats to security that now exist. They also give the Australian public little indication of what to expect of the ADF when it is called out; they give ADF members little certainty as to what is expected of them and little authority or protection in undertaking their duties; and the present framework provides almost no accountability to the Parliament.[6] The bill is intended to remedy these deficiencies.

The bill

Preconditions for call out

1.20 In general terms, the bill proposes to replace section 51 of the Defence Act and its accompanying regulations with a new regulatory framework. This framework provides that the ADF may be called out at the request of a State or Territory, or by the Commonwealth itself to protect "Commonwealth interests". In each situation the Prime Minister, Defence Minister and Attorney-General (the authorising Ministers) must all be satisfied that "domestic violence" is occurring, or is likely to occur in Australia, and that the relevant State or Territory is not, or is unlikely to be, able to protect itself or "Commonwealth interests" against that violence.[7]

1.21 A call out order is made (or revoked) by the Governor-General on the advice of the Executive Council unless one authorising Minister is satisfied that, for reasons of urgency, the Governor-General should act on the advice of that Minister.[8]

1.22 The call out order must specify the domestic violence, the State or Territory in which it is occurring or is likely to occur, any Commonwealth interests (if

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5 Foreign Affairs, Defence and Trade Legislation Committee, *Reference: Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000*, *Evidence*, 21 July 2000, p 37.

6 Minister's Second Reading Speech, *Hansard*, Hose of Representatives, p 16959.

7 Proposed new sections 51A to 51C.

8 Proposed new paragraphs 51A(7)(b); 51B(6)(b); 51C(6)(b).

relevant), that the order comes into force when made, and that it ceases to be in force after a specified period (which must not be more than 20 days). The order must also set out the powers available to the ADF.[9]

Exercise of powers on call out

1.23 If a call out order is made, the Chief of the Defence Force must utilise the ADF "in such manner as is reasonable and necessary" to protect the relevant Commonwealth or State or Territory interests.[10] This requirement is subject to compliance with Ministerial directions, and to the need to ensure, as far as reasonably practicable, that the ADF "cooperates with the police force of the State or Territory" and "is not utilised for any particular task unless a member of the police force requests, in writing, that the Defence Force be so utilised".[11] In addition, the ADF must not be used to "stop or restrict any lawful protest or dissent".[12]

1.24 The bill then sets out the powers available to ADF members called out. Under proposed Division 2, members may be utilised to recapture premises, a place, a means of transport or other thing and, in connection with such a recapture, may:

- free any hostage;
- detain any person reasonably believed to have committed an offence – such detention is for the purpose of placing that person in the custody of the police "at the earliest practicable time";
- evacuate persons; and
- search the premises for dangerous things (defined as guns, knives, bombs, chemical weapons or other things that are reasonably likely to be used to cause serious damage to property or death) and seize any dangerous thing found.[13]

1.25 Such powers may not be exercised without written authorisation from the authorising Ministers unless the ADF member "believes on reasonable grounds that there is insufficient time to obtain the authorisation because a sudden and extraordinary emergency exists".[14]

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9 Proposed new subsections 51A(4); 51B(3); 51C(3).

10 Proposed section 51D.

11 Proposed new sections 51E and 51F.

12 Proposed new paragraph 51G(a).

13 Proposed new subsection 51I(1).

14 Proposed new subsections 51I(2) and (3).

1.26 Under proposed Division 3, the authorising Ministers may declare an area to be a "general security area". Where such a declaration has been made, the bill provides that the Chief of the Defence Force (or an authorised officer) may authorise a search of premises or persons or means of transport in that area for dangerous things.[15] If an occupier is present, he or she must be given a copy of the search authorisation.[16]

1.27 Under proposed section 51Q, the authorising Ministers may declare that a specified area, being the whole or part of a general security area, is a designated area. Where such a declaration has been made, under proposed section 51R, ADF members may control the movement of persons or means of transport in the designated area.

1.28 Under Division 4, ADF members exercising any powers under Divisions 2 and 3 are also authorised to use "such force against persons or things as is reasonable and necessary in the circumstances".[17] However, in using force against a person, the ADF member must not:

- do anything that is likely to cause the death of, or grievous bodily harm to, that person "unless the member believes on reasonable grounds that doing that thing is necessary to protect the life of, or prevent injury to, another person"; or
- "subject the person to greater indignity than is reasonable or necessary in the circumstances"; or
- do anything likely to cause death or serious harm to a person attempting to escape detention "unless the person has, if practicable, been called on to surrender and the member believes on reasonable grounds that the person cannot be apprehended in any other manner".[18]

1.29 Under proposed section 51U, a person detained by an ADF member as a suspected offender must be informed of the relevant offence.

Accountability mechanisms

1.30 Once a call out order has ceased to be in force, proposed section 51X requires the Minister to publish a copy of the order, and any declarations of general

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15 Proposed new sections 51L and 51P.

16 Proposed new section 51M.

17 Proposed new subsection 51T(1).

18 Proposed new subsections 51T(2) and (3).

security areas or designated areas under the order, and a report on any utilisation of the ADF that occurred under the order. Publication takes place if, within 7 days after the order ceases, the documents are "tabled in the Parliament" or published on the Department's web site or "otherwise publicly released".

Issues identified in the Committee's Alert Digest

Extract from Alert Digest No. 10 of 2000

This bill was introduced into the House of Representatives on 28 June 2000 by the Parliamentary Secretary to the Minister for the Environment and Heritage. [Portfolio responsibility: Defence]

The bill proposes to amend the *Defence Act 1903* to enable the utilisation of the Defence Force to assist civilian authorities in protecting Commonwealth interests and States and Territories against domestic violence.

The bill creates the framework for Commonwealth or State or Territory initiated use of the Defence Force and provides for specific powers that the Defence Force has under the new scheme. These powers relate to the recapture of premises and, in connection with this, freeing hostages, detaining persons, evacuating persons, and searching and seizing dangerous things. There are also general security area powers and designated area powers.

The bill also proposes consequential amendments to the *Air Force Act 1923* and the *Naval Defence Act 1910*.

General comment

The Minister's Second Reading Speech states that this bill is intended to "bring the framework for call out of the Defence Force in law enforcement emergencies uptodate," and represents "a sound basis for the use of the Defence Force as a last resort in resolving such emergencies".

The Minister goes on to observe that the existing legislative framework "does not provide sufficient accountability to Parliament" nor does it provide the Defence Force with "appropriate authority to perform the tasks they may be required to carry out either in an assault upon terrorists or in a related public safety emergency".

In general terms, the bill seems to permit members of the Defence Force to exercise what are essentially civilian police powers when carrying out police duties during a time of threat. As such, it seems to represent a change in the distinction previously drawn between military and civilian powers. The Committee would be concerned about the effect on civil liberties were this change to become permanent.

Given this, the Committee **seeks the Minister's advice** as to the reason for the introduction of the bill at this time; what restrictions are imposed on the exercise of powers under the bill; and how the framework proposed under the bill differs from that which exists under the current provision.

Pending the Minister's advice, the Committee draws Senators' attention to this provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Relevant extract from response from the Minister

This legislation has been developing over a number of years following the report by Justice Hope on protective security in Australia in 1979. It was always considered that the existing legislative regime governing the call out of the Defence Force in situations of "domestic violence" was inadequate and unworkable, needing review and amendment.

The announcement of the 2000 Olympic Games in Sydney added extra impetus to the development of the legislation, to ensure that the Defence Force would have clearly defined powers and responsibilities under a comprehensive statutory scheme. The Games were not, however, the sole reason for the Bill. The scheme proposed under the Bill is intended to coincide with the Games and operate beyond them.

The Committee further asks what restrictions are imposed on the exercise of powers under the Bill. As you are aware, a number of statutory requirements need to be satisfied before the Governor-General issues an order calling out the Defence Force viz:

- The Prime Minister, the Attorney-General and the Minister for Defence (the authorising Ministers) must each be satisfied;
- That a State or Territory is not or is unlikely to be able to protect the Commonwealth or itself against the domestic violence;
- That the ADF is needed to assist; and
- Then and only then, the Governor-General may make a written order directing the Chief of the Defence Force to use the ADF for that purpose.

There are further safeguards enshrined in the legislation to protect both members of the public and the ADF in the exercise of their powers under the Bill.

These safeguards include:

- A member of the Defence Force is restricted to the use of "reasonable and necessary force" in the exercise of his or her powers and must not do anything that is likely to cause the death of or grievous bodily harm to a person or subject a person to a greater indignity than is reasonable and necessary in the circumstances;
- Publication of the declaration of a general security area and any designated area within the general security area;
- Authorisations to search premises in the general security area may be in force no longer than 24 hours;
- Searches of premises may only be undertaken when there are reasonable grounds for believing that there is a dangerous thing (eg. bomb) in the premises;
- The person in charge of the search must be identified;
- The occupier of premises is entitled to be present for the search and to be given a copy of the search authorisation;
- Property or persons detained by Defence Force personnel must be handed over to a police officer at the earliest practicable time; and
- Receipts must be given for property seized wherever practicable.

Members of the ADF exercising powers under Division 3 are required to wear uniforms displaying their surname as well as numbers or alpha numerics to allow each member to be uniquely identified.

Another important safeguard in the proposal is in relation to the legal position of the ADF. An important safeguard against the misuse of the Defence Force is the power of the Courts to ensure that members of the Defence Force comply with the requirements of the law. A court can consider whether the use of force, for example, was justified, whether any force used was excessive and whether any acts by members of the Defence Force were unlawful. The Bill does not alter this position.

I consider that these are a comprehensive set of safeguards which not only endeavour to protect the public, they provide the ADF with clear guidelines relating to their responsibilities while exercising powers under the Bill.

As mentioned above, the Bill sets out a scheme for the ADF to assist the civilian authorities in law enforcement emergencies. As you are aware, the powers under the Bill are exercisable subject to the safeguards and limitations listed above. The crucial premise behind the Bill is that the ADF may only be utilised where there is a situation of domestic violence that is beyond the capability of a State to deal with. Under the Bill the ADF will have no authority to act on its own initiative.

The current legislative scheme is contained in the *Defence Act 1903, the Australian Military Regulations 1927* and the *Air Force Regulations 1923* which deals with members of *the* Defence Force assisting police maintain law and order in the event of domestic violence on the application of a State. They are based on historical British government orders that permitted a magistrate or mayor to use the Army to keep public order. This involved, inter alia, reading proclamations, blowing of bugles, magistrates accompanying the Defence Force, all of which would be unworkable in the context of, for example, a terrorist incident. This is an unsatisfactory regime given that the assistance of the ADF is most likely to occur when there is a need to protect a Commonwealth interest.

The Committee thanks the Minister for this response and discusses the bill generally at the conclusion of this report.

Search and entry provision
Proposed new section 51L

Item 4 of Schedule 1 to this bill proposes to insert a new section 51L in the *Defence Act 1903*. This section will permit the Chief of the Defence Force, or an authorised Defence Force officer, to search premises in a general security area where the officer reasonably believes that it is necessary as a matter of urgency to render a dangerous thing on those premises safe, or to prevent its use. Under the Act, such an authorisation should only take place during circumstances of emergency.

In its *Fourth Report of 2000*, the Committee considered appropriate principles which should govern the inclusion of search and entry provisions in legislation. In discussing the 'emergency' powers available under the *Australian Security Intelligence Organisation Act 1979* and under the Defence (Area Control) Regulations the Committee stated that "in each case, a significant power of entry and search may be exercised on the authorisation of the relevant Minister alone. Unless there are clearly defined and exceptional circumstances, these provisions should similarly be exercisable only after a warrant has been obtained from a judicial officer".

The Committee, therefore, **seeks the Minister's advice** as to why the entry powers under proposed section 51L should not be exercisable only after a warrant has been obtained from a judicial officer.

Pending the Minister's advice, the Committee draws Senators' attention to this provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Relevant extract from the response from the Minister

> In relation to the Committee's query regarding proposed section 51L of the Bill relating to authorisations to search premises, given that the provision is dealing with an emergency situation (that is, it is necessary as a matter of urgency to make a dangerous thing safe) it was not considered appropriate to confer these powers on a judicial officer. The authorisations are given while the Defence Force is being utilised, so an almost instantaneous decision needs to be made by CDF or a person authorised by him or her in relation to the scenario envisaged in the section. There

are also specific requirements outlined in this section regarding the content of the authorisation to ensure that expedition is not at the expense of the proper processes being complied with.

The Committee thanks the Minister for this response and discusses the powers further at the conclusion of this report.

