



This Digest replaces an earlier version dated 14 January 2009 including some additional contextual material about medical and dental treatment.

Defence Legislation (Miscellaneous Amendments) Bill 2008

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Defence Legislation (Miscellaneous Amendments) Bill 2008

Date introduced: 3 December 2008

House: House of Representatives

Portfolio: Defence

Commencement: Sections 1–3 and Schedule 4 commence on Royal Assent; Schedule 3 on the day after Royal Assent; Schedule 1 on a day to be fixed by Proclamation but no earlier than the day on which Protocol III to the Geneva Conventions enters into force in Australia and no later than one month after the day on which Protocol III to the Geneva Conventions enters into force in Australia; and Schedule 2 commences on a day to be fixed by Proclamation but no later than 6 months after Royal Assent.

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

The purpose of the Bill is:

- to amend the *Geneva Conventions Act 1957* (Geneva Conventions Act) and the *Criminal Code Act 1995* (Criminal Code Act) to incorporate the third universal emblem called the ‘Red Crystal’ along with the existing emblems, the Red Cross and the Red Crescent
- to amend the *Defence Act 1903* (Defence Act) to allow the making of regulations for the provision of medical and dental treatment to an Australian Defence Force (ADF) member, to his or her family and also to cadets, and
- to amend the *Defence (Special Undertakings) Act 1952* (DSU Act) to provide that the Joint Defence Facility at Pine Gap is a prohibited area.

Background

Due to the differing natures of each of these amendments, this Digest will deal with background and other issues arising from them in turn.

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The third additional protocol to the Geneva Conventions

Background to Protocol III

The International Red Cross and Red Crescent Movement (the Movement) is ‘an international humanitarian movement with the stated mission to protect human life and health, and to prevent and alleviate human suffering, without any discrimination based on nationality, race, religious beliefs, class or political opinions’.¹

Since its inception, the Movement has utilized the Red Cross and Red Crescent emblems as devices to protect its medical services.² The use of these emblems is explicitly mandated by the Geneva Conventions being:

- the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, adopted at Geneva on 12 August 1949
- the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, adopted at Geneva on 12 August 1949
- the Geneva Convention relative to the Treatment of Prisoners of War, adopted at Geneva on 12 August 1949 and
- the Geneva Convention relative to the Protection of Civilian Persons in Time of War, adopted at Geneva on 12 August 1949.

The symbols employed by the Movement have two distinctively different purposes. On one hand, the symbols serve as protection markings in armed conflicts, a denotation which is derived from and defined in the Geneva Conventions. As a protection symbol, they are used in armed conflicts to mark persons and objects such as buildings and vehicles, which are working in compliance with the rules of the Geneva Conventions. In this function, they can also be used by organisations and objects which are not part of the International Red Cross and Red Crescent Movement, such as the medical services of the armed forces, civilian hospitals, humanitarian workers and civil defence units.³

Some countries have found it difficult to identify with one or the other symbol and have not wished to make use of either of these emblems, arguing that they have religious connotations. Israel’s national national emergency medical, disaster, ambulance and blood bank service, Magen David Adom (MDA), is one such society which until recently (June

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1. Joint Standing Committee on Treaties, *‘Report 86: Treaties Tabled on 27 March and 9 May 2007’*, Commonwealth of Australia, Canberra, August 2007, p. 37.
 2. A detailed history of the Red Cross emblem is available in an [article by François Bugnion](#) entitled *‘Red Cross, Red Crescent, Red Crystal’*, which is contained on the International Committee of the Red Cross website.
 3. Joint Standing Committee on Treaties, *op. cit.*, p. 39.

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2006) has been prevented from becoming a member of the Movement, because it has used the Red Shield of David as its emblem.⁴

Due to the controversy over MDA and a number of other disputes, the introduction of an additional neutral protection symbol had been under discussion for a number of years, with the 'Red Crystal' being the most popular proposal.⁵ The new symbol is referred to as 'the third Protocol emblem in Additional Protocol III'.

