



**HUMAN RIGHTS AND EQUAL OPPORTUNITY
COMMISSION**

**SUBMISSION TO THE SENATE LEGAL AND
CONSTITUTIONAL LEGISLATION
COMMITTEE INQUIRY INTO THE DEFENCE
LEGISLATION AMENDMENT (AID TO
CIVILIAN AUTHORITIES) BILL 2005**

January 2006

1 INTRODUCTION

- 1.1 The Human Rights and Equal Opportunity Commission ('the Commission') is established by the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ('HREOC Act'). It is Australia's national human rights institution.
- 1.2 The Commission's relevant functions are set out in s.11 of the HREOC Act and include the power to promote an understanding and acceptance, and the public discussion, of human rights in Australia.¹
- 1.3 In this submission, the Commission limits itself to the human rights issues arising from the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005 (the 'Bill').
- 1.4 The Commission asks this Committee to accept that Australia must comply with international human rights law when introducing measures to address serious and genuine national security concerns, including terrorism. International human rights law is not an open ended variable to be adjusted according to particular national security needs. Such an approach implies that human rights are somehow antithetical to issues of national security, necessitating a compromise or trade off. This approach also ignores the fact that international human rights law already strikes a balance between security interests and rights considered to be fundamental to the person. International human rights law allows for protective actions to be taken by states, but demands that those actions remain within carefully crafted limits – most notably proportionality.
- 1.5 Concerns about the heightened risks of domestic terrorist attacks are plainly legitimate and require innovative measures on the part of all responsible states, including Australia. However, as the United Nations Secretary General has stated, it is crucial that those measures are consistent with international human rights law to ensure that in an attempt to safeguard our society we do not give away the very rights that are essential to the maintenance of the rule of law, one of the fundamental principles of a functioning democracy.²

2 ISSUES REGARDING THE RIGHT TO LIFE

- 2.1 The Commission's principal concern is that the new provisions in Divisions 2A, 3A, 3B and Division 4 of the Bill providing additional powers to members of the Defence Force, may not adequately safeguard the right to life under article 6 of the International Covenant on Civil and Political Rights ('ICCPR').
- 2.2 Article 6 of the ICCPR protects the right to life, which has been described by the Human Rights Committee³ as 'the supreme right from which no

¹ Section 11(1)(g) of the HREOC Act.

² See UN Secretary-General's keynote address to the Closing Plenary of the International Summit on Democracy, Terrorism and Security, Madrid, Spain, 10 March 2005. See also, Security Council Resolution 1373 (2001) adopted by the Security Council at its 4385th meeting, on 28 September 2001.

³ The Human Rights Committee is the United Nations human rights treaty body created under article 28 of the ICCPR. Amongst other things, the Committee publishes interpretative comments, known as

derogation is permitted even in time of public emergency which threatens the life of the nation (art. 4).⁴ Article 6(1) of the ICCPR provides as follows:

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

- 2.3 The Human Rights Committee has stated that the protection against arbitrary deprivation of life which is explicitly required by the third sentence of article 6(1) is of paramount importance. The Committee stated as follows:

The Committee considers that States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. **The deprivation of life by the authorities of the State is a matter of utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.**⁵
[Emphasis added]

- 2.4 The term **arbitrary** has been interpreted by the Human Rights Committee in the context of article 6 as requiring more than mere compliance with domestic law.⁶ The prohibition on the **arbitrary** deprivation of life signifies that life must not be taken in unreasonable or disproportionate circumstances.⁷

- 2.5 The principle of proportionality requires a consideration of the relationship between the purpose and the means by which that purpose is achieved. The test of proportionality adopted by the Human Rights Committee requires that a particular measure be the **least restrictive means** of achieving the relevant purpose.⁸ If the measure is not, then it will be disproportionate. Further, in applying this principle, that which is weighed up must be understood. Account must be taken of the nature of the protected right or interest. As the right to life is the ‘supreme right from which no derogation is permitted’, any infraction or restriction on that right would require a strong justification.⁹

3 THE NEW DEFENCE FORCE POWERS AND THE COMMISSION’S RECOMMENDATIONS AS TO ADDITIONAL SAFEGUARDS

- 3.1 The Commission submits that for Australia to better comply with its international human rights obligations, additional safeguards should be placed on the new powers afforded to members of the Defence Force under the Bill.

General Comments, designed to assist States parties to give effect to the provisions of the Covenant by providing greater detail in relation to their substantive and procedural obligations.