Tabling "in the Parliament"
Proposed new sections 51X(3) and (4)

Proposed new section 51X imposes certain publication and reporting requirements when a call-out order ceases to be in force. In general terms, a copy of the order and the accompanying report on the utilisation of the Defence Force that occurred under the order will be taken to be published if, within 7 days after the order ceases to be in force, the copy and report are "tabled in Parliament" or published on the Department's web-site or otherwise publicly released.

If deemed publication occurs by means other than tabling in the Parliament, proposed new subsection 51X(4) requires the Minister to arrange for the order and report "to be tabled in the Parliament within 3 sitting days" after the end of the 7 day period.

Subordinate legislation is usually required to be "laid before each House of the Parliament" within a specified number of sitting days of that House after a defined event (see, for example, *Acts Interpretation Act 1901* s 48; *Environment Protection and Biodiversity Conservation Act 1999* s 522A(4)). This requirement makes clear that each House of the Parliament is entitled to receive notice of the particular matter in issue. It is unclear whether the clause "tabled in Parliament" maintains this dual entitlement, or whether it may be satisfied simply by tabling in one House. The Committee, therefore, **seeks the Minister's advice** as to why the bill does not make explicit that orders and reports be tabled in both Houses.

Pending the Minister's advice, the Committee draws Senators' attention to these provisions, as they may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

Relevant extract from the response from the Minister

> In relation to the Committees query in relation to tabling requirements, section 51X is being amended in line with the recommendations of the Senate Committee on Foreign Affairs, Trade and Defence. The section will make it clear that a report under the section be tabled in Parliament within 7 calender days and that if Parliament is not sitting, the report. be presented to the Presiding Officer of each House for circulation to members of that House.

The Committee thanks the Minister for this response and notes the amendment to be moved to clarify the tabling requirement.

Issues identified at the Committee's briefing

1.31 As noted above, the Committee received a briefing on the provisions of the bill on 17 August 2000. As is its practice, the Committee has not considered the general policy underlying the bill or its internal consistency, but has examined the provisions of the bill against the Committee's terms of reference which focus on personal rights and liberties and excessive administrative powers or discretions. As a result, the following issues arose:

Defining "domestic violence"

1.32 Proposed new section 51 of the Defence Act states that "domestic violence" has the same meaning as in section 119 of the Constitution. As noted above, section 119 of the Constitution uses the term "domestic violence" without defining it, and the term has not been considered by the High Court and was not referred to during the Constitutional Debates.

1.33 Quick and Garran note that this provision was adapted from Article IV(4) of the US Constitution and comment as follows:

> The Federal Authority is not required or empowered to interfere to protect a State against domestic violence, except on the application of the Executive Government of the State. The maintenance of order in a State is primarily the concern of the State, for which the police powers of the State are ordinarily adequate. But even if the State is unable to cope with domestic violence, the Federal Government has no right to intervene, for the protection of the State or its citizens, unless called upon by the State Executive. If however, domestic violence within a State is of such a character as to interfere with the operations of the Federal Government, or with the rights and privileges of federal citizenship, the Federal Government may clearly, without a summons from the State, interfere to restore order. Thus if a riot in a State interfered with the carriage of the federal mails, or with interstate commerce, or with the right of an

> elector to record his vote at a federal election, the Federal Government could use all of the force at its disposal, not to protect the State, but to protect itself.[19]

1.34 Annotations to Article IV(4) of the US Constitution suggest that questions arising under that provision are essentially political not judicial in character, and therefore not justiciable, and that, in recent years, "the authority of the United States to use troops and other forces in the States has not generally been derived from this clause and it has been of little importance".[20]

1.35 American cases in which military forces have been used to control domestic violence and disorder have involved situations as varied as union labour disputes,[21] insurrection and rebellion against an incumbent government,[22] and resistance to desegregation decrees in the American South.[23]

1.36 In evidence to the Foreign Affairs, Defence and Trade Legislation Committee, Major General Alan Stretton suggested that the lack of a definition of this term was 'unfortunate', and the NSW and Victorian Governments both expressed concern at the bill's use of indeterminate terms such as this.

1.37 The Foreign Affairs, Defence and Trade Legislation Committee considered that "domestic violence" would be interpreted in the light of its natural meaning (conduct or treatment within Australia that is marked by great physical force), and that Committee was satisfied that the use of the term in the bill was "adequate and appropriate".[24]

1.38 In briefing this Committee, Lt Colonel Kelly stated that the term had to be interpreted in the light of the additional requirement that the domestic violence had to be beyond the capabilities of the State or Territory police. It encompassed terrorism, and similar situations where "specialist ADF training and technical capability would be superior to the capability of the state", and could also include

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19 Quick J & Garran R, *The Annotated Constitution of the Australian Commonwealth*, Angus and Robertson, Sydney, (1901), p 964.

20 US Constitution, Annotations, pp 892-3, fnn 326, 335.

21 For example, *Moyer v Peabody* 212 US 78 (1909): action by a union leader against a State Governor who had ordered his arrest during a labour dispute.

22 For example, *Luther v Borden* 48 US (& How) 1 (1849): declaration of martial law by the Rhode Island State legislature to combat insurrection in that State.

23 For example, *Williams v Wallace* 240 F Supp 100 (MD Ala 1965) where President Johnson used federal troops and federalised local Guardsmen to protect participants in a civil rights march on the grounds that there was a substantial likelihood of domestic violence because state authorities were refusing the marchers protection.

24 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000*, (August 2000) para 1.64.

other situations where there was a "large scale threat of violence or violence occurring".[25] Both the existing provisions and the provisions in the bill might apply to a request from a State Premier for troops to assist during a violent waterfront dispute if the authorising Ministers were satisfied that the violence, or likely violence, was likely to be beyond the capacity of State police.[26]

1.39 However, in essence, the bill was intended to deal with two specific situations: conducting counter-terrorist assaults, and emergency situations where there was a grave threat to the general safety and livelihood of the public beyond the capability of the police to deal with.[27]

Defining 'Commonwealth interests'

1.40 Another significant term left undefined in the bill is "Commonwealth interests". In evidence to the Foreign Affairs, Defence and Trade Legislation Committee, the Governments of NSW, Victoria and Western Australia all submitted that this term should be defined. For example, the Government of Victoria considered that "it is critical that a legislated definition be included in the Bill. The concept of a threat to 'Commonwealth interests' is the trigger for the Defence Force to enter a State without a request from that State for assistance".[28]

1.41 Mr Geoffrey Dabb from the Commonwealth Attorney-General's Department told that Committee that:

> This is a drafting matter – whether the bill would be better and better give effect to its purpose if an attempt was made to spell out various interests. A decision was taken that the broad expression 'Commonwealth interests' was appropriate in the context of the bill. It would cover things like protecting Commonwealth property, possibly buildings, protecting against violence that would prevent the performance of Commonwealth functions of one kind or another. Giving effect to a treaty obligation or an obligation to international law could possibly be quite important. You finish up with a very long list and, in the end, the decision was taken to use the broad expression 'Commonwealth interests' ...
>
> In practice the government is going to have legal advice available to it during any of the kinds of situations we are talking about here. If there were doubt or difficulty, if we were at the margins of what might be a Commonwealth interest, I would imagine that the state would be invited to make a request. In other

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25 Scrutiny of Bills Committee, *Evidence,* pp 4, 5, 7.

26 Scrutiny of Bills Committee, *Evidence,* pp 14-15.

27 Scrutiny of Bills Committee, *Evidence*, p 23.

28 See Foreign Affairs, Defence and Trade Legislation Committee, Report, para 1.53.

> words, if there was not a clear Commonwealth interest, as a precaution, in order to ensure the action was covered, that possibility would then be explored.[29]

1.42 Lt Colonel Kelly reaffirmed before this Committee that a deliberate decision had been taken not to define the term 'Commonwealth interests' as "it is too difficult to come up with a satisfactory definition".[30]

1.43 The Committee notes the words of Dixon J (as he then was) that the Commonwealth's legislative power was not unrestricted, applying where "the functions of the Commonwealth are involved or some subject matter within the province of its legislative power or there is some prejudice to the security of the federal organs of government to be feared", and that the incidental power could not authorise legislation on matters "which are prima facie within the province of the States upon grounds of a connection with Federal affairs that is only tenuous, vague, fanciful or remote".[31]

1.44 While this bill must be drafted in a way that will enable its application in a variety of circumstances, there is nevertheless an issue as to whether the broad phrase 'Commonwealth interests' is excessively wide.

1.45 The Committee notes that an amendment has been proposed which will require that a relevant State or Territory be notified of any call out to protect Commonwealth interests.

Authorising ministers to be "satisfied"

1.46 All three situations of call out require the authorising Ministers to be "satisfied" that the State or Territory is not, or unlikely to be, able to protect the relevant interests. There is no requirement that the Ministers be reasonably satisfied, there are no criteria for determining what should constitute 'satisfaction', and it is not clear whether the appropriateness of 'ministerial satisfaction' can be reviewed other than following the tabling of a call out report in the Parliament.

1.47 Lt Colonel Kelly stated that this requirement would indicate close consultation between the Ministers and the State authorities:

> So the Ministers would not be able to formulate that opinion without advice from the State and obviously the Defence Force as well, because they would have to know what the capability of the state was, whether or not there was a superior defence capability, whether the numbers that were involved were

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29 Foreign Affairs, Defence and Trade Legislation Committee, *Evidence*, pp 35-36.

30 Scrutiny of Bills Committee, *Evidence*, p 3.

31 *R v Sharkey* (1949) 79 CLR 121 at 150-1.

perfectly adequate or the state could draw on resources from other states. Those sorts of issues would be considered by the Ministers.[32]

1.48 However, this consultation is assumed and these criteria are not spelt out in the bill. The difficulty is illustrated in the following exchange:

> **Senator MURRAY** – Well, if a minister of the Crown gave that order, even if it were in relation to three people on horseback, would or would not the Army have to obey that order and attend that event?
>
> **Lt Col. Kelly** – You cannot use this legislation to do that. That is the basic bottom line.
>
> **Senator MURRAY** – Where does it say you cannot?
>
> **Lt Col. Kelly** – Because it has to be beyond the capability of the state or territory police.
>
> **Senator MURRAY** – But who makes the assessment?
>
> **Lt Col. Kelly** – The three authorising ministers must each be satisfied.
>
> **Senator CROSSIN** – And what if they assess that it is beyond the capabilities? No-one is going to challenge that assessment, are they?
>
> **Lt Col. Kelly** – There may well be High Court challenges, as there have been in the past, to exercise –
>
> **Senator CROSSIN** – But that will be after the event.
>
> **Lt Col. Kelly** – But that can happen now. That is the situation now. In relation to anything we set down in legislation, the minute the government of the day decides to act to do something and gives the Defence Force orders to do things, there is no legislation that we could produce that would prevent –
>
> **Senator CROSSIN** – In the scenario Senator Murray outlined, could that happen now under current legislation?
>
> **Lt Col. Kelly** – Yes, it certainly can.[33]

1.49 In this respect, the bill is based (as is the existing provision) on Commonwealth Ministers' perception or judgment about the likely capabilities of State or Territory police forces. Where Ministers act in good faith, the provision will be used appropriately. Should a Minister act otherwise than in good faith (for example, if domestic violence were provoked by an authorising Minister) then the provision may be used inappropriately. It should be noted that this possibility applies equally to the existing provisions.

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32 Scrutiny of Bills Committee, *Evidence*, pp 4-5.

33 Scrutiny of Bills Committee, *Evidence*, pp 14-15.

Sunset clause

1.50 While the bill has been introduced prior to the Sydney Olympic Games, it is a bill of general application. Suggestions have been made that the legislation should include a sunset clause, and cease to have effect after those Games.[34]

1.51 While supporting the need for regular reviews of the legislation, Lt Colonel Kelly has pointed out that:

- the clarification of ADF powers under the bill provides greater certainty to ADF members during any call out;
- the ADF will require training in the new procedures and this would be redundant were the bill to include a sunset clause; and
- the bill contained greater restraints and provided greater accountability than the existing provisions.

Exercising police powers

1.52 The bill authorises the ADF to exercise certain powers traditionally available only to members of the police force. Police powers are given to individuals who are trained in their exercise, and have been subject to guidelines and judicial interpretation over many decades. However, the bill does not address some of the consequences of the exercise of those powers by members of the ADF. For example, the general law makes specific provision concerning the evidentiary use that may be made of confessions or other statements made to police officers when under arrest. This bill makes no provision regarding the evidentiary use that may be made of anything said by a person while detained by the Defence Force.

