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SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

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SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

Tuesday, 31 January 2006

Members: Senator Payne *(Chair)*, Senator Crossin *(Deputy Chair)*, Senators Bartlett, Kirk, Mason and Scullion

Participating members: Senators Abetz, Allison, Barnett, Bartlett, Mark Bishop, Brandis, Bob Brown, George Campbell, Carr, Chapman, Colbeck, Conroy, Crossin, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Fielding, Fierravanti-Wells, Heffernan, Hogg, Humphries, Hurly, Joyce, Lightfoot, Ludwig, Lundy, McGauran, McLucas, Milne, Nettle, Parry, Robert Ray, Scullion, Sherry, Siewert, Stephens, Stott Despoja, Trood and Watson

Senators in attendance: Senators Bartlett, Mark Bishop, Bob Brown, Johnston, Ludwig, Payne and Trood

Terms of reference for the inquiry:

Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005

WITNESSES

Committee met at 9.05 am

CHAIR (Senator Payne)—Welcome to this inquiry into the provisions of the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005. This is the first hearing of the Senate Legal and Constitutional Legislation Committee's inquiry into the provisions of the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005. On 8 December 2005 the Senate referred the bill to the Senate Legal and Constitutional Legislation Committee for inquiry and report by 7 February 2006. The Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005 seeks to amend part IIIA of the Defence Act 1903. Proposed amendments include those relating to: the use of reserves in domestic security operations; ADF call-out notification requirements; expedited call-out procedures for sudden and extraordinary emergencies; identification of called out ADF personnel; criminal laws and procedures applicable to called out ADF personnel; and ADF powers to protect designated critical infrastructure and respond to domestic security incidents or threats in offshore areas or the air.

The committee has received 17 submissions for this inquiry. They have been authorised for publication and are available on the committee's web site. Witnesses are reminded of the notes they have received relating to parliamentary privilege and the protection of official witnesses. Further copies are available from the secretariat. Witnesses are also reminded that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. The committee prefers all evidence to be given in public but, under the Senate's resolutions, witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera.

[9.07 am]

BHASIN, Mr Anish, Committee Member, New South Wales Council for Civil Liberties

MURPHY, Mr Cameron, President, New South Wales Council for Civil Liberties

CHAIR—Welcome. The council has lodged a submission with the committee which we have numbered five. Do you need to make any amendments or alterations to that submission?

Mr Murphy—No; I just apologise for the brevity of the submission. Unfortunately, we do not get any government funding and we have had a number of requests from the Commonwealth and state governments for submissions recently and we have not had the time to devote the appropriate resources to the submission.

CHAIR—I note your concerns, Mr Murphy. The committee is grateful for your submission. We cannot assist you in the matter of government funding, but it is on the record.

Mr Murphy—Thank you for your sentiments.

CHAIR—I invite you to make a short opening statement. At the conclusion of that we will go to questions from members of the committee.

Mr Murphy—I will start by talking generally about the bill. My colleague is going to focus on a particular area of the bill, which is the use of the military in relation to critical infrastructure. In our view this bill facilitates and regularises the use of the military for events which are essentially ordinary policing functions. It is an unwelcome development in our view to have the military, whose primary function is the defence of the nation, being used in circumstances where it is policing the nation. Recent events such as Mercury 2004 and the many other joint terrorism exercises demonstrate that it is no longer a power of last resort to be using the military in this way but it is becoming a power that is going to be regularly used, particularly in relation to antiterrorism exercises. In our view the recent increase in powers that have been given to ASIO and the Federal Police and the antiriot powers that have been given to state police in jurisdictions such as New South Wales should lessen the need for the military to be involved in civil disobedience rather than increase it, which this bill seeks to do.