⁴ Human Rights Committee, *General Comment No.6: The right to life (Art 6): 30/04/82, CCPR General Comment No.6 (General Comments)*, at [1].

⁵ *Ibid* at [3].

⁶ *Suarez de Guerrero v Colombia, Communication No. 45/1979: Colombia 31/03/82. CCPR/C/15/D/45/1979.*

⁷ S Joseph et al., *ICCPR: Cases, Materials and Commentary*, 2nd Ed, OUP 2004, [8.04].

⁸ See generally regarding proportionality and the tests applied internationally: J Kirk “Constitutional Guarantees, Characterisation and Proportionality” (1997) 21 *MULR* 1.

⁹ *Ibid* at 8. See also, *McCann v United Kingdom* (1995) 324 ECHR [147]-[150].

Division 3A - Incidents in the Australian offshore area and internal waters

- 3.2 The Bill provides the Governor-General with power, acting on the advice of authorising Ministers, to utilise the Australian Defence Force ('ADF') in:
- a. the Australian offshore area to protect against a threat to Commonwealth interests (ss.51AA(1) and (2)); and
 - b. the internal waters of a State or Territory to respond to domestic violence that is occurring, or is likely to occur, to protect the Commonwealth interests against the domestic violence (s.51AA(4) - (7)).¹⁰
- 3.3 New Division 3A sets out the powers of the ADF when operating in accordance with s.51AA in the offshore area and in internal waters.¹¹
- 3.4 New s.51SE(1) provides a non exclusive list of measures that a member of the ADF may be authorised to take. A member of the ADF may, inter alia:
- a. take measures (including the use of force) against a vessel or an aircraft, up to and including destroying the vessel or aircraft (s.51SE(1)(a)(i));
 - b. give an order relating to the taking of such measures (s.51SE(1)(a)(ii));
 - c. detain a person for the purpose of placing the person in the custody of the police force, if a member of the ADF believes on reasonable grounds that the person has committed an offence against a law of the Commonwealth, a State or a Territory (s.51SE(1)(b)(ii)); and
 - d. do anything incidental to these actions (ss.51SE(1)(c)).
- 3.5 The Commission notes that these measures include the use of force against a vessel or an aircraft, including destroying the vessel or aircraft, which must be presumed to be capable of causing loss of life of the persons on board. The Commission acknowledges that the Bill imposes conditions on the use of these measures, but submits that these safeguards should be strengthened or clarified as set out below in order to comply with Australia's international obligations.
- 3.6 First, the authority to take the measures, or to give orders in relation to the taking of the measures, against a vessel or aircraft is granted subject to the conditions in proposed ss.51SE(2) and (3). These conditions seek to maintain control over the engagement of any vessel or aircraft through the process of ADF members being given and responding to orders. The conditions include, inter alia:

¹⁰ In making orders under s.51AA, the Governor-General is to act with the advice of the Executive Council or, where there are reasons of urgency, the authorising Minister only: See s.51AA(11). 'Authorising Ministers' are defined to mean the Prime Minister, the Minister and the Attorney-General: s.51(1) of the *Defence Act 1903 (Cth)*.

¹¹ The application of Division 3A relies upon the Governor-General stating in the s.51AA order that the provisions of Division 3A and Division 4 apply: proposed ss.51AA(8)(c) and s.51SA.

- a. the member takes the measure under an order of a superior, and the member was under a legal obligation to obey the order (s.51SE(2)(a) and (b)); or
 - b. the member gives the order under an order of a superior ('a superior order'), and the member was under a legal obligation to obey the superior order (s.51SE(3)(a) and (b)); and
 - c. the order, or the superior order, was not manifestly unlawful (s.51SE(2)(c) and s.51SE(3)(c)); and
 - d. taking the measure was reasonable and necessary to give effect to the order (s.51SE(2)(f)), or giving the order was reasonable and necessary to give effect to the superior order (s.51SE(3)(f)).
- 3.7 That the Bill requires both (i) the member taking the measure to consider whether the measure was 'reasonable and necessary' to give effect to the order and (ii) the member giving the order to consider whether giving the order was 'reasonable and necessary' to give effect to the superior order means that proportionality is being considered to some extent. The government should be congratulated for adopting that approach. However, the Commission submits that a more stringent condition for the giving of an order that authorises measures that may lead to the loss of life should be imposed to adequately reflect the international law requirement of proportionality. The Commission submits that the process whereby a member of the ADF gives an order that is to be implemented by another member should be subject to the condition that the member giving the order is satisfied that no lesser action would give effect to the superior order.