1.53 Similarly, the law imposes requirements on police officers who search premises to inform occupiers of their rights. The bill imposes some obligations on members of the Defence Force, but these are not the same as the obligations imposed on the police.

1.54 It is conceivable that personal rights and liberties might be adversely affected by the failure of the bill to canvass these matters.

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34 Australian Council for Civil Liberties, Submission to Senate Foreign Affairs Defence and Trade Committee.

Conclusions

The Committee accepts that this bill has attempted to clarify the law in a difficult area. There is a need for legislation which sets out the powers and responsibilities of the Defence Force when called out in aid of the civilian power. Clarifying these powers and responsibilities is of benefit to the Defence Force (which needs to be appropriately trained), to police forces (with which the Defence Force must work) and to the public whose lives are to be protected.

The Committee accepts that such legislation should be flexible, and should enable a rapid and effective response to terror, danger or emergency. However, such legislation should not abrogate rights and liberties unnecessarily, and should not be capable of misinterpretation or misuse.

Legislation authorising the call out of the Defence Force, by its very nature, trespasses on personal rights and liberties. It is intended to operate at a time of extreme threat, and to provide adequate powers to deal with such circumstances. This bill will obviously operate in these circumstances. However, its use of undefined terms such as 'domestic violence' and 'Commonwealth interests', and its failure to fully address the rights and obligations of those who find themselves in military detention, invites great reliance on the good faith of those at whose disposal these powers are placed.

Australia has a proud democratic tradition, and its governments have traditionally been governments of good faith. There is no question that good faith has been shown by all governments in the manner in which the existing call out powers have been exercised. However, laws which affect rights and liberties should not be drafted on the assumption that those using them will necessarily always be of good faith. Laws which assume good faith are inevitably misused by those whose motives are less than good. In the case of this bill, while terrorism is clearly encompassed by the term 'domestic violence', it is not clear what else might be.

The Committee considers that the bill represents an improvement over the vague and anachronistic provisions which it proposes to replace. It includes safeguards and accountability mechanisms that are lacking in the legislation that currently exists, and it deals with the role and powers of all those involved in a call out. This approach has much to commend it. Indeed, it is arguable that the bill has not taken the approach of clarification far enough.

In essence, the bill clarifies the relationship between the Commonwealth and the States and Territories at a time of threat. The Committee welcomes this. However, by leaving key terms (such as 'domestic violence') undefined, by not fully addressing the implications of detention and the other powers available to members of the Defence Force – particularly the possible use in evidence of statements made by people detained by the Defence Force – the bill creates uncertainty because it does not clarify the relationship between the Defence Force and citizens at a time of threat.

In this sense, the process of clarification is incomplete. One way in which this process should be continued is for the bill to require that procedures or protocols be developed which address the relationship between the Defence Force and the public for public scrutiny.

As noted above, a bill such as this trespasses on personal rights and liberties. Whether it trespass unduly on those rights and liberties is properly a matter best left for the Senate itself to determine.

Barney Cooney
Chairman

MINISTER FOR DEFENCE

25 AUG 2000

Senator Barney Cooney
Chairman
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator

I refer to the report of the Committee contained in Alert Digest 10/00 of 16 August 2000 within which you seek my advice on some issues concerning the Committee regarding the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000.

This legislation has been developing over a number of years following the report by Justice Hope on protective security in Australia in 1979. It was always considered that the existing legislative regime governing the call out of the Defence Force in situations of "domestic violence" was inadequate and unworkable, needing review and amendment.

The announcement of the 2000 Olympic Games in Sydney added extra impetus to the development of the legislation, to ensure that the Defence Force would have clearly defined powers and responsibilities under a comprehensive statutory scheme. The Games were not, however, the sole reason for the Bill. The scheme proposed under the Bill is intended to coincide with the Games and operate beyond them.

The Committee further asks what restrictions are imposed on the exercise of powers under the Bill. As you are aware, a number of statutory requirements need to be satisfied before the Governor-General issues an order calling out the Defence Force viz:

- The Prime Minister, the Attorney-General and the Minister for Defence (the authorising Ministers) must each be satisfied;
- That a State or Territory is not or is unlikely to be able to protect the Commonwealth or itself against the domestic violence;
- That the ADF is needed to assist; and
- Then and only then, the Governor-General may make a written order directing the Chief of the Defence Force to use the ADF for that purpose.

There are further safeguards enshrined in the legislation to protect both members of the public and the ADF in the exercise of their powers under the Bill.

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These safeguards include:

- A member of the Defence Force is restricted to the use of "reasonable and necessary force" in the exercise of his or her powers and must not do anything that is likely to cause the death of or grievous bodily harm to a person or subject a person to a greater indignity than is reasonable and necessary in the circumstances;
- Publication of the declaration of a general security area and any designated area within the general security area;
- Authorisations to search premises in the general security area may be in force no longer than 24 hours;
- Searches of premises may only be undertaken when there are reasonable grounds for believing that there is a dangerous thing (eg. bomb) in the premises;
- The person in charge of the search must be identified;
- The occupier of premises is entitled to be present for the search and to be given a copy of the search authorisation;
- Property or persons detained by Defence Force personnel must be handed over to a police officer at the earliest practicable time; and
- Receipts must be given for property seized wherever practicable.

Members of the ADF exercising powers under Division 3 are required to wear uniforms displaying their surname as well as numbers or alpha numerics to allow each member to be uniquely identified.

Another important safeguard in the proposal is in relation to the legal position of the ADF. An important safeguard against the misuse of the Defence Force is the power of the Courts to ensure that members of the Defence Force comply with the requirements of the law. A court can consider whether the use of force, for example, was justified, whether any force used was excessive and whether any acts by members of the Defence Force were unlawful. The Bill does not alter this position.

I consider that these are a comprehensive set of safeguards which not only endeavour to protect the public, they provide the ADF with clear guidelines relating to their responsibilities while exercising powers under the Bill.

As mentioned above, the Bill sets out a scheme for the ADF to assist the civilian authorities in law enforcement emergencies. As you are aware, the powers under the Bill are exercisable subject to the safeguards and limitations listed above. The crucial premise behind the Bill is that the ADF may only be utilised where there is a situation of domestic violence that is beyond the capability of a State to deal with. Under the Bill the ADF will have no authority to act on its own initiative.

The current legislative scheme is contained in the *Defence Act 1903*, *the Australian Military Regulations 1927* and the *Air Force Regulations 1923* which deals with members of the Defence Force assisting police maintain law and order in the event of domestic violence on the application of a State. They are based on historical British government orders that permitted a magistrate or mayor to use the Army to keep public order. This involved, inter alia, reading proclamations, blowing of bugles, magistrates accompanying the Defence Force, all of which would be unworkable in the context of, for example, a terrorist incident. This is an unsatisfactory regime given that the assistance of the ADF is most likely to occur when there is a need to protect a Commonwealth interest.

In relation to the Committee's query regarding proposed section 51L of the Bill relating to authorisations to search premises, given that the provision is dealing with an emergency situation (that is, it is necessary as a matter of urgency to make a dangerous thing safe) it was not considered appropriate to confer these powers on a judicial officer. The authorisations are given while the Defence Force is being utilised, so an almost instantaneous decision needs to be made by CDF or a person authorised by him or her in relation to the scenario envisaged in the section. There are also specific requirements outlined in this section regarding the content of the authorisation to ensure that expedition is not at the expense of the proper processes being complied with.

In relation to the Committees query in relation to tabling requirements, section 51X is being amended in line with the recommendations of the Senate Committee on Foreign Affairs, Trade and Defence. The section will make it clear that a report under the section be tabled in Parliament within 7 calender days and that if Parliament is not sitting, the report be presented to the Presiding Officer of each House for circulation to members of that House.

I trust that the preceding information assists in allaying the concerns of the Committee. I believe that the Bill is a responsible, certain and appropriate piece of legislation governing the use of the ADF in law enforcement emergencies.

Yours sincerely

JOHN MOORE

Domestic violence'

Questions have been raised about the expression 'domestic violence' as used in the Bill.

The expression is taken from section 119 of the Constitution, and in turn from the corresponding provision in the United States Constitution. The expression is used in the present s51 of the *Defence Act 1903*.

In the Bill the expression has the same meaning as in section 119 of the Constitution where the context shows that it is used in the sense of internal violence as distinct from an invasion. Clearly, conduct that is 'domestic violence' must entail'violence' in the sense of force or the threat of force to persons or property, and not constitute merely a non-violent breach of the law.

Moreover, and this is the more significant point, under proposed sections 51B or 51C , the 'domestic violence' must be, to the satisfaction of each of the three Ministers, such that the State or Territory is not, or is unlikely to be, able to protect itself against it. Under proposed section 51A , the domestic violence must be, to the satisfaction of each of the three Ministers, such that the State or Territory is not or is unlikely to be able to protect specified Commonwealth interests against it.

Clearly, such a requirement cannot be satisfied by any mere civil disturbance, but only by actual or threatened violence beyond the resources of the civilian police to cope with.

The emergency that can be most readily envisaged is a terrorist attack. One possible situation is where a group of armed hostage-takers defends a position in a building or aircraft. The civilian police have the ability to deal with many kinds of siege situations, but not to the level of the Defence Force. An emergency requiring that level of response is, unfortunately, something that must be contemplated as a possibility and planned for. Another possible situation might be a terrorist attack involving a large bomb, or chemical or biological agents that could create an immediate danger to public safety across a large area. We might hope that such an emergency would not arise, or if it did that civilian authorities could deal with it. However, if the resources of the Defence Force are needed, they should have clear powers to be able to perform the task required of them, and that is why there is a balanced and controlled set of appropriate powers in the proposed Division 3.

It is true, again unfortunately, that instances of possible violence beyond the resources of civil authorities are not necessarily limited to terrorist threats. An example could be a demand for money accompanied by a credible threat to destroy lives or property (with a bomb or chemical or biological agents). Another could involve a military-style attack, with high-powered weapons or explosives, on members of the public by one or more individuals without any demand and even without any readily comprehensible motive. Another conceivable situation could involve serious violence to persons or property following a break-out of a large number of prisoners. Again, we might hope that such an emergency would not arise, or if it did that civilian authorities could deal with it. However, if the resources of the Defence Force are needed, they should have clear powers to be able to perform the task required of them.

ATTORNEY-GENERAL'S DEPARTMENT

Executive Adviser

25 August 2000

Mr James Warmenhoven
Secretary
Senate Committee for the Scrutiny of Bills
Parliament House
Canberra ACT 2600

Dear Mr Warmenhoven

DEFENCE LEGISLATION AMENDMENT (AID TO CIVILIAN AUTHORITIES) BILL 2000: PROTECTION AGAINST SELF-INCRIMINATION; ADMISSIONS BY A DETAINED PERSON

I understand that the Committee would like the Department to comment further on the above issue, which was raised at the briefing on 17 August 2000. The Department provides the following comments.

2. There is no power under the Bill to compel answers to questions or the provision of information, so no issue arises of providing what is sufficient excuse for failure to answer or alternatively of providing use or derivative use immunity for self-incriminatory statements.

3. Under the proposed amendments, a member of the Defence Force has limited powers to detain persons (s51I(1)(b)(ii) - power to recapture, buildings, free hostages etc; s51V(e) - dangerous thing seized from person). The power to detain arises if, in specified circumstances, the member believes on reasonable grounds that the relevant person has committed an offence against a law of the Commonwealth, a State or a Territory.

4. In each case, the power to detain is only 'for the purpose of placing the person in the custody of a member of a police force at the earliest practicable time'. Detention would not be authorised if it continued for longer than the earliest practicable time in the circumstances. That provision corresponds to that in the *Australian Protective Services Act 1987* s17.

5. In the case of both detention provisions in the Bill, there is an obligation to inform the detained person of the relevant offence: s51U.

Robert Garran Offices, National Circuit, Barton ACT 2600 Telephone (02) 6250 6666 Fax (02) 6250 5921

6. Because a Defence Force member does not have an investigative function, and is not an 'investigating official', the questioning regime in *Crimes Act 1914* Part IC will not apply. That regime, which authorises pre-charge detention for a period of time, and provides for cautioning, interpreting, tape-recording of interviews and other matters, is intended to regulate the investigative conduct of the police and other persons who hold offices 'the function of which include the investigation of Commonwealth offences'.

7. The detention powers provided by the Bill would not enable a person to be held for the purpose of questioning or other investigation.