The three symbols are:



Entry into the third additional protocol

On 8 March 2006 Australia signed the [*Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Adoption of an Additional Distinctive Emblem for the Red Cross/Red Crescent Movement*](#) (Protocol III).⁶ Protocol III entered into force internationally on 14 January 2007. On 9 May 2007, Protocol III was tabled in Parliament, with a proposal that Australia take binding treaty action to ratify the protocol.

The Joint Standing Committee on Treaties reviewed the protocol, conducting hearings on 18 June 2007. The Committee tabled its report to Parliament on 16 August 2007 and recommended that binding treaty action be taken.⁷

The Bill incorporates the 'Red Crystal' emblem along with the existing emblems, the Red Cross and the Red Crescent, into Australian statute.

4. Joint Standing Committee on Treaties, op. cit., p. 41.

5. *ibid.*

6. [National Interest Analysis](#) [2007] ATNIA 7, para. 2.

7. Available at: <http://www.aph.gov.au/house/committee/jsct/9may2007/report/chapter5.pdf>, accessed 6 January 2009.

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Medical and dental treatment

Schedule 2 of the Bill amends the Defence Act to provide a broad power to make regulations about medical or dental treatment of a ‘member’ or ‘cadet’, or a ‘member of the family’ of a member. According to the second reading speech by the Minister for Defence:

The effect of the amendments would be to create a regime that would ensure that the ADF and its members are not hindered in the uniform application of their duties, here and overseas, by competing state and territory laws.⁸

Unfortunately the Explanatory Memorandum does not provide any context to the Minister’s speech.

Whilst the effect of the amendment may well be as the Minister has indicated, the amendment, given its breadth, will also potentially provide a platform for the government to extend medical and dental care to ADF members in the context of its recent policy commitments. In this context, the following gives some background on such commitments and the relevance of the Schedule 2 of the Bill to any future implementation of them.

Background

The Australian Labor Party’s (ALP) 2007 federal election policy on defence, entitled *Labor’s plan for defence*, set out the party’s plan for health care for Australian Defence Force (ADF) family members as follows:

Free medical and dental care for ADF families

ADF families can face significant difficulties obtaining access to general medical and dental care for dependants, especially in regional and remote localities.

Posting to a remote location can mean that ADF families struggle to access the sort of health care that Australians enjoy.

A Rudd Labor Government will progressively extend free health care currently provided to ADF personnel to ADF dependent spouses and children.

Labor will begin this with a \$33.1 million investment starting at 12 Defence Family Health Care Clinics, with a focus on remote bases locations and major regional centres.⁹

8. Hon. Joel Fitzgibbon MP, Minister for Defence, ‘[Second Reading Speech: Defence Legislation \(Miscellaneous Amendments\) Bill 2008](#)’, *House Hansard*, 3 December 2008, p. 12290

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However, the Rudd Government's 2008–09 Budget funded the new entitlement **as a trial only**, allocating

\$12.2 million over four years for the provision of free basic GP services and limited dental care to families of ADF members in the rural and remote areas starting with Singleton (NSW), Katherine (NT), East Sale (Vic), Cairns (QLD) and Karratha/Pilbara (WA).¹⁰

The amount allocated for 2008–09 is \$2.4 million with dental care limited to \$300 per dependant per annum. In addition, Defence families are to 'select the doctor or dentist of their choice' rather than attending one of the promised Defence Family Health Care Clinics.¹¹

On 17 October 2008, the Minister for Defence Science and Personnel announced that the free ADF [family health care trial would be expanded](#) to include Townsville (Qld), Darwin (NT) and Puckapunyal (Vic):

The trial is being expanded to fully test the delivery model, and ensure the development of evidence based policy to implement the Government's commitment to progressively extend free basic health care for ADF dependants.