The bill, for the first time, provides for the Prime Minister to have the power to call out the troops and it greatly broadens the circumstances in which the troops may be used, including the protection of property where no life is at risk. The protection, in our view, that the bill provides for soldiers seeks to give them immunity from state law in certain circumstances. Decisions to prosecute breaches of the criminal law are restricted to the Commonwealth Director of Public Prosecutions. While this purports to protect soldiers, in our view they will still face the problem of choosing on the spot whether or not to follow an order. If they refuse to follow an order, they may be prosecuted for doing so. On the other hand, if they carry it out, they may be prosecuted afterwards if the order is found to be unlawful. The bill fails to provide any express exemption for the use of the powers in situations where there is peaceful protest that may also be characterised as civil disobedience or industrial action which may be interpreted as threatening critical infrastructure.

It is also our view that, while the Constitution clearly provides the power for the Defence Force to be used in defence of the nation, and also in the defence of Commonwealth interests, it does not provide the power for the troops to be deployed in all of the circumstances in

which the legislation seeks to provide it, particularly where there is no request from the state executive for the troops to be used. It is our view that the bill should be rejected in parts and also amended to include proportionality and protections against its use in the context of peaceful protest or industrial action and to make it clear that it is a measure of last resort.

Mr Bhasin—I am going to discuss our concerns with schedule 2 of the bill, which involves the introduction of powers to protect designated critical infrastructure. Schedule 2 is extraordinary in that it expands the authorised use of lethal force by ADF personnel from the protection against threats to life to the protection of property. As outlined in a number of other written submissions, including HREOC's, the right to life is considered a supreme right which cannot be abrogated even in times of public emergency. As such, the intentional lethal use of force by the state should be strictly limited to circumstances where it is unavoidable to protect life. It is an extreme measure only to be used in the most extreme circumstances. However, as currently drafted, at a minimum, proposed section 51CB(2)(b) only requires that authorising ministers reasonably believe that there is a threat of damage or disruption to infrastructure that would 'indirectly endanger the life of, or cause serious injury to, other persons'.

Proposed section 51T(2A)(a)(ii) then operates to authorise the use of lethal force to protect the designated infrastructure against the perceived threat. Unlike provisions within the bill with respect to vessels and aircraft, there is no test for proportionality involved in the use of lethal force in these circumstances. The definition of infrastructure in item 2 of schedule 2 reveals the potential breadth of the provisions, extending to include 'information technologies and communication networks or systems'. This is far too low a test to authorise the use of lethal force and is clearly broader than the circumstances where the use of such force is unavoidable to protect life. The most serious examples illustrated in the explanatory memorandum involve potential attacks on infrastructure leading to the loss of power or gas to hospitals. Such scenarios highlight the need for ensuring systemic redundancy in critical infrastructure, not laws to sanction state killing where there is no direct threat to life. Where there is a clear threat to life, the existing provisions in section 51T(2) are sufficient. We are therefore of the view that the proposed sections 51T(2A) and 51T(2B) should be removed from the bill.

CHAIR—Thank you both very much.

Senator TROOD—Mr Bhasin, I would just like to clarify this point. Mr Murphy, in his remarks, suggested that there were sections of the bill that required amendment and sections of the bill that should be removed. You mentioned 51(T)—

Mr Bhasin—It is 51T and subsection (2A).

Senator TROOD—And subsection (2A)?

Mr Bhasin—Subsection (2A) and subsection (2B). They both authorise the use of lethal force when critical infrastructure is threatened.

Senator TROOD—Are they the only two proposed sections of the bill about which you have a particular concern? Are other parts of it of concern?

Mr Murphy—There are other parts of the bill which we are concerned about. It is our view that you are going to—

Senator TROOD—Sorry, but can I interrupt. It would probably be helpful if you would outline the particular sections of the bill which you think need to be either amended or removed altogether so that we could have a clear understanding.