8. It is possible that during the limited detention period the person might make admissions of complicity in an offence. It is also possible that the person might be asked questions by a Defence Force member or by some other person. Indeed, in the case of a terrorist incident it might be essential to save lives that a person suspected of involvement be asked questions ('Where's the bomb?'; 'Where are the hostages?')

9. If a person detained were later to be tried for an offence, the admissibility of any admissions made by the person, in answer to questions or otherwise, would depend on the relevant evidence laws. In general, these would provide for the exclusion of any admissions unlawfully or improperly obtained.

10. For example, if the provisions in the *Evidence Act 1995* applied, any questioning that occurred might be regarded as 'official questioning' on the ground that a Defence Force member was 'a person appointed under an Australian law ... whose functions include functions in respect of the prevention ... of offences' (section 85 and Dictionary Part 1). Section 85 might also or alternatively apply on the basis that the admission was made 'as a result of an act of another person who is capable of influencing the decision whether a prosecution of the defendant should be brought or should be continued'. Section 85 requires the exclusion of an admission 'unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected'.

11. In addition, section 138 provides that the court shall not admit evidence obtained unlawfully or improperly unless the *desirability* of admitting it outweighs the *undesirability* of admitting evidence obtained in that way. (This is a variation of what is known as the *Bunning v Cross* rule. There is a specific sub-section about improper questioning.) Section 90 provides that a court may refuse to admit evidence of an admission if having regard to the circumstances in which it was made it would be unfair to the defendant to use the evidence. (This reflects what is know as the '*Lee* discretion'.)

12. Accordingly, there is no need for further provision to address the possibility that a person detained by a Defence Force member might make an incriminating statement.

13. Given the necessarily temporary nature of any detention, any general rules for how it should be managed in other respects could appropriately be contained in guidelines or standing instructions.

Yours sincerely

Geoffrey Dabb

Telephone: (02) 6250 5877
Facsimile: (02) 6250 5921
Email: geoff.dabb@ag.gov.au

Analysis of

Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000

against the Terms of Reference of the

Senate Standing Committee for the Scrutiny of Bills

(i) trespass unduly on personal rights and liberties

Policy reason for Bill

In considering the Bill against this criterion it is important to recognise that the Bill is intended to cover violent emergency situations beyond the capacity of the civilian police.

Situations in which powers under the Bill might be utilised

Broadly, there are two kinds of such situations, that might be illustrated by examples.

(a) There is a possible situation where armed force and a highly trained combat capacity is needed to overcome heavily armed criminals, such as terrorists. The police have this capacity to a certain extent, but believe that situations may occur where the superior capacity of the Defence Force is needed. The alternative would be to develop a stronger army-style capacity within the Australian police forces, equipped with, for example, a helicopter and marine assault capacity.

(b) The second kind of violent situation concerns a major threat to public safety from a bomb or chemical/biological/radiological (CBR) device. Australian governments are obliged to develop plans for dealing with such an emergency. If the police can cope with it, there will be no need to have recourse to the Defence Force. Indeed, use of the Defence Force will always be a matter of last resort.

A distinction should be drawn between Division 2 powers (appropriate for situation (a) above) and Division 3 powers (appropriate for situation (b) and possibly some contingencies under situation (a)).

Division 2 powers do not add significantly to powers under the existing laws of the Australian jurisdictions where the Defence Force is given the task of taking action to protect lives or property.

Division 3 powers are intended to enable the Defence Force to take action that is reasonable and necessary to deal quickly with the kind of emergency described under situation (b). Some of these powers will correspond to existing police or emergency powers, which will differ from jurisdiction to jurisdiction. That variation is one reason for setting out a clear set of powers in the new part. Other powers may go beyond

those currently available. The reason is that legislation intended to address an emergency such as a CBR attack should confer adequate powers to control the movement of persons, for example.

The Bill contains a significant number of safeguards and accountability mechanisms.

Mechanisms that limit availability of powers

Powers under the Bill do not come into play until the Governor-General has called-out the Defence Force.

Before that can happen the Prime Minister and Minister for Defence and Attorney-General must be satisfied of certain matters including that 'domestic violence' is occurring, or is likely to occur, in Australia, and that the relevant State or Territory is not, or is unlikely to be able to, provide protection - either for Commonwealth interests or for the State/Territory itself.

The use of the Defence Force is then limited to providing protection, in such manner as is reasonable and necessary, against the particular 'domestic violence' specified in the order - being the violence against which the State/Territory (including its police) is or is unlikely to be able to provide protection (s51D).

When the Defence Force is used it is to cooperate with the State/Territory police force, and is not to be utilised for any particular task except when requested in writing by the State/Territory police force (s51F). (This may not happen if it is not 'reasonably practicable' - for example if no State/Territory police officer is available when urgent action is needed.)

Power to recapture buildings and free hostages (Division 2)

The s51I task (recapture buildings and free hostages etc)members of the Defence Force called may only use such force as is reasonable and necessary to recapture premises and to, free hostages, detain persons, evacuate persons, search for and seize any dangerous thing. Before exercising power the Defence Force requires ministerial authorisation except in a sudden and extraordinary emergency such as where hostage takers commence killing hostages.

Cordon, search and seizure powers in General and Designated Security Areas (Division 3 power)

Under Division 3 of the Bill, emergency cordon, search and seizure powers may be conferred on members of the Defence Force. To utilise these powers the Governor-General must specifically confer the new Division 3 powers in the Order calling out the Defence Force. Furthermore, these powers only become available if the authorising ministers declare a general security area. Ministers may also declare a designated area in relation to which further powers are available to members of the Defence Force. A designated area must be wholly contained within a general security area. .

General security area - actions that must occur before powers made available and specific safeguards

If the Order specifies that members of the Defence Force are to exercise general security powers (new Division 3 - subdivision B) authorising Ministers must declare a specified area to be a general security area. Within that general security area, members of the Defence Force may search premises, transport, and persons for dangerous things. General security powers of the members of the Defence Force may only be exercised in relation to that area. If such an area is declared, then there is a requirement to arrange for a statement advising the public of the description of the general security area and its boundaries, the nature of the violence or threat and the powers which may be exercised by members of the Defence Force.

Designated Area Powers - actions that must occur before powers made available and specific safeguards

Within a General Security Area, the authorising Ministers may declare a specified area to be a designated area or areas and if this is done, reasonable steps must be taken to inform the public of the designated area and its boundaries. Powers within the designated security area include power to: direct a person about where they, or their may vehicle may, remain in the area, if at all, remove or move unattended vehicles, erect barriers, and enter and search premises or vehicles for the purposes of directing any person found therein to leave the area.

Safeguards that apply to Bill as a whole

The safeguards established in the Bill were developed in order that a proper balance could be reached between the objective of the Bill to enable to Commonwealth could effectively utilise the Defence Force in emergencies and the rights of the citizen

Scrutiny of the Courts: The conduct of individual members of the Defence Force is subject to the scrutiny of the courts. In exercising powers under the Bill members of the Defence Force remain individually criminally and civilly liable for their actions eg would be liable for use of excessive force, for false imprisonment and for unlawfully damaging property.

Lawful protest: Under the Bill the Defence Force is not to be used where persons are engaged in lawful protest or dissent.

Industrial disputes: The existing proviso in section 51 of the Defence Act prohibiting use of the Reserve and Emergency Force of the Defence Force, in connection with industrial disputes, at the request of a State, is retained and Government amendments will extend this to Commonwealth and Self-Governing Initiated call out.

Detaining Persons: If a person, such as a hijacker is detained, a member of the Defence Force may only use force than is reasonable and necessary in the circumstances and, if practicable, the person being detained must be given an idea of the nature of the offence unless the person should know the substance of the offence. Further in using force against a person members of the Defence Force may not subject a person to greater indignity than is reasonable and necessary in the circumstances. A person detained must be handed over to police at the earliest practicable time.

Non-compliance with obligations: If a member of the Defence Force fails to comply with any obligation in relation to the exercise of any power under the Bill, then he or she is taken not to have been entitled to exercise the power.

Identifiers including offence for not displaying identifiers: Members of the Defence Force exercising powers under Division 3 are required to wear uniforms displaying their surname as well as numbers or alpha numerics to allow each member to be uniquely identified. This will assist in making members of the Defence Force accountable for their actions.

(ii) make rights, liberties or obligation unduly dependent upon insufficiently defined administrative powers

As stated above the Bill attempts to strike an appropriate balance between the objective of providing the Commonwealth with the ability to utilise the Defence Force in law enforcement emergencies and the rights and liberties of members of the public. The administrative powers of ministers and Defence Force members under the Bill are necessarily broad to enable appropriate latitude for the Commonwealth to respond to such emergencies. However, the administrative discretions under the Bill are subject to judicial supervision. In addition the actions of authorising ministers would be the subject of significant parliamentary and public scrutiny . The Minister for Defence must arrange to report to the Presiding Officers of the Parliament within 7 days of the expiry or revocation of an Order or Orders relating to an incident for which the Defence Force was called out.

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions

The powers of authorising ministers to declare general security and designated areas are subject to the scrutiny of the High Court under section 75(v) of the Constitution.

Insofar as the action of individual members of the Defence Force, their actions, as stated above are subject to the scrutiny of the courts. Elaborate administrative merit review mechanisms are not practical in this legislation given that speed of reaction is likely to be all important in dealing with law enforcement emergencies.

(iv) inappropriately delegate legislative powers

Not applicable as no legislative powers are delegated under the Bill.

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny

Not applicable as no legislative powers are delegated under the Bill.

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COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

(Private Briefing)

Reference: Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000

THURSDAY, 17 AUGUST 2000

CANBERRA

BY AUTHORITY OF THE SENATE

SENATE

STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

Thursday, 17 August 2000

Members: Senator Cooney *(Chair)*, Senators Crane, Crossin, Ferris, Mason and Murray

Senators in attendance: Senators Cooney, Crane, Crossin, Mason and Murray

Terms of reference for the inquiry:

Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000

WITNESSES

Committee met at 9.06 a.m.

KELLY, Lt Col. Michael Joseph, Director, Military Law Centre, Department of Defence

KUETER-LUKS, Ms Angela Julia, Acting Director, Directorate of Advisings and Legislation Review, Department of Defence

McDOUGALL, Mr Geoffrey David, Principal Legal Officer, Security Law and Justice Branch, Attorney-General's Department

CHAIR—Do you just want a briefing or shall we ask questions?

Senator CRANE—I would like to get the briefing first and then I think there is a series of questions. There are some basic questions and some questions could flow out of the briefing.

CHAIR—Right.

Lt Col. Kelly—Basically, we wanted to take advantage of this opportunity to get an overview of the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000. You may or may not be aware that the Senate committee handed down its report last evening. That actually goes through some of the issues that have been raised in recent days by the states. Some of those issues are addressed in that report, and I recommend that to you.

I am not sure how much background you have to the bill and the historical development of this process, but it all began about 20 years ago after the Hilton bombing, when there was the Hope protective security review which looked at the issue of both Australia's physical capability in dealing with counter-terrorism and also the issue of the status of members of the ADF when called out in aid of the civil power. At the time of the Hilton call-out, you might remember that troops of the 1st Task Force from the Holsworthy area were called out to secure the town of Bowral. Articles were written at that time concerned about the status of members of the ADF when performing those tasks and raising great concerns about their legal authority and protection for the members and the awareness of the public about what to expect from members of the ADF. So taking all of those concerns at that time, over the years we have tried to address that, but obviously the issue is a low priority, not having a major event or a disaster to focus people's attention. In recent years, obviously, we have had the Olympics to focus the attention. For the last 2½ years we have been developing this legislation based on the debate and the commentary that has gone on over the previous 20 years.

Senator CRANE—I have to leave here at about a quarter to or 20 to 10. Can I suggest we devote 20 minutes to your remarks and leave about 20 minutes for questions? Would that be okay?

Lt Col. Kelly—I can definitely finish this in 20 minutes. I will go through the bill quickly and give you an overview. What we have done is get rid of the old section 51 of the Defence Act and repeal the archaic Australian Military Regulations and Air Force Regulations that currently govern call-out. They only actually dealt with the state requested scenario. There were no provisions for a Commonwealth initiated call-out. If you look at them, they are very archaic.

They are based on an 18th century English riot control model and refer to things like having a magistrate present, blowing bugles and reading archaic proclamations, none of which is likely to impress the modern terrorist.

CHAIR—We would probably be more interested in the terms of the present legislation and what they do. Do not let me interrupt you.