Recommendation 1: The Commission recommends the Bill include an additional sub-clause in s.51SE(3) which requires the member to be satisfied in giving the order that no lesser action would give effect to the superior order.

- 3.8 Second, proposed s.51SE(4) provides that the member must not take any of the above measures, or give an order relating to the taking of such measures, unless an authorising Minister has in writing authorised taking that action. The Bill contains an exception to this provision if the ADF member believes on reasonable grounds that there is insufficient time to obtain this authorisation because a sudden and extraordinary emergency exists.¹²
- 3.9 The Commission submits that in view of the serious consequences attached to the measures (including loss of life) and accordingly, the fact that the measures should be taken only in the most exceptional cases, the circumstances in which the Minister may authorise the taking of such measures should also be limited by reference to a stringent proportionality condition.

¹² See proposed s.51SE(5).

3.10 The Commission notes that the government has included a limitation on the circumstances in which Ministers may authorise the taking of measures against aircraft by reference to considerations of proportionality in proposed s.51ST(7) in Division 3B (see para 3.17 below).

Recommendation 2: The Commission recommends the Bill include an additional sub-clause in s.51SE which requires the Minister to be satisfied, in giving an authorisation under s.51SE(4), that the purpose for which the measure is authorised cannot be achieved by a lesser measure.

3.11 Third, the Bill provides that in giving an authorisation, authorising Ministers must have regard to Australia's international obligations.¹³

3.12 The Commission congratulates the government on this approach. However, the Commission considers that it would be of assistance to clarify, perhaps in a note to the section or an amended explanatory memorandum, that Australia's international obligations include its obligations under the ICCPR.

Recommendation 3: The Commission recommends the Bill include a note to s.51SC that Australia's international obligations include its obligations under the International Covenant on Civil and Political Rights.

Division 3B - Aviation incidents

3.13 Proposed Division 3B sets out new powers of the ADF relating to taking measures against aircraft.¹⁴ Currently there are no provisions within the *Defence Act 1903* (Cth) ('the Act') to enable the ADF to conduct operations against air threats.¹⁵

3.14 New s.51ST(1) in Division 3B provides that a member of the ADF may:

- a. take measures (including the use of force) against an aircraft, up to and including destroying the aircraft (s.51ST(1)(a)); or
- b. give an order relating to the taking of such measures (s.51ST(1)(b));

whether or not the aircraft is airborne.¹⁶

¹³ See proposed s.51SC.

¹⁴ The application of Division 3B relies upon the Governor-General stating in an order under s.51A(4)(c), 51AB(4)(c), 51B(3)(c) or 51C(3)(c) that the provisions of Division 3B and Division 4 apply: see proposed s.51SR. Note: new s. 51AB will enable the Governor-General to specify circumstances (which if they actually arose would justify a call out of the ADF) where the Chief of the Defence Force is already authorised to utilise the ADF to deal with a threat.

¹⁵ Explanatory Memorandum, para 90.

¹⁶ Note: this is an exclusive list of the powers of the ADF: cf proposed s.51SE(1) in Division 3A.

- 3.15 The Commission notes that the new provisions authorise the use of force against an aircraft, whether or not the aircraft is airborne. This must be presumed to be capable of causing the aircraft to crash and/or be destroyed with loss of life both of the persons on board the aircraft and potentially on the ground at the crash site.
- 3.16 The conditions attached to the use of these powers, for the most part, reflect the conditions attached to the use of the powers of the ADF in the Australian offshore area and internal waters in Division 3A (set out above). Relevantly:
- a. the authority to take the measures is subject to the conditions in proposed ss.51ST(2) including that: the member takes the measure under an order of a superior;¹⁷ the member was under a legal obligation to obey the order;¹⁸ the order was not manifestly unlawful;¹⁹ and taking the measure was reasonable and necessary to give effect to the order;²⁰
 - b. the authority to give an order in relation to the taking of the measures is subject to the conditions in proposed ss.51ST(3) including that: the member gives the order under an order of a superior;²¹ the member was under a legal obligation to obey the superior order;²² the superior order was not manifestly unlawful;²³ and giving the order was reasonable and necessary to give effect to the superior order;²⁴ and
 - c. the member must not take the measures, or give an order in relation to the taking of the measures, unless an authorising Minister has in writing authorised the taking of measures against the aircraft.²⁵ In giving an authorisation, the authorising Minister must have regard to Australia's international obligations.²⁶
- 3.17 Proposed s.51ST(7) contains an additional condition attached to Ministerial authorisations (not contained within Division 3A), that an authorising Minister must not authorise the taking of measures against an aircraft unless the Minister is satisfied that taking action against the aircraft is reasonable and necessary.
- 3.18 The Commission repeats its submission (above) that in view of the serious consequences attached to the taking of these measures against an aircraft (including loss of life) a more stringent proportionality condition would reflect the fact that these measures should only be taken in the most exceptional