The initial phase of the trial is set to commence in early 2009 for 2,700 ADF dependants within the Singleton (NSW), Cairns (QLD), Katherine (NT), East Sale (VIC) and the Karratha/Pilbara (WA) regions...

Under the trial, ADF dependants will be able to visit general practitioners at no cost for standard consultations.

ADF dependants will also receive a benefit of \$300 per dependant per annum for basic dental services.

When the trial is expanded in late 2009, it will provide for a total of approximately 16,000 ADF dependants.¹²

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9. Kevin Rudd, Joel Fitzgibbon and Alan Griffin, 'Labor's Plan for Defence', *Election 2007 Policy Document*, Canberra, 10 November 2007, p. 9, available at: <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fparty%2FHMWO6%22> accessed 6 January 2009.
 10. The Hon Warren Snowdon MP, Minister for Defence Science and Personnel, 'Budget 2008–09: Defence Support to Families', media release, Canberra, 13 May 2008.
 11. Tony Raggatt, '[Defence clinic axed: election promise ditched](#)', *Townsville Bulletin*, 15 May 2008, p. 2.
 12. The Hon Warren Snowdon, MP, Minister for Defence Science and Personnel, 'Free ADF Family Health Care Trial Expanded to Darwin, Townsville and Puckapunyal from Late 2009', media release, Canberra, 17 October 2008.

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Current arrangements for ADF members

Apart from the provision of emergency health treatment to civilians, and health care provided to an ADF member's dependants accompanying the member on an overseas posting, the focus of Defence's health care is currently aimed at the operational readiness of ADF members. The relevant regulations¹³ allow for the provision of medical and dental treatment to members of the ADF on the grounds that 'the Commonwealth must provide the medical and dental treatment required to keep a member healthy for the purpose of discharging the member's duties'.¹⁴

The details of the treatment available to ADF members are contained in Defence Instructions (General) issued under the authority of the Secretary of the Department of Defence and the Chief of the Defence Force (the 'diarchy'). In particular, Defence Instruction (General) *PERS 16-1* emphasises that health care for ADF members is based on operational readiness as well as equity with Medicare stating that:

The Australian Defence Force (ADF) requires medical and dental fitness of its personnel in order that they are able to undertake their operational duties. As such, the provision of health care by the Defence Health Service (DHS) to members of the ADF is a requirement of service.¹⁵

It goes on to state:

Equity with *Medicare* under the provisions of the *Health Insurance Act 1973* underpins the basic entitlement to the range of medical services provided to members of the Permanent Forces. Usually the range of, and ease of access to, health care provided to such members will exceed that available through the public health care system because of the requirement to meet and maintain operational readiness. However, DGDHS [the Director-General of the Defence Health Service] will, from time to time, issue policy which may exclude or limit the provision of certain medical or dental treatment on the grounds that such treatment is contra-indicated or unnecessary for operational readiness.¹⁶

According to another Defence Instruction (General), *PERS 16-27: Defence Health Services Division philosophy and instruments of control*, while the 'overall health and wellbeing of [ADF] personnel remains a Command responsibility within the individual Services', the coordination of health care and health advice in the ADF is the responsibility of Defence Health Services.

13. See the [Defence Force Regulations 1952](#).

14. Regulation 58F, Defence Force Regulations 1952.

15. Paragraph 1, Defence Instruction (General) *PERS 16-1*.

16. Paragraph 5, Defence Instruction (General) *PERS 16-1*.

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Possible Issues

Whether the details will be contained in regulation

As previously noted, the Bill provides for the making of regulations about medical and dental treatment for a *'member'* or *'cadet'*, or a *'member of the family'* of an ADF member.¹⁷

It is not clear whether the nature and extent of the medical and dental treatment will be detailed in the proposed regulations or whether it will be left to the discretion of the diarchy or the individual service chiefs, as is the case currently with the relevant Defence Instructions. Certainly, in the interests of transparency and accountability, it would be preferable that the medical and dental care entitlements are contained in regulations which would be subject to disallowance under the *Legislative Instruments Act 2003*, rather than in internal Defence documents such as Defence Instructions.