Mr Murphy—While we accept that you are going to have circumstances in which the military may be called out and while we accept that there is the power for the Commonwealth to do that to protect its interests, it is our view that the bill does not clearly set out the powers that it should use in a general sense. It also does not in particular provide the protection that we think should be there for troops who are exercising that power. When we say the bill should be amended, we think it should be amended to set out, for example, the sorts of rules of engagement that should apply, when troops are used, how exactly troops should follow orders that are made and how to provide them with increased protection from prosecution in the circumstances where they are used. So, rather than having particular sections of the bill and saying that this section is something that we believe should remain in there and that something else should be out, it is really the broader context of the way in which the powers are used and troops are deployed.

Senator TROOD—Is there a model outlining these protections and specificities that you are referring to that exists somewhere else in legislation that you think would be suitable for that?

Mr Murphy—To give you an example, with respect to the police it is quite clear; it is publicly available what police powers are and it is contained in the legislation. Yet in this legislation when it comes to deploying the troops all we have is the broadest of frameworks saying that they can be deployed in certain circumstances but it does not clearly set out exactly how they are going to be used. There are broad references there to following the directions of police when they are deployed with police but it does not have, for example, rules of engagement contained in the legislation that set out exactly what the troops are entitled to do and how they are entitled to make decisions.

This is likely to be a problem in the following example. While the legislation does have a defence for soldiers who fail to follow an order if they think it is unreasonable—for example, they are asked to shoot to kill someone in circumstances where that may not be necessary—the defence is in legislation but they are at a different level to police who might be used in the same exercise. If police fail to follow an order, the worst that can happen to a police officer is that they might be dismissed from the police force. They do not have the threat hanging over them of prosecution and sentencing, including being held in jail for failing to follow an order, if they make a mistake. So troops are not going to be in the same position as police when they are required to make a judgment in an instant about whether to follow an order or not. It is our view that the legislation should be amended and that now provides the right opportunity to make that clear and put in place protocols that say, 'This is how it is going to operate; here are the rules of engagement, here is how the chain of command works when it is interacting with the police force,' and spell those rules out in the same way that it already happens in terms of police and police powers through legislation.

Senator TROOD—Members of the Defence Force are part of the executive of government, aren't they? Clearly, they are not police. Their power and authority come from being employed as part of the executive power of the Commonwealth government so it does

put them in a different class of position from police. You are saying that for these particular circumstances they ought to be placed in the same category as police and that the same restraints regime and circumstances should be applied to them. Is that so?

Mr Murphy—That is effectively right, because to do otherwise I think would just be dangerous. You are talking about deploying the military in a context which is not an ordinary military context. It is not defence of the nation. It is not invasion of another nation. It is performing what is effectively an ordinary policing function.

They are effectively being used as additional support. If police are unable to control a civilian disturbance or a domestic violence situation, which could be widely interpreted, then the military are deployed. Yet while they are doing that, they should be treated effectively as police. To treat them as an arm of the executive in that context, to give them broader powers than the police, I think, is where in the future you are going to end up with difficulties in the legislation in terms of soldiers choosing how they exercise their power.

Senator TROOD—We are talking about the defence forces being used in extraordinary circumstances. I think you are alluding in your submission perhaps to the possibility that this is an undesirable movement towards the militarisation of the defence forces in a civilian context. I think most of the members of the committee would share that concern. But I think it is clear that this particular piece of legislation is for extreme circumstances.

Mr Murphy—While that is said often about the legislation, if we look at the history of it, it originally emerged in the context of the Sydney 2000 Olympic Games. It was characterised as a unique event and one where, if we had a terrible incident, we might need the military. Since then we have seen a series of joint exercises. The most widely publicised was the Mercury 2004 exercise involving police working with the miliary in an antiterrorism exercise. There have been media reports of a number of joint exercises since. The message that that sends is that this is no longer something that is going to be used in extraordinary or exceptional circumstances but that in the future the miliary are going to form part of the ordinary battery against terrorism offences. So they will be used regularly. And if they are going to be used in that context then I think the parliament should clearly spell out exactly how they are going to be used. Since the legislation was first introduced in 2000, there have been a large number of these antiterrorism exercises and they have been used. It is not as though the situations in which they might be deployed are so extraordinary that we would not see them.