Lt Col. Kelly—Sure. That is the concept we are going through now. Basically, what we have done is introduce a new part IIIAAA to the Defence Act. That is broken up into five divisions. Division 1 deals with the process of call-out, division 2 specifically with the counter-terrorist assault powers and division 3 with the more generic public safety powers that would be associated with supporting the police where their numbers were not sufficient.

CHAIR—Sorry to interrupt you again, but I am just trying to find those divisions in the legislation. I do not see them.

Lt Col. Kelly—It is set out sequentially and broken up by the provisions under each as part of IIIAAA.

CHAIR—Thank you very much.

Lt Col. Kelly—Then there are some general safeguard provisions as well in divisions 4 and 5. I will not spend any time going into these in detail, but the key things to note in the definitions part is that the key decision makers in this process are the three authorising ministers: the Defence Minister, the Attorney-General and the Prime Minister. The requirement is that each of those ministers have to be satisfied for there to be a call-out. So they are key to this whole process. The dangerous thing is critical in terms of the search power, which relates to the suspicion or the belief that members must have in order to conduct the search, and that relates to things like bombs, firearms and chemical devices.

CHAIR—But you had to have the three ministers giving the okay?

Lt Col. Kelly—Yes.

CHAIR—Have we amended 51A(7)(b)?

Lt Col. Kelly—In all of the actual decisions to call out you have the three ministers involved. Then there are elements where one authorising minister may communicate with the Governor-General, for example. At the present time, there is also a provision for the authorising ministers to authorise another minister to give the final go-ahead for a counter-terrorist assault, but that may change in light of the report of the Senate committee which reported last night. These are the key decision makers in relation to actually calling out with the ADF.

The bill introduces a concept of a general security area and a designated area, which I will go through in a second, but that basically sets the parameters for the exercise of any authority under the legislation. That was a device used to actually confine the area within which these

authorities would be exercised. I will not go through the others; it would take too long. So I will just quickly move through.

The provision there for searching persons prohibits strip and cavity searches. So they are rudimentary searches to determine whether or not someone has a dangerous thing on their person. Basically the process for call out is broken up into three categories: 51A, B and C. 51A represents the ability of the Commonwealth to call out the ADF to protect Commonwealth interests, 51B is the call-out at the request of the state and 51C is at the request of the self-governing territory. We have tried to standardise that process across all three types of call-out. You will note that the ministers have to decide that, if there is domestic violence occurring or likely to occur, the state or territory is unable to or unlikely to be able to deal with that situation and that therefore the ADF should be called out. They must determine what powers the ADF should have in this situation within the framework of the bill.

This requirement for the ministers to be satisfied of the state's inability relates to all types of call-out. That is a requirement that we have added in this bill that does not exist at present for a Commonwealth call-out—that is, to look after the states' interests in this respect. The Governor-General may order the CDF to protect the Commonwealth's interests and in this Commonwealth initiated call-out, he can do that whether or not there has been a state request.

CHAIR—Is that defined anywhere?

Lt Col. Kelly—It is not defined in the legislation. It has been the subject of commentary by the High Court and by various constitutional commentaries. It is a matter that we addressed when preparing the legislation, but it is too difficult to come up with a satisfactory definition of 'Commonwealth interests'.

Senator CRANE—Could I just clarify the point about the states responding to a request in terms of a call-out. Let us say it is my state of Western Australia and something goes wrong there. Who has the final say in terms of whether you go or not? What are the guidelines that apply to going? Is it because the state does not have the resources or the expertise to handle it through their civil forces?

Lt Col. Kelly—Exactly right.

Senator CRANE—Say our Premier says, 'We've got to have this or we're in trouble.' Do you turn around and have an overriding power, or is it an automatic thing?

Lt Col. Kelly—Under section 119 of the Constitution if the state requires protection from domestic violence, then the Commonwealth is obliged to respond and provide whatever support it considers is necessary. But it still remains a discretion of the Commonwealth to say whether or not this state actually needs that support. There have been no occasions so far where the Commonwealth has been satisfied that the state's resources are not adequate to deal with the situation. So you can see that a fairly high threshold is involved here.

Senator MASON—Does it require an invitation from state government?

Lt Col. Kelly—In the state requested call-out process, it involves a request from the state government.

Senator MASON—It has to be a request from the state; the Commonwealth cannot move in of its own volition?

Lt Col. Kelly—It can under 51A, which is only to protect Commonwealth interests, and the sorts of Commonwealth interests are those that would be reflected in the provisions of the Constitution and our international obligations. For example, the call-out in 1978 in relation to the Hilton bombing was in response to the protection of foreign diplomats and political personnel who were obviously required to be protected under our international obligations and our domestic Commonwealth law.

Senator CRANE—Where was it set with regard to some of the more recent problems we have had with some of the refugees on the north-west coast of WA?

Lt Col. Kelly—This legislation has set a very high bar for usage. We cannot use the ADF under this legislation unless it is beyond the capability of the state or territory police to deal with and it has to be a situation of violence. So obviously there would need to be a large-scale threat of violence or violence occurring for there to be a need to use the ADF. The only other situation would be where the capability of the state was inadequate and that would be in circumstances of, say, a counter-terrorist assault when the specialist ADF training and technical capability would be superior to the capability of the state.

The order that the Governor-General makes in calling out the ADF would specify that it was made under each of these provisions—in this case, the Commonwealth interest provision. It would specify the state or territory, the Commonwealth interest involved, what the domestic violence was and whether division two or three powers should apply, or both. The order would only be in place for 20 days, unless it was specified to operate for a shorter time or unless it was revoked earlier. If the minister seeks to be satisfied of the inability of the state, then the Governor-General must revoke the order. It is indicated in the act that the Governor-General would act on the advice of the Executive Council unless it was an emergency and he could then act on the advice of an authorising minister. In relation to a crisis, there could be a further series of orders issued if that was necessary.

The state process is almost identical to that Commonwealth process, except that it is done at the state's request. The order would specify the same things as under the Commonwealth call-out, but the call-out would cease if the state withdrew its application. The Governor-General would have to revoke the order. Once again, the Governor-General will act on advice of the Executive Council or the authorising minister. The same requirements exist in relation to the order and the same process is set out for a self-governing territory type call-out. They are basically the three processes.

Senator CROSSIN—You may well have already answered this question, but how do you know? What does a minister use to determine that he is not satisfied that the state or territory police can deal with that situation?

Lt Col. Kelly—This is a flag to indicate that there obviously will be close consultation between the ministers and the state authorities. So the ministers would not be able to formulate that opinion without advice from the state and obviously the Defence Force as well, because they would have to know what the capability of the state was, whether or not there was a superior defence capability, whether the numbers that were involved were perfectly adequate or the state could draw on resources from other states. Those sorts of issues would be considered by the ministers. Certainly, that indicates that there would have to be consultation with the state or territory.

The legislation requires that the ADF is used in a reasonable and necessary manner to protect the Commonwealth or states or territories. There is a requirement that the CDF operate in accordance with ministerial directions. There are a further two caveats on the use of the ADF, and this applies across the board to all three types of call out: that the ADF must be used in cooperation with the state authorities and that the ADF cannot actually do anything unless they are requested to act by the state or territory police. That applies across the three types of call-out. That is a restriction that is not currently in place for a Commonwealth initiated call-out. So we have actually added restrictions there.

We have put in a specific provision prohibiting the use of the ADF to restrict lawful protest or dissent. That could not have happened under this legislation anyway, because it would have to be a situation of domestic violence beyond the capability of the state or territory police to deal with for us to be used. But, for added certainty, we have included a specific prohibition in here in relation to demonstrations or dissent.

Senator CRANE—If there were a call-out that met all the criteria, the state authorities would need resourcing up in terms of what they had on the ground. Who is actually in charge?

Lt Col. Kelly—The police always remain in control of an incident. At any time they can withdraw their request for the ADF to provide assistance.

Senator CRANE—I am talking about the operation on the ground.

Lt Col. Kelly—There is a military commander who is responsible for the direct command of the troops, all the way up through to the CDF and then the Minister for Defence. But they must respond to either the request or the revocation of the request from the police on the ground.

CHAIR—Where is that section which states that police are in command of the situation at all times, that the Army is operating under the direction of the police?

Lt Col. Kelly—Section 51F spells out that they must act on the request of the police.

CHAIR—That says on the direction of the police, does it? Where is that?

Lt Col. Kelly—At 51F(1)(b). It states 'unless a member of the police force of the State or the Territory requests in writing that the Defence Force be so utilised'.

CHAIR—Does that say they are under the command of the police force?

Lt Col. Kelly—No.

CHAIR—That is the question I asked.

Lt Col. Kelly—Constitutionally, members of the ADF cannot be under command of the police because of section—

CHAIR—That is the answer, I think. They are not under the command of the police?

Lt Col. Kelly—No.

CHAIR—Thanks very much.

Lt Col. Kelly—Just to summarise that process, the authorising ministers make their decision and go for a Governor-General's order. There may or may not be ministerial directions. Then finally there has to be the civilian police request to act in all three types of call-out.

I will move very quickly, then, to the powers aspect. Division 2, as I mentioned, is the counter-terrorist assault powers. These are the tasks that have been identified in the national anti-terrorist plan as what would be required of the ADF in a call-out to deal with a counter-terrorist assault or stronghold situation. They only reflect providing lawful authority for what the members of the counter-terrorist assault unit are currently trained to do and are expected to do under the national anti-terrorist plan. They cannot actually execute a deliberate assault unless they have the final green light of an authorising minister—unless it is a situation of extraordinary emergency, and then they can go straight in after the police have made the actual request to act.

Then we move into division 3, public safety-type powers. Under this set of powers the ministers must declare a general security area for them to take effect and they are confined strictly to that general security area. The information about that has to be disseminated to the public—broadcast by whatever means available. If there is some technical reason that that information cannot get out, the declaration is not invalidated. Under that general security area umbrella there are basically three types of functions the ADF would perform. These are reflected in the national anti-terrorist plan. They may be required to help police to search premises, vehicles and persons for dangerous things, and only on the basis of a belief or a suspicion that there is a dangerous thing on that premises, transport or on that person.

CHAIR—You talk about terrorism. The amendments seem to be directed to domestic violence. I am just wondering where terrorism is defined or referred to in the legislation.

Lt Col. Kelly—We have not defined terrorism because, basically, all of the current criminal provisions in the criminal acts of the states and Commonwealth are adequate to define the types of offences that are terrorist—

CHAIR—Shouldn't you talk in terms of the amendments rather than broadly? That just occurs to me. We are trying to find out what this says.

Lt Col. Kelly—Sure. There was no necessity to define terrorism. The only necessity was to reflect the constitutional position in relation to call-out, which is that there be domestic violence. We have used that expression in connection with the Commonwealth interest as well. 'Domestic violence' is a phrase that was borrowed from the US constitution. Its meaning has to be taken in tandem with the fact that it has to be domestic violence beyond the capability of the state or territory police to deal with. That gives you an idea of what level of threat and what type of threat we are talking about, which may change over time.

CHAIR—I do not want to interrupt, but I would have thought it is not what we are talking in terms of but what the legislation says. That is our concern, I think. Can you follow? We have to look at —

Lt Col. Kelly—Sure, and I think the Senate committee report has been satisfied with that position on domestic violence and basically acknowledging that this is a situation that may change over time, too, in that the states or the Commonwealth may develop different capabilities in time to deal with counter-terrorism. It may cease in the future to become an ADF function, who knows, but basically we are confining the operation of the ADF to this extreme situation of domestic violence beyond the capability of the state or territory.

CHAIR—I will not interrupt again. Do not take it for one minute that I am in any way doubting what you say, but what we have got to do is deal with the terms of the legislation. That is what we are trying to get through to you.

Lt Col. Kelly—That is the understanding of that term; that encompasses terrorism.

CHAIR—Is there any High Court case that says that domestic violence means terrorism? Can you direct us to that?

Lt Col. Kelly—Well, there is no High Court case that considers the term or the phrase 'domestic violence', but in the explanatory memorandum and in other indications by the minister in his second-reading speech, that is clearly what is intended and certainly domestic violence has always been taken to include counter-terrorism or terrorist response, and looking at it in the obverse, why would terrorism be excluded from the expression 'domestic violence'? There is no logic to that.