Entitlements of others

As stated, the Bill provides for the making of regulations about medical and dental treatment for a *'member'* or *'cadet'*, or a *'member of the family'* of an ADF member. These terms are defined in section 58A of the Defence Act¹⁸ as follows:

- *member* includes a person who has ceased to be a member, whether by reason of death or otherwise
- *cadet* means an officer, instructor or cadet in the Australian Army Cadets, the Australian Navy Cadets or the Australian Air Force Cadets, and includes a person who has ceased to be such an officer, instructor or cadet, whether by reason of death or otherwise
- *member of the family* includes:
 - in relation to a member—a member of the household of the member and a dependant of the member, or
 - in relation to a cadet—a member of the household of the cadet and a dependant of the cadet.

Importantly, the term *'member of the family'* includes but is not limited to a member of the household and a dependant of the ADF member or cadet. The extent of medical and dental treatment, if any, available to persons other than members of the ADF and their families is also not clear. The terms *'member of the household of the member'* and *'a*

17. Item of Schedule 2 to the Bill.

18. Section 58A is the interpretation provision in Division I of Part IIIA of the Defence Act. Division I deals with determinations by the Minister relating to remunerations, allowances and other benefits.

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dependant of the member' are not defined in either the Defence Act or the Bill. It is not clear whether the proposed medical and dental treatment could, for instance, be extended to grandparents of an ADF member who are 'members of the household of the member'. It would seem to hang on the extent of their dependency. It is not clear whether the member of the household of the ADF member must be totally, or need only be partially, dependent on the member in order to receive the proposed medical and dental care.

In addition, whilst section 4 of the *Defence Act 1903*, defines a '*member*' as including 'any officer, sailor, soldier and airman' it is not clear whether the Bill intends that Reserves and their families are to be included in the class of persons who will have access to the proposed medical and dental treatment. However, this is probably unlikely given that in section 4 and elsewhere in the Defence Act (for example, section 58B) a distinction is drawn between the terms '*member*' and '*member of the Reserves*'.

Joint Defence Facility Pine Gap

In the 1960s, Prime Minister Harold Holt entered into an agreement with the United States of America (USA) which led to the establishment of a Joint Defence Space Research Facility, a top secret base, 20 kilometres south of Alice Springs at Pine Gap.¹⁹ The then Minister for External Affairs, Paul Hasluck, signed the agreement on behalf of the Australian Government in December 1966.²⁰

The nature of the facility

The [Ministerial Statement on the Joint Defence Facility at Pine Gap](#) made by the then Defence Minister, the Hon Dr Brendan Nelson, MP in September 2007, provides useful background information about the Pine Gap facility as follows:

Due to the classified nature of the work performed at Pine Gap, it is necessarily the case that relatively few people are briefed on its functions and very few are briefed on the most sensitive activities that are undertaken there. It is therefore in the public interest that periodic public statements on the role and function of the facility are made. This is so the public can have confidence that its elected representatives are responsibly and accountably overseeing such activities which are, after all, in their name and are rendering that accountability in public within the limits of security.

Construction of the Joint Defence Facility at Pine Gap began in 1967 and, in recognition of the 40 years of outstanding contribution to our national security made by the facility, I consider it is timely to make such a statement. Before turning to the role and functions of the facility, I should acknowledge that not all Australians agree with its presence here. This is not a new phenomenon. During the Cold War some

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19. For the text of the agreement see [1966] ATS 17 at <http://www.austlii.edu.au/au/other/dfat/treaties/1966/17.html>, accessed 6 January 2009.
 20. George Negus, '[Pine Gap](#)', *George Negus Tonight*, 4 August 2003.