¹⁷ See proposed s.51ST(2)(a).

¹⁸ See proposed s.51ST(2)(b).

¹⁹ See proposed s.51ST(2)(c).

²⁰ See proposed s.51ST(2)(f).

²¹ See proposed s.51ST(3)(a).

²² See proposed s.51ST(3)(b).

²³ See proposed s.51ST(3)(c).

²⁴ See proposed s.51ST(3)(f).

²⁵ See proposed s.51ST(4). Note: proposed s.51ST(5) provides an exception to s.51ST(4) if the ADF member believes on reasonable grounds that there is insufficient time to obtain this authorisation because a sudden and extraordinary emergency exists.

²⁶ See proposed s.51ST(8).

cases. The Commission submits that the more stringent proportionality condition should be applied to both:

- a. the process whereby a member of the ADF gives an order that is to be implemented by another member in relation to the taking of the above measures; and
- b. the decisions of authorising Ministers in authorising the taking of the measures.

Recommendation 4: The Commission recommends the Bill include an additional sub-clause in s.51ST(3) which requires the ADF member to be satisfied in giving the order that no lesser action would give effect to the superior order.

Recommendation 5: The Commission recommends the Bill include an additional sub-clause in s.51ST which requires the Minister to be satisfied, in giving an authorisation under s.51ST(4), that the purpose for which the measure is authorised cannot be achieved by a lesser measure.

Recommendation 6: The Commission recommends the Bill include a note to s.51ST(8) that Australia's international obligations include its obligations under the International Covenant on Civil and Political Rights.

Division 2A - Incidents involving designated critical infrastructure

3.19 Proposed s.51CB will permit authorising Ministers to declare that particular infrastructure in Australia is 'designated critical infrastructure' if they believe on reasonable grounds that:

- a. there is a threat of damage or disruption to the operation of the infrastructure (s.51CB(2)(a)); and
- b. the damage or disruption would directly or indirectly endanger the life of, or cause serious injury to, other persons (s.51CB(2)(b)).

3.20 Proposed Division 2A sets out the powers of the ADF in relation to designated critical infrastructure.²⁷ New s.51IB provides a non exclusive list of measures that a member of the ADF may be authorised to take, under the command of the Chief of the Defence Force, for the purpose of protecting designated critical infrastructure. A member may, inter alia:

- a. prevent, or put an end to, damage or disruption to the operation of the designated critical infrastructure (s.51IB(a)(i));

²⁷The application of Division 2A relies upon the Governor-General stating in the order under either s.51A(4)(c), s.51AA(8)(c), s.51B(3)(c) or s.51C(3)(c) that the provisions of Division 2A and Division 4 apply: see proposed s.51IA.

- b. prevent, or put an end to, acts of violence (s.51IB(a)(ii));
- c. detain a person for the purpose of placing the person in the custody of the police force, if a member of the ADF believes on reasonable grounds that the person has committed an offence against a law of the Commonwealth, a State or a Territory (s.51IB(b)(i));
- d. control the movement of persons or of means of transport (s.51IB(b)(iii)); and
- e. do anything incidental to these actions (s.51IB(c)).

3.21 As discussed further below, the powers in Division 2A must be read together with the provisions of Division 4 of the Act relating to reasonable and necessary force. Section 51T(1) in Division 4 (as amended) will provide that in exercising any power under Division 2A a member of the ADF may use such force against persons and things as is reasonable and necessary in the circumstances. Proposed s.51T(2A) provides, in effect, that such force can include lethal force if the member believes on reasonable grounds that it is necessary to protect the designated critical infrastructure against the threat.