Senator CRANE—Can I just follow this through—and I know it is an interruption again; maybe we will deal with some of these things as we go through. Have you had an opportunity to look at our terms of reference as a committee vis-a-vis the Senate report where we deal fundamentally with the rights of the individual, whether or not they are inadvertently or otherwise affecting innocent third parties? This is fundamentally where we are coming from. Against those terms of reference, can I just ask what is the status of innocent third parties or people who are unduly affected by an activity which would be a terrorist activity, whatever it might be, between two groups of people? Is that covered in the legislation? Where are their rights protected?

Lt Col. Kelly—All of the rights of the citizen as currently exist in existing legislation continue to operate. Basically, this legislation does nothing to interfere with the situation in

regard to habeas corpus and due process in any part of the Commonwealth and the issues in here that are spelled out in terms of detention are only those citizens' rights of arrest, in any event. There are certain limitations that are placed on liberty of movement in a disaster situation such as a chemical, biological or radiological incident. They are just issues of movement and place. The search, how that is included in here, only relates to the belief of a dangerous thing. So it would be a suspicion that there was a dangerous thing or a reasonable belief of a dangerous thing, being premises, transport or on the person.

Senator CRANE—I do not think there would be any of us—maybe I should not speak for other members of the committee—who would be opposed to having the appropriate measures for matters that cannot be controlled within the civil law protecting units that exist in the states, but we need to know that there is no loss of rights of people—particularly of the innocent or the unaware. Things happen, as I think we all accept. So you are telling us that there is no loss of any civil rights, common law rights? It does not override any of those particular aspects?

Lt Col. Kelly—Basically, there are already provisions in the states that deal with these issues of control of public movement in emergencies. What we have tried to do in relation to the ADF is standardise those nationally because it would be impossible to train members of the ADF under every piece of state legislation. So those restrictions in public emergencies exist already just in relation to freedom of movement. Already the police have the power to search vehicles and people and transport for dangerous items, anyway, under their legislation.

Senator CRANE—That leads me to the next point that I want to follow through. These, if you like, are common—I do not know how common, but they have been described as necessary amendments for the Sydney Games. They are the Sydney Games amendments, et cetera. But, from what you have told us already, it is quite obvious that it is a lot broader than the Sydney Games. Is there any thought of amendment after the games, is there any thought that there should be a sunset clause, or is this seen as separate from the Sydney Games and a defence mechanism with the states and the territories that we actually really require in Australia in the longer term?

Lt Col. Kelly—Obviously, the impetus to get this happening now is the games, but it is a replacement of the current call-out framework. A proper democratic framework for the Commonwealth call-out does not currently exist. So in those terms it is meant to carry on after the games, clearly, but we certainly in Defence and Attorney-General's would hope that there is a review of this legislation more regularly than has been the case in the past. It has taken 100 years to look at this framework so far, and the recommendation of the committee was that the legislation be reviewed within three years or six months after any call-out incident occurs and that the minister give an undertaking in that regard. We would certainly support that.

Senator MASON—I think what Senator Crane is getting at is that you are arguing, I think, that the new amendments are restricting your powers, not enhancing them. That is correct, is it not?

Lt Col. Kelly—No, I think the issue is that they describe them in a situation that is completely vague at the moment and certainly, in describing them, provide set limitations that reflect what was expected of the ADF and the national anti-terrorist plan.

Senator MASON—Do you think they restrict them or do you think that they enhance your current powers?

Lt Col. Kelly—Basically, it is at present vague as to what those powers are. So it is hard to say definitively but, certainly, by describing them, they restrict.

Senator MASON—They restrict the powers? If you think that they restrict the powers, why would you want to bring this legislation in before the Olympic Games?

Lt Col. Kelly—So that the public and the defence force would know with certainty what is expected of them and what the parameters of their authority are so that they can actually train to do that and be able to respond in conjunction with the police effectively.

Senator MASON—Also what it means is that potentially you are restricting your potential power at a moment when we might need it.

Lt Col. Kelly—What we have done is analyse this very carefully in terms of what would be expected of the ADF and, in doing that, we set the parameters and are basically saying, 'Okay, we know we are going to be required for the counter-terrorist assault function, but for anything beyond that, the police should be able to cope with most things.' However, if it is way beyond that—

Senator MASON—It is vacillating, you see. What the executive is saying is, 'We are just defining the powers.' We are not sure if they are restricting them or enhancing them. If they are restricting them, we wonder why they are doing it before the Olympic Games. If they are enhancing the powers, then Senator Crane is right, we should have a sunset clause after the Olympic Games. We are vacillating backwards and forwards. We are not sure whether the powers are being restricted or enhanced. In either case, I wish we knew that. There should be a sunset clause if the powers are being enhanced. We do not ever get a straight answer.

Mr McDougall—I think that I should come in here for a couple of points. One is that the bill sets out powers and the most significant powers are these division 3 powers, which are the powers in relation to the so-called general security area and designated area.

CHAIR—Where is that? You are telling me that the powers are set out in detail.

Mr McDougall—The detail of the powers is in division 3, which starts on page 13. There are general security area powers which go through in subdivision B, and then if you go into subdivision C, you end up in these so-called designated area powers, which are the ones to do with the control of movement. Basically, the general security area powers are really focused on this search power.

CHAIR—Are any powers of arrest set out here?

Mr McDougall—There is a power to detain. The key thing about the power to detain is that, as soon as reasonably practical, the members of the ADF who have detained a person who seems to have a reasonable connection to, say, a bomb, are obliged to hand them over to police.

CHAIR—Are the military allowed to use anything that that person may have said while being detained in evidence?

Mr McDougall—There is nothing in the bill on that.

CHAIR—When you say that everything is set out here, why is that not set out?

Mr McDougall—Because the general law applies. If someone confesses to a person, be they a police officer or otherwise, that is one of the exceptions to the rule against hearsay.

CHAIR—Mr McDougall, are you saying that these powers are not set out in the Crimes Act—that is, how you have to give warnings?

Mr McDougall—Yes, but the difference here is that they are not—

CHAIR—Anyhow, I was interrupting—

Mr McDougall—We will come back to Senator Mason's point. The point is that these ADF people are not there as investigators and they are not exercising police investigative powers. It is not as though they go and get listening device warrants. It is not as though they go and get telephone interception warrants. At the end of the day, the ADF people—

CHAIR—Before we go on, are you telling me that the basis for the necessity for giving a warning is not the person but what powers the person has? The test is not whether you are investigating it or not, is it? The test is whether you are a person in authority?

Mr McDougall—Put it another way—

CHAIR—That is the way that the court puts it, is it not?

Mr McDougall—If you were out in the street and you just happened to run into someone who said, 'I just robbed that bank over there', your role is not as a police officer and you are not obliged, if someone said that to you, before they said it to you, to tell them, 'Anything you may tell me may be taken down in evidence against you.'

Senator CRANE—That is a pretty weak and unsatisfactory explanation, with all due respect. We have just been through an inquiry into search, entry and seizure. One of our recommendations was that, if you go through this process, the individual must be handed at the first appropriate time a sheet of paper spelling out their rights. We have just been listening to the stuff here. You say this can happen, that cannot happen and what have you. There is no definition within that as to what the individual's rights are. Once again, I will come back to the innocent third-party scenario. I find that totally inadequate. They are not the same as other components of the law. Joe Blow out in the street would not have a clue what the other components of the law are, anyhow. There is no mechanism by which an individual has their individual rights protected by being told in that situation what their rights are. I do not see how in any way that would give any advantage or protection to the terrorist or the people you are

there to deal with. But I think at the end of the day there must be in that legislation a way of making sure that those individuals know what their rights are.

Mr McDougall—I might just clarify a point there. For example, under the general security area search powers an officer who is authorised to search is obliged, under the legislation, to provide a copy of the authorisation to the occupier. The occupier, under the legislation, is entitled to be present.

Senator CRANE—But where are their rights spelt out? How do they know what their rights are? If they do not know what their rights are, how do they know that, if they say something, they are not incriminating themselves?

CHAIR—That comparison you made before between a citizen performing an arrest and an armed military force being directed to take on a particular task just does not seem to be very apt.

Lt Col. Kelly—The basic premise here is that there is nothing different from the citizen's power of detention. If you are talking about having to provide greater safeguards, you would have to legislate for the whole citizen array of detention. The philosophy here is that the members will hand them over immediately to the police, who will then go through all of the formal investigative and advisory requirements of an arrest. This is a temporary citizen's detention to put these people in the hands of the police in a situation of dire emergency where they are a dangerous threat to life or serious injury.

CHAIR—So you are saying to us that, when you have an armed force going upon a group of people and being directed to do so in what would normally be a policing situation, that is comparable to a citizen's arrest; that is what you are telling the committee?

Lt Col. Kelly—That is what the legislation reflects. It is the citizen's power of detention.

Senator CRANE—I am saying that, whether those individuals are guilty or innocent, there should be some mechanism so that in that interim period of time they have access on a piece of paper to what their status is and what their rights are.

Lt Col. Kelly—Under the legislation, those persons detained will be advised of the reason why they are being detained, as is required in a citizen's detention. As soon as they are handed over to the police, the normal arrest and investigation requirements will immediately kick in. Members are given no authority to maintain any long-term or short-term detention of a person; they must hand them over immediately or as soon as possible to the nearest police officer.

Senator CRANE—Sometimes that would be very quickly and other times it could be some period of time, wouldn't it, depending on the circumstances?

Mr McDougall—But all that is justiciable. If under this bill members of the ADF held people unreasonably, this is justiciable both in the sense of habeas corpus—all that kind of ordinary general law. But the other point is that the Commonwealth and those individuals would be liable both in civil damages and for criminal acts. This does not in some way create a situation of martial law where the ordinary civil law does not apply. To suggest that they can hold people

without any reference to the circumstances in which they are holding them for that period of time until it is reasonable that they have the opportunity to hand them over to the police is just not the case.

Senator CRANE—In terms of what you said there, nobody on this side of the table has suggested that. What I have said is, in fact, that there should be some mechanism whereby when these people have been detained in that interim period they are handed their rights. Otherwise all we can do from our side of the table is assume that, in fact, anything they do in that period of time under the pressure of the moment or whatever might happen will not incriminate them.

Lt Col. Kelly—That is the current position in relation to a citizen's power of detention. The bottom line is that all of the requirements in terms of the judicial process of dealing with any detainee still remain in effect. So if there are any processes that do not comply with evidentiary or citizen's rights aspects in any criminal proceeding, then the courts will naturally apply that in determining the position of that individual. So all those safeguards remain in effect. That citizen's rights are 100 per cent guaranteed under the law in terms of the process that we follow.

Senator MURRAY—If I may say so, that is after the event—the ill would have occurred, and then it has to be corrected. The most stupid, newest and most ignorant of police will have more training and more experience and that creates a culture of understanding of these things than the military could ever hope to achieve. We are dealing here in a situation where we have police forces established for well over a century, because they predate the Federation, and they have a culture and an understanding of these matters which are absolutely explicit in the carriage of their duties. They understand those issues from day one. A military person—and I speak as somebody who has served for nine years in the forces in times of war—is not trained. It would be an extra to their entire culture, their entire environment, their entire understanding. These are just not powers that can lightly go to somebody who is not trained and who does not reside within a culture such as the police have.

Lt Col. Kelly—Could I say, firstly, that this scenario is only an extreme contingency based on whether the resources of the police are completely overstretched. There is no other circumstance in which these division 3 authorities would come into play. But we do not have any option other than the Defence Force at present beyond the resources of the police. Might I also say that, regardless of whether we express this detention authority in this legislation, that authority already exists under citizen's powers of arrest. So whether we put it in this legislation or not, that power will be there and members would be expected to restrain a person who is intent on causing injury or death.

Senator MURRAY—We will be giving that power to an armed person and the right to determine the exceptional circumstances can never, as I understand it, be defined in any legislation. Therefore, it becomes discretionary. As soon as it becomes discretionary, it depends on the person who exercises that discretion. What is to say that, at some future date—and let us not talk about this government or even the following government—some person does not consider a major set of strikes with a great deal of aggravation in a state of this country to be one of these circumstances? What is to say that some future minister might not decide that the use of troops and strike breaking would not be required?

Mr McDougall—This bill is not aimed at strike breaking. Indeed, in terms of the substitute labour issue, which perhaps was relevant in the 1949 coal dispute and the airlines dispute, this bill has no plausible application in those circumstances.

Senator CROSSIN—With all due respect, Mr McDougall, in our briefing notes, section 51G states that the Chief of the Defence Force must not 'stop or restrict any lawful protest or dissent'. What about an unlawful protest under the terms of the Workplace Relations Act—that is, a protest or a strike that occurs outside a protected bargaining period, outside the Trade Practices Act, that is in fact an unlawful protest?