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Australians were concerned about the risk of joint facilities, which prior to 1999 included the Joint Defence Facility Nurrungar at Woomera in South Australia and the North West Cape Naval Communication Station in Western Australia, being targeted by nuclear missiles. This was a risk that successive Australian governments have acknowledged in the process of supporting global security through the operation of the joint facilities.

Other concerns over the years have related to the supposed loss of sovereignty caused by the presence of such facilities on Australian soil and our interaction with so-called US war-fighting systems. While these voices reached their zenith in the 1970s and 1980s, they still echo occasionally in Australian political discourse, including the extent of protest against the facility. While the views held by critics of the joint facility are to be respected, I could not disagree with them more strongly. The Joint Defence Facility at Pine Gap is just that—a joint facility. It is not a US base. It is run by the governments of Australia and the United States as partners, and Australians hold crucial positions at the facility.

I am particularly impressed by the application of Australia's policy of full knowledge and concurrence. 'Full knowledge and concurrence' is an expression of sovereignty, of a fundamental right to know what activities foreign governments conduct on our soil. The people and parliament rightly hold the government responsible for exercising this right. It is through this policy that Australians ensure that our sovereignty is honoured and that we retain complete visibility of the facility's capabilities, and the Australians that hold those crucial positions at the facility ensure that our requirement for full knowledge and concurrence is maintained.

The Joint Defence Facility Pine Gap continues to make a vital contribution to the security interests of both Australia and the United States of America and is an outstanding manifestation of the level of cooperation that has been achieved in Australia's closest defence relationship. The facility at Pine Gap has two principal roles: the collection of intelligence by technical means and the provision of ballistic missile early warning information.

The intelligence collected at Pine Gap meets critical requirements of both our nations, providing us with information on priority intelligence targets such as terrorism, the proliferation of weapons of mass destruction, and military and weapons developments. It also contributes to the monitoring of compliance with arms control and disarmament agreements and provides communication support.

The operations at Pine Gap continue to provide us with intelligence which is valuable to our own security. Through the relay ground station at Pine Gap, Australia supports the United States and its ballistic missile early warning program, thereby making a significant contribution to global security. The program provides reassurance against the possibility of surprise or accidental nuclear missile attack as well as early warning capability against shorter ranged tactical missiles. The program also provides information about the occurrence of nuclear explosions.

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Our participation in this program, therefore, in addition to contributing to global security, helps us to inhibit the proliferation of ballistic missiles and provides information on ballistic missile launches of interest to Australia. Ballistic missile launch early warning information could be used in any US missile defence system and, as such, this would be a continuation of a ballistic missile early warning partnership that we have shared with the United States for over 30 years.

The capabilities present at Pine Gap will continue to evolve to meet new demands and to take advantage of new technologies. In that regard, our two nations will continue to have technical exchanges. Pine Gap will remain a central element of Australia's security and its relationship with the United States for the foreseeable future. All activities at the Joint Defence Facility Pine Gap are managed to ensure that they are consistent with Australian interests. These activities take place with the full knowledge and concurrence of the Australian government, and Australia benefits fully from them.

Australia will continue to pursue its close intelligence relationship with the United States. Pine Gap remains a central element of the Australia-US alliance, and it continues to contribute to our security. The Australian government remains satisfied with the arrangements that govern the facility's use and warmly welcomes the continued involvement of the United States in the facility.²¹

Protests against the facility

The Pine Gap facility has been the site of many protests, generally anti-nuclear or anti-USA in nature. Protesters attempting to enter the facility have generally been charged with minor offences, however, in May 2007, four Christian pacifists, who cut through wire fences to access to the facility in December 2005, faced court charged with indictable offences under the *Defence (Special Undertakings) Act 1952*. If convicted, they could have faced custodial sentences of up to seven years.