3.22 The Commission considers that additional safeguards should be placed on the use of these powers in order to better comply with Australia's international human rights obligations. The Human Rights Committee has stated that domestic laws must **strictly control and limit the circumstances** in which a person may be deprived of his life by State authorities.²⁸ In the Bill, as presently drafted, the powers of the members of the ADF (which include the use of lethal force to protect 'designated critical infrastructure') are limited by:

- a. the declaration of the Minister that the infrastructure is 'designated critical infrastructure' as there is a threat of damage or disruption to its operation and the damage or disruption would directly or indirectly endanger the life of, or cause serious injury to, other persons; and
- b. the command of the Chief of the Defence Force (s.51IB).²⁹

3.23 The Chief of the Defence Force appears to be afforded a wide discretion as to the use of the above measures to protect the 'designated critical infrastructure'. This discretion is not regulated by a test as to proportionality. Moreover, the discretion is not regulated by the requirement that the measures are subject to Ministerial authorisation, and that in providing such authorisation the Minister must have regard to Australia's international obligations and be satisfied that the measures are reasonable and necessary (compare the requirements attached to the taking of measures against aircraft in Division 3B, ss.51ST).

²⁸ Human Rights Committee, *General Comment No.6: The right to life (Art 6): 30/04/82, CCPR General Comment No.6 (General Comments)*, at [3].

²⁹ The use of the above measures is, of course, also limited by the Governor-General ordering the Defence Force to be called out and stating in that order that the provisions of Division 2A apply: see proposed s.51IA.

- 3.24 Further, the actions of the members of the ADF, in taking the above measures, are not regulated by a test as to proportionality. Nor is the authority granted to the members of the ADF subject to the same safeguards that regulate their authority to take measures against vessels and aircraft (Division 3A, ss.51SE(2) and Division 3B, ss.51ST(2)). These safeguards require the member of the ADF taking the measure to consider, inter alia, whether:
- a. the circumstances have changed in a material way since the order was given;
 - b. there is reason to believe that the order was based on a mistake as to a material fact; and
 - c. taking the measures was reasonable and necessary to give effect to the order.
- 3.25 In the circumstances, the Commission has concerns as to whether the Bill adequately **controls and limits the circumstances** in which the Defence Force are authorised to take the above measures, so as to comply with Australia's international obligations.
- 3.26 The Commission submits that the discretion afforded the Chief of the Defence Force should be limited to adequately reflect the international law requirement of proportionality. The Commission submits that the process whereby the Chief of the Defence Force (or the relevant superior member) gives an order that is to be implemented by another member, should be subject to the condition that the Chief of the Defence Force (or the member giving the order) is satisfied that no lesser action would achieve the desired purpose. Further, in giving an order in relation to the taking of the above measures, the Chief of the Defence Force should be required to have regard to Australia's international obligations, including its obligations under the ICCPR.
- 3.27 The Commission submits that the authority granted to the members of the ADF taking the measures should be subject to the same safeguards that regulate their authority to take measures against vessels and aircraft (Division 3A, ss.51SE(2) and Division 3B, ss.51ST(2)). These conditions allow the member of the ADF taking the measure to take account of, for example, a change in circumstances or a mistake as to a material fact.

Recommendation 7: The Commission recommends that the Bill be amended to require the Chief of the Defence Force (or the relevant superior member of the ADF) to be satisfied, in giving an order under proposed s.51IB, that no lesser measure would achieve the desired purpose.

Recommendation 8: The Commission recommends that the Bill be amended to require the Chief of the Defence Force, in giving an order under proposed s.51IB, to have regard to Australia’s international obligations, including its obligations under the International Covenant on Civil and Political Rights.

Recommendation 9: The Commission recommends that the Bill be amended to provide that the conditions regulating the use of the powers in Divisions 3A and 3B (in ss.51SE(2) and ss.51ST(2) respectively) also apply to regulate the use of the powers in Division 2A.

Division 4 – Use of reasonable and necessary force

3.28 The powers in new Divisions 2A, 3A and 3B must be read together with the provisions in Division 4 of the Act relating to reasonable and necessary force.

3.29 Section 51T(1) (as amended) will provide that in exercising any power under Divisions 2A, 3A or 3B a member of the ADF may use such force against persons and things as is reasonable and necessary in the circumstances.

3.30 Existing s.51T(2) of the Act places restrictions on the use of force as follows:

(2) However, a member of the Defence Force must not, in using force against a person:

(a) do anything that is likely to cause the death of, or grievous bodily harm to, the person unless the member believes on reasonable grounds that doing that thing is necessary to protect the life of, or prevent serious injury to, another person (including the member); or

(b) subject the person to greater indignity than is reasonable and necessary in the circumstances.