Mr McDougall—You would not get to that point even if that arose. The reason is that, before you call out the ADF under this part of the Defence Act, assuming it is enacted, ministers have to be satisfied that division 2 or division 3 is appropriate to the circumstance. We can clearly rule out division 2, which is the assault role. In terms of division 3, it is hard to see any circumstance in which, in terms of strike breaking, these general or designated security areas would be an appropriate use of the power.

CHAIR—Mr McDougall, I think that one of the problems we are finding here is that your concept in your mind, if I might say so with the greatest respect, is that we are dealing here with terrorism, that we are dealing with a situation that might arise at the Olympics. This is the issue that Senator Crane raised at the start. However, we are not dealing with terrorism; we are dealing with domestic violence. That is the term. If you look first at the Constitution and then at the legislation, the term used is 'domestic violence', not 'terrorism'.

Mr McDougall—That is correct. Sure.

CHAIR—When you give us answers that really contemplate terrorism, you are not perhaps quite satisfied with what the committee is trying to get at.

Mr McDougall—But the critical point is that members of the ADF can only be called out under this bill if powers are conferred on them. At the end of the day, you have to be satisfied that it is, firstly, beyond the capability of a state or territory to deal with it and, secondly, that the powers are appropriate to the function.

Senator CRANE—In terms of our questioning, we are dealing with when or after those powers have been granted. We are not dealing with the lead up of getting into the situation; we are dealing with how you handle it afterwards. I think we would be pretty game people to assess what may occur in the future in this particular area where the states cannot handle a particular situation. Before you came into the room I mentioned the situation with the refugees in the north-west of Western Australia and some of the problems we have had there and elsewhere as well, and they are very real things. Every time you hear this come up, people say to you, quite loosely, 'Bring in the army. Fix the problem. Take control it,' because it is beyond the capability and the resources of the West Australian police in the north-west to handle these situations. It is always a rescue exercise after the event. That is what we are talking about and that is what we are dealing with. I use that as a possible example. It may never happen with the term 'domestic violence'.

However, I do have to go. I am sorry about this, because, I have to tell you, I am not satisfied. I leave with the Department of Defence and Attorney-General's a copy of our terms of reference. I would like a fairly considered detailed answer to satisfy me and the committee that there are no breaches of the terms of reference under which we have to operate.

If it is possible, I think some reference should be made in the explanatory memorandum in the interim period and that a mechanism be put in place at the first opportunity so that people who are detained, innocent or otherwise—we know what happens in the process—know what their actual rights are. That could be set out on even a one-page sheet of paper so that they know precisely where they stand and how they should behave. I think that would enhance the understanding of the community enormously. Certainly it was one of our very strong recommendations in the report I mentioned earlier. I apologise that I have to go. Can I see that that gets through in relation to our terms of reference? I want to make sure you satisfy us that we are not actually in breach of it. Mr Chairman, I apologise, but I do have to go.

Senator MURRAY—I want to explore a specific hypothetical and see what response I get. Are you happy with that, Mr Chairman?

CHAIR—Yes.

Senator MURRAY—If during the waterfront dispute the Premier of the state of Victoria had made an official request to the authorising minister at the Commonwealth level under this act and the authorising minister at the Commonwealth level had agreed with the Premier of Victoria, would there be anything whatsoever to stop the troops of this country being obliged under the law and under orders to go on to the docks in Victoria?

Lt Col. Kelly—To do what?

Senator MURRAY—To quell domestic violence, to have a presence, to be armed in the company of striking workers. Let us go through the hypothetical. The proposition is that the Premier of Victoria has made an official request on behalf of his cabinet, without reference to his parliament, to the cabinet or the minister authorising in the Commonwealth, who agrees that such a request should be fulfilled and that, under the terms of this act, troops will be put on the docks.

CHAIR—Just to make it non-political, can I use another example?

Senator MURRAY—I have deliberately not used names. I have just used an event.

CHAIR—Or if another Premier of Victoria called on the government to quell a situation involving people riding on horseback into Melbourne from the country with great complaints about the way the country is being treated and starting to get violent. They are the two scenarios.

Lt Col. Kelly—Under the current law?

CHAIR—No, under this law.

Lt Col. Kelly—Under the current law that could actually happen, except that the ministers would still be in a position of being able to refuse that request if they felt the states were capable of dealing with it. Under this law we have actually specifically spelled out that it has to be domestic violence beyond the capability of the state or territory police to deal with it. That includes their ability to draw on resources from other states or territories.

CHAIR—So the answer to it is yes? That is what you have said? You have given the answer yes to that question?

Mr McDougall—I think it would be very—

CHAIR—That is what we wanted. The lieutenant colonel in effect answered yes to the question.

Mr McDougall—My point by qualification would be that it would depend on the fact situation. If it were three people on horseback riding into Melbourne breaking windows, there would be no chance in the world. If it were 100,000 people—

Senator MURRAY—Let me stop you there. If the minister had authorised it, what option would the Defence Force have whether it is three people on horseback or not? It has to obey orders, doesn't it?

Mr McDougall—As a general proposition, a lawful order, yes. Absolutely.

Senator MURRAY—Well, if a minister of the Crown gave that order, even if it were in relation to three people on horseback, would or would not the Army have to obey that order and attend that event?

Lt Col. Kelly—You cannot use this legislation to do that. That is the basic bottom line.

Senator MURRAY—Where does it say you cannot?

Lt Col. Kelly—Because it has to be beyond the capability of the state or territory police.

Senator MURRAY—But who makes the assessment?

Lt Col. Kelly—The three authorising ministers must each be satisfied.

Senator CROSSIN—And what if they assess that it is beyond the capabilities? No-one is going to challenge that assessment, are they?

Lt Col. Kelly—There may well be High Court challenges, as there have been in the past, to exercise—

Senator CROSSIN—But that will be after the event.

Lt Col. Kelly—But that can happen now. That is the situation now. In relation to anything we set down in legislation, the minute the government of the day decides to act to do something and gives the Defence Force orders to do things, there is no legislation that we could produce that would prevent —

Senator CROSSIN—In the scenario Senator Murray outlined, could that happen now under current legislation?

Lt Col. Kelly—Yes, it certainly can.

Senator CROSSIN—What do you mean by 'fewer constraints'?

Lt Col. Kelly—Without any consideration of whether it was within the capability of the state or territory police in terms of a legislative requirement.

CHAIR—And what you say is that the position is going to continue with greater restrictions?

Lt Col. Kelly—With restrictions to the extent that it would be impossible for it to be considered lawful under this legislation to use the ADF to interfere in an industrial dispute or to deal with violence that was within the capability of the state or territory.

CHAIR—If the industrial dispute became violent, what do you say happens then?

Lt Col. Kelly—If it becomes violent, it still has to fall outside of the capability of the police to deal with, so it would have to be something of the order of widespread anarchy for the ADF to be considered.

CHAIR—It has to be domestic violence. You see, you have got—

Mr McDougall—But the capability is a critical test. In other words, even if we accepted that domestic violence was someone breaking a single window in a shop in downtown Melbourne, leaving that argument aside you have still got this critical capability issue to address.

CHAIR—Do you know what is a bit worrying about this legislation—

Senator MASON—Can I just interrupt, because it is a legal issue. That is irrespective of whether it is a Commonwealth facility.

Lt Col. Kelly—It is the same processes across the board for any type of call-out.

CHAIR—No, it is not. It is not, because in some call-outs you have got to have the state asking and where Commonwealth interests are concerned you do not.

Lt Col. Kelly—Yes, Senator, but the same criterion applies in that it has to be beyond the capability of the state or territory police.

Senator MASON—But essentially that assessment is by Commonwealth ministers in that situation.

Lt Col. Kelly—The three authorising ministers.

CHAIR—Or one.

Senator CROSSIN—Or one of the three.

CHAIR—If you are telling us something, you have to tell us everything. There are three ministers in some circumstances, one minister in other circumstances.

Lt Col. Kelly—You cannot be called out in the first place unless each of the three authorising ministers is satisfied.

Mr McDougall—And the further point is where the reference to the individual minister is in the context of the so-called deliberate assault in division 2. The rest of—

CHAIR—All we are wanting is complete answers. Can you follow?

Mr McDougall—Yes, and the point that Mike is making is that for a call-out to be lawful under this bill you cannot just have the Attorney-General acting unilaterally. It must be all three ministers forming a view as individual ministers. In other words, they cannot just say, 'The Attorney-General told me I should be satisfied.' It should be, 'I the Prime Minister am also satisfied.' 'I the Defence Minister am also satisfied.' 'I the Attorney-General'—

CHAIR—What is 51A(7)(b) all about?

Mr McDougall—That is in terms of conveying the advice to the Governor-General. In other words, in cases of urgency, that would be where the three ministers have become satisfied, but in terms of the mechanics of conveying the advice to the Governor-General seeking call-out, there an individual minister can, if you satisfy the requirement of urgency, advise the Governor-General but they still have to advise the Governor-General that each of those three ministers is satisfied of the requirements set out in (1).

CHAIR—That is a very interesting reading of the subsection.

Mr McDougall—Well, that is the intent. In terms of the drafting, we have been dealing with the second parliamentary counsel. We gave them the policy that we were attempting to enact and we think that the professional skills of the drafter have been satisfactory.

Senator MURRAY—Let me ask a further question, if I may. It is about a conflict of interest in the authorising minister or ministers. If a situation of domestic violence arose that was a direct consequence of the actions or policies of the government of the day, do you really think that it is appropriate that that government of the day, which provoked the domestic violence, should then have the powers and the discretion to send the troops in to deal with that domestic violence?

Lt Col. Kelly—That is way too hypothetical.

Senator MURRAY—It is not way too hypothetical, because we have given you a hypothetical situation that can occur and has occurred in other countries in the past, where troops have been used against the working people of the nation. In those circumstances, if industrial relations laws or actions provoke such grave antagonism from large sections of the community, would it be appropriate for the minister who might have provoked that, or three authorising ministers who might have been part of the decision-making process—and let us not refer to this government; let us refer to some hypothetical government of some other time—to have the discretion to do that?

Lt Col. Kelly—These restrictions do not apply at present.

Senator MURRAY—I do not agree with that. Let me put this proposition to you. In our law—customary law, conventional law and conventions—custom and common law materially affect the way in which laws can be exercised. What you seek to do here through prescriptive law is, in fact, change a situation where it is highly unlikely—extremely unlikely—that any Australian government would regard itself as lawfully able to send troops in against its citizens.

Mr McDougall—I do not think that there are any constraints other than the usual political and common law constraints on the government today that this bill will greatly alter, but the other point is that, in terms of Senator Murray's question about is it appropriate, I think maybe a question can be put the other way as to what other mechanism could there be if the Commonwealth was to have the capability to use the ADF in law enforcement emergencies. I think that it would be highly unusual for this authority to be moved from the executive.

CHAIR—I think that is a fair question. Do you know how I would answer it? In the following way: I think that what this bit of legislation does is to confuse too many situations. What we want to do as a nation is protect the Sydney Games. I would tend to give quite extensive powers to the Army—or I may after debate. If, though, we want to go about our business as Australian citizens, we would want to restrict the Army and the power that the Army has. What this legislation does is to try to deal with two situations that really cannot be dealt with. This is legislation that we want to direct to the Olympic Games, but I would not have thought that any reasonable citizen of Australia would want the Army coming around there and being able to search them, to detain them or to come with their many weapons onto designated areas. I think that is just not consistent with the sort of Australia that we want. So that is what I think—since you have asked the question—about the legislation. I think that it is legislation that is schizophrenic in the sense that it has two views.

Lt Col. Kelly—Senator, could I say that we have looked at a lot of overseas experience in other modern comparable industrial democracies in this respect and we have actually taken a far more conservative approach than even our neighbours in New Zealand and Canada. What they have done in their legislation is, in fact, give their defence services the blanket powers of police without any restriction.

CHAIR—Since you have raised those questions, Colonel Kelly, how many of those countries that you have mentioned have a bill of rights, and has Australia got a bill of rights?

Lt Col. Kelly—We have a conventional constitution and the rights of citizens flow from the Magna Carta.

CHAIR—I ask you, Colonel Kelly—and it would help me if you would answer—which of those countries have a bill of rights and has Australia got a bill rights?

Lt Col. Kelly—Australia does not have a bill of rights.

CHAIR—Have those countries got bills of rights of different sorts?

Lt Col. Kelly—They have human rights legislation but not a bill of rights.