The initial court decision

Section 8 of the DSU Act provides that the Minister for Defence may, by notice published in the Gazette, declare an area of land or water to be a prohibited area if it is necessary to do so for the purposes of the defence of the Commonwealth. At issue in the prosecution of the protestors was whether the area on which each of the defendants allegedly committed offences was a 'prohibited area'.²²

On 9 November 1967, the relevant area was declared a 'prohibited area' by a Notice in the *Commonwealth of Australia Gazette (No. 96)* which read:

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21. The Hon Dr Brendan Nelson, then Minister for Defence, 'Ministerial Statement: Joint Defence Facility Pine Gap', *House Hansard*, 20 September 2007, p. 74.
 22. [*The Queen v Law and Others*](#) [2006] NTSC 84, paragraph 2.

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In pursuance of the powers conferred on me by section eight of the Defence (Special Undertakings) Act 1952-1966, I, Allen Fairhall, Minister of State for Defence, being satisfied that it is necessary for the defence of the Commonwealth to do so, hereby declare the area of land described in the Schedule hereunder to be a prohibited area for the purposes of that Act.²³

All the parties agreed that the area in which the alleged offences took place was the area explicitly described in the Schedule to *Commonwealth of Australia Gazette (No. 96)*, that is, the Joint Defence Facility Pine Gap.

The Crown case was that there was a valid declaration that the Joint Defence Facility Pine Gap was a 'prohibited area' and that the activities of the four defendants in that 'prohibited area' were subject to criminal penalties.

The defendants sought to challenge the Crown case that the Pine Gap Facility was a 'prohibited area' based on the interpretation of section 8 of the DSU Act. They argued that the 1967 declaration was invalid because, at that time, the declaration was not necessary for defence purposes. Particularly, they sought to establish that in 1967 the Pine Gap Facility was not being used for defence purposes.

In addition, the defendants sought to advance a case that the Pine Gap Facility was not a prohibited area in 2005 on the basis that, in 2005, the Pine Gap Facility was primarily used for the purposes of aggression rather than defence, and therefore, the continuation of the declaration was not necessary for defence purposes.

The trial Judge ruled that evidence about these matters was inadmissible. The trial Judge also ruled that the precondition to the exercise of the power to declare an area a 'prohibited area' under section 8 was satisfaction by the Minister that the declaration was necessary, rather than the objective fact that the declaration was necessary for defence purposes. The four were convicted in June 2007 and were fined but not given custodial sentences.²⁴

The decision on appeal

On appeal to the Northern Territory Criminal Court of Appeal the convictions were overturned in February 2008.²⁵ According to Chief Justice Brian Martin, there had been a

... miscarriage of justice.

23. *ibid.*, paragraph 8.

24. Kasey Brunt, '[Christian activists risk jail time over refusal to pay fines](#)', Northern Territory News, 4 January 2008, p. 7.

25. [The Queen v Law and Others](#) [2008] NTCCA 4.

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The defendants were deprived of a possible defence, mainly establishing that the facility was not necessary for defence purposes.²⁶

In making his decision, Chief Justice Martin stated:

It is appropriate to note that following the ruling by the trial Judge, in the conduct of the trial it appears to have been overlooked that in challenging the validity of the declaration, the defendants were entitled to attack the basis upon which the Minister in 1967 reached his state of satisfaction that the declaration was necessary for defence purposes. If, as an objective fact, the declaration was not necessary for defence purposes, that fact could be used by the defendants to mount an argument that in the absence of a factual basis for the declaration the Minister could not reasonably have been satisfied that the declaration was necessary for defence purposes. This was a way in which the defendants could seek to attack the validity of the declaration under the terms of her Honour's ruling. However ... this basis of relevance appears to have been overlooked.²⁷

The amendments to the DSU Act contained in the Bill are intended to overcome the inadequacies in the drafting of the DSU Act which were highlighted by both the Northern Territory Criminal Court and the Northern Territory Criminal Court of Appeal in this matter.