3.31 Proposed s.51T(2A) and s.51T(2B) will weaken this existing restriction on the use of lethal force when a member of the ADF is exercising powers under new Divisions 2A, 3A or 3B.

3.32 Proposed s.51T(2A) provides that in exercising powers under Division 2A, a member of the ADF must not, in using force against a person:

a. do anything that is likely to cause the death of, or grievous bodily harm to, the person unless the member believes on reasonable grounds that doing that thing is necessary to:

i. protect the life of, or to prevent serious injury to, another person (including the member); or

ii. **protect, against the threat concerned, the designated critical infrastructure;** or

- b. subject the person to greater indignity than is reasonable and necessary in the circumstances.
- 3.33 Proposed s.51T(2B) provides that in exercising powers under s.51SE(1)(a)(i) or (ii)³⁰ or Division 3B, a member of the ADF must not, in using force against a person or thing, do anything that is likely to cause death of, or grievous bodily harm to, the person unless the member believes on reasonable grounds that:
- a. doing that thing is necessary to protect the life of, or to prevent serious injury to, another person (including the member); or
 - b. **doing that thing is necessary to protect critical infrastructure against a threat of damage or disruption to its operation; or**
 - c. **doing that thing is necessary and reasonable to give effect to the order under which the member is acting.**
- 3.34 The Commission is concerned that these new provisions may breach article 6 of the ICCPR. The Human Rights Committee has stated that domestic laws must strictly control and limit the circumstances in which a person may be deprived of his life by authorities of the State.³¹ Further, the United Nations has adopted the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (the ‘Basic Principles’).³² The Basic Principles, and therefore article 6 by implication, strictly limit the use of potentially lethal force. In particular, Basic Principle 9 provides that the ‘intentional lethal use of firearms may only be made when **strictly unavoidable in order to protect life.**’ The Human Rights Committee has recommended that States parties re-draft their relevant laws to accord with the Basic Principles.³³
- 3.35 The Commission is concerned that the new provisions may allow the use of lethal force in circumstances extending beyond those set out in the Basic Principles and article 6 of the ICCPR. In particular, new ss.51T(2B)(c), in effect, authorises the use of lethal force to give effect to an order under which the member is acting. The Commission submits that this new provision impermissibly widens the circumstances in which the Defence Force are authorised to use lethal force and should be removed from the Bill.
- 3.36 Further, new ss.51T(2A)(a)(ii) and ss.51T(2B)(b) authorise the use of lethal force when necessary to protect ‘designated critical infrastructure’ against a threat of damage or disruption to its operation. The Commission notes that for infrastructure to be declared ‘designated critical infrastructure’ the authorising

³⁰ see para 3.4 above.

³¹ Human Rights Committee, *General Comment No.6: The right to life (Art 6): 30/04/82, CCPR General Comment No.6 (General Comments)*, at [3].

³² Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

³³ *Concluding Observations of the Human Rights Committee: Portugal. 05/07/2003. CCPR/CO/78/PRT. (Concluding Observations/Comments)* at [9]. See also, S Joseph et al., *ICCPR: Cases, Materials and Commentary*, 2nd Ed, OUP 2004, [8.06].

Ministers must be satisfied that damage or disruption to its operation would directly or indirectly endanger the life of, or cause serious injury to, other persons (s.51CB(2)). Accordingly, the use of lethal force to protect designated critical infrastructure against a threat of damage or disruption may, in certain cases, be 'strictly unavoidable in order to protect life'. In these circumstances, the Commission submits that the new provisions are not necessary as existing s.51T(2) of the Act authorises the use of lethal force when necessary to protect the life of, or prevent serious injury to, another person. And, to the extent that the new provisions authorise the use of lethal force in circumstances extending beyond 'when necessary to protect the life of, or prevent serious injury to, another person' – they potentially breach article 6 of the ICCPR.

- 3.37 The Commission submits that proposed s.51T(2A) and s.51T(2B) should be removed from the Bill. The Commission considers that existing s.51T(2) of the Act (set out above) appropriately restricts the use of lethal force in accordance with Australia's international human rights obligations.

Recommendation 10: The Commission recommends that proposed s.51T(2A) and s.51T(2B) be removed from the Bill.

Human Rights and Equal Opportunity Commission

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