CHAIR—I think that you would find—

Mr McDougall—New Zealand's bill of rights is just a mere act of parliament, which—

CHAIR—Mr McDougall, has New Zealand got a bill of rights?

Mr McDougall—Yes, it does, but it is an act of parliament that can be modified by another act of parliament and, indeed, there may be an argument—and I am not an expert on the New Zealand position—that the New Zealand emergency legislation modifies or abrogates it to the extent of that.

Senator MURRAY—Mr McDougall, just a question to you. At the time the legislation in New Zealand was passed, I understand that—and perhaps I am wrong and you can correct me if I am wrong—at that time New Zealand had a unicameral house.

Mr McDougall—It still has.

Senator MURRAY—And a majoritarian system and, therefore, the majority government was able to push through its legislation without any opposition whatsoever. It had absolute power to pass that legislation; is that so?

Mr McDougall—Almost certainly, yes.

Senator MASON—In addition, in respect of Canada, as was also raised by the Chairman, they certainly do have a bill of rights.

Mr McDougall—They have their charter of rights and freedoms, yes—1982.

Senator MURRAY—The issue here as well is the question of the definition of 'domestic violence'. If your proposition was that it concerned acts of terrorism which put the national security of this country at risk, you would find far less resistance from persons concerned with the liberties of our citizens, because acts of terrorism can be defined and there is a national revulsion against that sort of activity. Your problem is that domestic violence as defined and even as established in our Constitution is so wide and so discretionary and so ill defined that

you put, through this legislation, in my view, the liberties of our citizens at potentially grave risk. We cannot refer to the good record of previous governments of whatever complexion.

As parliamentarians, we have to look prospectively. We could have in this country governments of bad faith, of bad morality. It has happened in other countries. There is no reason why it could not happen here. If you give them laws and powers which in a black-letter sense change the nature of our law, the nature of our conventions and the nature of our customs which we presently operate under, in my view you put our citizens at risk. What you have done with this bill is not tighten and improve the law; you have actually given far greater licence. Our job as a committee on an absolutely non-partisan basis—because this committee has a wonderful record of acting on a non-partisan basis—is to alert the Senate to fundamental infringements of rights and liberties of our citizens. Unfortunately, I was doing other things and I could not attend your entire briefing. But my judgment of what I have read and my perception of this bill is that this bill goes too far.

Senator MASON—Your equivocation earlier about whether this bill enhanced or restricted the powers of the ADF worries all of us. I know you said it clarified—I know that is your view. But the view of a lot of us is that it may well enhance the powers. Certainly anything that does, of course, is antithetical to our culture and concerns us all.

Lt Col. Kelly—I think the real question, though, is to look at the powers themselves and to decide whether they are satisfactory either from the point of view of protection of civil liberties or the adequacy of provision for the ADF to respond to what requests might be made of it. That is the real issue. In that respect we have decided not to go down the road of issuing blanket powers as to police; we have said we do not want to be considered as a substitute for police; we do not want to have that broad range of police powers. What we want is to focus on the tasks that have been flagged to us in the—

Senator MASON—I accept that, but it is not clear. You cannot give me a clear answer as to whether the powers to the ADF are increased or restricted. Even if we just look at the bill before us, we are still not sure of the compass of domestic violence. We are still not clear. That is our concern.

Senator CROSSIN—'Domestic violence' is not entirely defined. If you have a look at section 19 of the Constitution, which I have just done while you have been speaking, it still says that the Commonwealth shall protect every state against invasion on an application against domestic violence. Nowhere does it really define what is meant by 'domestic violence', not even in the Constitution.

Lt Col. Kelly—The difficulty that you would run into in trying to define that would be clashes with potential Constitution interpretations. What we have tried to do is make sure that there would be a clear understanding of what that term means by tying it to the capability of the state or territory police. So that will give you a clear indication of what sort of domestic violence we are talking about.

Senator CROSSIN—I am not sure if you have successfully done that in the bill, given some of the questions we have asked this morning. It is based on a minister's perception or judgment about the capabilities of the state or territory police force.

CHAIR—Can I just use an illustration? Take 51(2). This allows an armed member of the Defence Force to shoot someone in certain circumstances and, for example, if the person is taking pursuit, to shoot them while he or she is escaping in certain circumstances, and clearly with restrictions about it. That section seems an appropriate section in the context of terror carried out at the Olympic Games or terror anywhere. If we hear that somewhere it has got out of hand, it causes a lot of domestic violence and the Army was called, it just seems horrific to think that these people, untrained as police officers or what have you, could shoot us. The situation is just entirely different.

Lt Col. Kelly—The requirement is that any force that is used be reasonable or necessary. In other words—

CHAIR—Sorry to stop you, this has been raised before. Senator Murray raised it. The person who has to make that decision is an untrained person.

Lt Col. Kelly—They are trained.

CHAIR—I had not understood that. I did not realise that they had been trained in policing duties.

Lt Col. Kelly—They are trained to understand how the graduated level of force regime works both in a domestic and overseas environment.

CHAIR—Can you give us a run-down on that training? Not now, but later on?

Lt Col. Kelly—Certainly. It is extensive.

CHAIR—And all the obligations of warning and all that sort of stuff? They are temperamentally right, are they?

Lt Col. Kelly—That training—

CHAIR—The only thing that worries me a bit about this—and I do not want to raise it—is that you say they are all temperamentally right; is that correct?

Lt Col. Kelly—They are trained to respond appropriately in all—

CHAIR—We have had these incidents. We have just had this incident now where there has been some bastardisation, which does not seem to augur well for the sort of temperament that you might have in troops that are out doing this sort of thing.

Lt Col. Kelly—There have been obviously incidents in all agencies that are involved in law enforcement where they have circumstances where the issues of appropriate levels of force arise. The Victorian police have struggled in recent times. But I am satisfied that members of the ADF well understand the concept of graduated levels of force, what is appropriate to meet the specific threat that they will face, and they receive a great deal of practical training in that. It is very similar, in fact almost identical, to the sort of training that they receive and the way they operate on peace operations. The vast bulk of the Australian Defence Force has received that experience in the peace operations.

Senator MURRAY—I have never heard a policeman use that phrase 'graduated levels of force'. It sounds very military to me. Do the police have the very same training in graduated levels of force?

Lt Col. Kelly—I cannot comment on the training for all of the Commonwealth and all of the different police forces, but they obviously have to respond in the same way under the domestic law as to providing a reasonable response to the level of threat they face. That is all that the 'graduated level of force' phrase indicates, that you must respond appropriately to the level of threat that you are facing. But we go beyond that, in fact, in trying to train members to take the minimalist approach to use levels of force sometimes that would be below what would normally justify it if that is an effective way of defusing the situation.

Senator MURRAY—If the training is different and if the culture is different, the application of force will be different. Our civilian population is used to the way in which force is applied by our police service. If your training or culture produces a different application of force, however well meaning you might judge it or however well phrased you might judge it, that will differ and it might differ in an unacceptable manner.

Lt Col. Kelly—No. The training is based on the law. The law is the same for the police as it is for members of the Defence Force.

Senator MURRAY—With the greatest respect, you missed the point. The training is not based just on the law; the training is based on over 100 years—and it is over 100 years deliberately—of a culture and an approach to interaction with civilian people which, frankly, the Army does not have experience on and will not have experience on.

Lt Col. Kelly—The Army has acquired a lot of experience along those lines in all its recent peace operations.

CHAIR—So your evidence is that the sort of peacekeeping operation you were carrying out in East Timor so wonderfully—I think we as Australians are all very proud of it—is your understanding of what policing duties are all about and that you can see that policing duties carried out in our capital cities and throughout Australia are the same as the policing duties that were carried out in East Timor?

Lt Col. Kelly—No. East Timor was an environment where there were many levels of operation in which the ADF had to be able to respond. So in the border areas there were significant confrontations with militia elements and back in Dili there was what amounted to

basic community policing because there was no other capability present—similar to the situation we faced in Somalia, where I was deployed. There was no civil policing capability there. The members were in fact providing a fundamental, rudimentary communal policing capability.

Basically, what we are talking about here, though, is two specific situations with this legislation. The first is about conducting the counter-terrorist assault, which is obviously something that does not bring them into general contact with the public, other than the hostages. The second is an emergency situation where there is a grave threat to the general safety and livelihood of the public, beyond the capability of the police to deal with, where they would be providing only three simple types of activity, not general communal policing. Those types of activity are well within their experience on operations they have been involved in.

They have not had experience in a chemical, biological or radiological incident, but no-one has. However, they are probably the best equipped to deal with that because of our decontamination facilities and the large amount of apparel we possess that enables us to operate in that environment, which we are trained to operate in.

Senator MURRAY—But the authority you are given under 'domestic violence' just does not go back to isolated and hopefully improbable biological or terrorist incidents. From just listening to you, Colonel, it seems that the instances you outlined are just not comparable. That is the point the Chairman is making. Australia is a civil society with a well-functioning police service at every level of the community in every state and territory. In Somalia and East Timor there was not that situation.

I mentioned to you earlier that I have a war record. That was in a country which had a fully functioning police service at the same time as a fully functioning military in a situation of civil war, with civil society operating in tandem with a very difficult military situation. I can assure you from personal observation that the way in which police, even paramilitary police, conducted themselves in theatres of operation was absolutely different from the way the military conducted themselves, and it was because of their culture, because of the way in which they were trained and brought up in dealing with matters of concern and gathering evidence.

Each person's experience is different, and I do not want to say that my experience should dictate my total views on that, but mine is a real-life personal experience of the very different approaches of the military people and the police. That is not denigrating, either, because we are all very proud and very fond of our military people, probably more so than we are of our police people in many respects, because they often have done heroic things for Australia, which a few policemen haven't. But the fact is that in the history of democracies there has been a real reluctance on the part of ordinary people to have troops on the streets.

Mr McDougall—And this bill does not intend to change that.

Senator MURRAY—It gives the discretion and authority to a government to do so, and that is why we have deliberately put to you some hypothetical questions, which you have answered in the affirmative. If you are ordered to do it, you will do it.

Lt Col. Kelly—Can I just say that things have changed a lot since World War II days, conventional warfare days or even the experience in counter-insurgency operations in that these days defence forces commonly in modern industrial countries have a primary function of restoring order and respect for the rule of law. So there has been a change in doctrine and training in that respect.

Let me emphasise, though, that the Defence Force would be quite happy if the Australian community developed another option to supplement the police force. We would be very glad to walk right away from any of this type of activity. However, throughout the history of the Federation—it was referred to in the Hope protective security review—they rejected the option of raising paramilitary mobile forces. They have said time and time again that if police are not capable it will be the ADF that is called upon. That is the reality we are stuck with.

We have members that potentially could be called out in the circumstances reflected in the national anti-terrorist plan. Their situation is currently very uncertain in terms of their lawful authority. It is irresponsible of any government or any Defence Force to not raise their hand to say, 'This situation should be fixed.' This is a fundamental responsibility in terms of those members that we may expect to do these tasks.

Senator MURRAY—You see, Colonel, my expectation—maybe it would not be realised—was that if this bill had a narrower view and said, 'Without derogating from the custom, convention or common law circumstances which have governed the relationships between the military and our civilian lives, this bill specifically provides for powers to be used in the event of terrorist acts or biological incidents or nuclear incidents such as you might outline', people would be able to say, 'Yes, we can imagine those circumstances and, yes, that might be appropriate.' I am not putting a party position, because I have not discussed this with anybody. I am just saying that those things people can understand. The problem with this bill is that, when you allow wide discretion, which we think is in here, and a very loose definition of domestic violence, it is possible for parliamentarians to envisage situations which could arise, which you could not resist as a defence unit—under law you are going to obey a lawful order—which we would find unacceptable from a civil libertarian point of view. Our job, frankly, is to do as much as we can to ensure that our civil society and the values attached to it are preserved in the interests of us all. That is what is driving my anxiety about this bill.

CHAIR—The last contribution Colonel Kelly made seemed to me to sum up exactly what this bill should be all about. It seemed to me that what he enunciated is the sort of consideration that should be taken into account. In my view anyway, what Colonel Kelly said is not reflected in this bill. I think the answer to that comes back to what Mr McDougall said. It intends to do something, but its wording is different. What this bill intends to do is preserve Australia from terrorism and from awful activities by people who might come and use the games or some other incident for a particular purpose that clearly calls for military action. But this legislation does not do that. Thanks very much, Colonel Kelly, Mr McDougall and Ms Kueter-Luks.

Committee adjourned at 10.25 a.m.