Committee consideration

At its meeting on 4 December 2008, the Selection of Bills Committee resolved to recommend that the Bill be referred immediately to the Senate Foreign Affairs, Defence and Trade Committee (the Committee) for inquiry and report by 20 February 2009.²⁸

Financial implications

According to the Explanatory Memorandum, the amendments in the Bill 'will have no impact on Commonwealth expenditure or revenue'.²⁹

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26. Tara Ravens, '[Pine Gap protesters' convictions quashed](#)', *Canberra Times*, 23 February 2008, p.11 and Michael Pelly, '[Pine Gap four cleared](#)', *Australian*, 23 February 2008, p.5.
 27. *The Queen v Law and Others* [2008] NTCCA 4, paragraph 39.
 28. Selection of Bills Committee, [Report No. 17 of 2008](#), 4 December, 2008, paragraph 2(a).
 29. Explanatory Memorandum, p. 2.

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Main provisions

Schedule 1—Third additional protocol to the Geneva Conventions

Existing section 268.44 of the Criminal Code currently provides that a person commits a criminal offence, punishable by life imprisonment, if:

- the person uses one of the distinctive emblems of the Geneva Conventions for combatant purposes ‘to invite the confidence of an adversary in order to lead him or her to believe that [the person] is entitled to protection, or that the adversary is obliged to accord protection to [the person], with intent to betray that confidence’
- the person knows of, or is reckless as to, the illegal nature of such use
- the person’s conduct results in death or serious personal injury, and
- the conduct takes place in the context of, and is associated with, an international armed conflict.

Items 1 and 2 amend the Dictionary in the Criminal Code Act. **Item 1** inserts the proposed definition of ‘*Protocol III to the Geneva Conventions*’ by defining the term as the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), done at Geneva on 8 December 2005. **Item 2** includes reference to Protocol III in the existing definition of the term ‘*Protocols to the Geneva Conventions*’.

The effect of the amendments in **items 1 and 2** is to ensure that the new Geneva Emblem (the Red Crystal) is covered by the offence in existing section 268.44 of the Criminal Code.

Items 3–12 amend the Geneva Conventions Act which was enacted to give effect to:

- the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, adopted at Geneva on 12 August 1949
- the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, adopted at Geneva on 12 August 1949
- the Geneva Convention relative to the Treatment of Prisoners of War, adopted at Geneva on 12 August 1949, and
- the Geneva Convention relative to the Protection of Civilian Persons in Time of War, adopted at Geneva on 12 August 1949.

Item 3 amends existing subsection 5(1A) to insert the definition of Protocol III in the interpretations section of the Geneva Conventions Act. The definition is in the same terms as for **item 1** above.

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Existing section 15 of the Geneva Conventions Act relates to the use of the Red Cross and other emblems, signs, signals, identity cards, insignia and uniforms. Existing subsection 15(1) of the Geneva Conventions Act provides, in essence, that a person shall not, without the written consent of the Minister, use certain proscribed items for any purpose whatsoever.³⁰ **Item 5** inserts **proposed paragraph 15(1)(ca)** to add the Red Crystal to the list of proscribed items.

Items 8 and 10 apply so that the date of commencement of the legislation is a date to be fixed by Proclamation and would not be before the date on which Additional Protocol III enters into force in Australia. The effect of these amendments is that anyone who uses the Red Crystal, or similar design, as a registered trademark before the proposed Act received Royal Assent is not guilty of an offence under section 15 of the Geneva Conventions Act.

Item 12 inserts **proposed Schedule 6** to the Conventions Act which sets out Protocol III in its entirety. Annexed to the Protocol is a pictorial representation of the Red Crystal emblem.

Schedule 2—Medical and dental treatment

Items 1–5 of Schedule 2 amend the Defence Act.

Existing subsection 124(1) of the Defence Act provides for the making of regulations about a list of matters. **Items 1 and 3** make an editorial amendment by adding ‘and’ at the end of paragraphs 124(1)(a)–(h) and paragraphs 124(1)(j)–(u) respectively so that it is clear that the Governor-General may make regulations about all of these matters.

Item 2 inserts **proposed paragraph 124(1)(i)** so that regulations can be made about medical or dental treatment of a ‘*member*’ or ‘*cadet*’, or a ‘*member of the family*’ of a member.

Item 4 amends existing subsection 124(1B). The effect of this amendment is that in proposed paragraph 124(1)(i) the terms ‘*cadet*’, ‘*member*’ and ‘*member of the family*’ have the same meanings as in Part IIIA of the Defence Act, that is as they are currently defined in section 58A of the Defence Act.

The regulations do not cover a member of the family of a cadet.³¹

30. Existing paragraph 15(1)(a) provides that one of the proscribed items is the Red Cross and existing paragraph 15(1)(b) provides that another of the proscribed items is the Red Crescent.

31. Confirmed in Second Reading Speech p. 2.

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Item 5 inserts **proposed paragraph 124(1C)** which clarifies that ‘medical and dental treatment’ includes the provision of services or goods, including pharmaceuticals, related to medical and dental treatment.

Schedule 3—Joint Defence Facility Pine Gap

The DSU Act makes it an offence to enter, without government approval, a place used for a special defence undertaking. Such an undertaking is defined as one for the defence of Australia or ‘some other country associated with Australia in resisting or preparing to resist international aggression’.³²

Item 1 of Schedule 3 inserts **proposed section 2A** into the DSU Act to enunciate the purpose of the Act. The purposes are:

- to provide for the protection by the Commonwealth of works and undertakings that are carried out for or in relation to the defence of Australia either alone or in combination with the defence of another country: **proposed paragraph 2A(a)**
- to provide for the protection by the Commonwealth of areas that are reserved for the defence of Australia either alone or in defence of another country: **proposed paragraph 2A(b)**
- to provide for the protection by the Commonwealth of works, undertakings and areas that require special security measures: **proposed paragraph 2A(c)**, and
- to provide for the protection by the Commonwealth of works, undertakings and areas in order to enable Australia to fulfil its obligations under treaties, conventions and international agreements relating to defence or security: **proposed paragraph 2A(d)**.

The Explanatory Memorandum states that:

As well as clarifying the purposes of the Act this section makes it clear that there is a range of constitutional basis [sic] available to support the Act.³³

It is clear that **proposed paragraphs 2A(a) and (b)** are based on the defence power in section 51(vi) of the *Commonwealth of Australia Constitution Act* (the Constitution) and that **proposed paragraph 2A(d)** is based on the external affairs power in section 51(xxix) of the Constitution. However, in the absence of any definition in the DSU Act of the term ‘*special security measures*’, the Constitutional support for **proposed paragraph 2A(c)** remains unclear.

Items 2–4 adds clarity to the DSU Act by inserting new definitions into existing section 4 to add clarity to the DSU Act.

32. Paragraph 6(a), Defence (Special Undertakings) Act 1952.

33. Explanatory Memorandum, paragraph 25, p. 7.

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Items 5–7 and item 9 contain amendments which are incidental to the insertion of the new definitions of the terms '*prohibited area*', '*restricted area*' and '*special defence undertaking*'.

Item 8 inserts proposed section 8A. **Proposed subsection 8A(1)** provides that whole of the area in the geographical location of the Joint Defence Facility Pine Gap is a prohibited area. **Proposed subsection 8A(2)** provides that a work or undertaking that is carried out in the Joint Defence Facility Pine Gap is a special defence undertaking.

Schedule 4–Technical amendments

The amendments in Schedule 4 are technical amendments to the DSU Act to modernise the language. In particular, **items 3–11** amend a number of sections to include a reference to female as well as male. This will not have any effect on the operation of the various provisions of the DSU Act as section 23 of the *Acts Interpretation Act 1901* already provides that in any Act, unless the contrary intention appears, words importing a gender include every other gender.

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