Senator TROOD—There have been exercises, but I do not think there has been any call-out.

CHAIR—Are you telling us that you object to the involvement of the ADF in counter-terrorism exercises?

Mr Murphy—No. I am sorry if I have given that impression. That is not what I am saying. I am saying that we have seen the use of the miliary in terrorism exercises since 2000, working with the police force, and that provides the impression that it will become a situation where the miliary may well be regularly deployed if there are terrorism exercises.

CHAIR—Terrorism incidents.

Mr Murphy—Incidents—sorry. Of course they would be used in that context. If they are being used in exercises, that provides the impression that it will not be an extraordinary event, but it may be that the military are called out whenever there is a terrorism incident.

CHAIR—I do not particularly wish to intervene in the questioning, but it just seems to me slightly counterintuitive to acknowledge that, in the event of a terrorism incident, they will be used but that, by implication, their engagement in terrorism exercises means that this is a bad thing. I am confused.

Mr Murphy—No, I am not saying it is a bad thing that the miliary are working with the police in terrorism exercises. The point is that the view is that this is only going to be used in extraordinary circumstances. The view that is being put to me is that it will not be used every day; it is the sort of power that will only be used when domestic violence occurs and when there is an extraordinary incident. I am saying that it may be used more frequently than when an extraordinary incident occurs. An indication of that is the level of training and cooperation that has been taking place between police and the miliary since the 2000 Olympic Games.

CHAIR—You would not want them to be untrained and ill-equipped to operate.

Mr Murphy—Of course they need to be trained. But when you look at that in the context of this legislation, which expands the types of incidents in which the powers could be used, particularly in use offshore in relation to asylum seekers, defending critical infrastructure and the many other areas that expands it, I think you will find that it is something that may well be used regularly rather than for an extraordinary event.

CHAIR—I will not divert the questioning any further.

Senator MARK BISHOP—I want to pursue two points, Mr Murphy. The first is an extension of the previous questioning and the second is the issue of critical infrastructure and its effect on life and limb—a point you made in your submission. Firstly, in the context of terrorist exercises that have occurred in a number of countries, there is obviously a role for intelligence gathering. There is obviously a role for the dissemination of information gained from overseas military intelligence agencies to the Australian military and down the line to police forces and the like. If there is a real perception of an actual threat or occasion where violence might be encountered against individuals, train stations, bus stations or other types of infrastructure and if there is a feeling, understanding or belief that there is overseas involvement, funding or support, such as in the terrorist incidents we have seen in other parts of the world, what is your in-principle objection to a part of the Australian security apparatus—that is, the military, as opposed to defence agencies, ASIO or intelligence agencies—being involved in offering assistance to state agencies? What is your in-principle objection in that limited scenario?

Mr Murphy—It is our view that the primary agency that should be performing a policing function is the police.

Senator MARK BISHOP—You have characterised this as a policing debate. Why is it not a security debate, a security action?

Mr Murphy—I think it is a policing debate because the circumstances in which the legislation envisages that this should be used are not in the context of defence of the nation;

they are in the context of policing issues. When you look at the powers that have been recently given to ASIO and the Federal Police and the amendments that have been pushed through in relation to terrorism, and when you also look at the increased powers that have been given to state police to deal with riots, for example in New South Wales, then you see that those organisations and agencies should have the power to deal with those situations themselves. While it may be necessary in an extraordinary case to deploy the military, in line with what I said earlier, it is now becoming a situation where we see that they are regularly trading with the police—and we may see that the military are regularly deployed with police when these incidents arise. Instead of it being an extraordinary event, something that is so large that the police are unable to deal with it, we are of the view that we are seeing the military and the police working closely together and we may well see that, when incidents occur, we deploy them together. It really should not be a security or defence problem. It is effectively a policing problem. The whole purpose of giving the police and ASIO the extra powers that they have been provided with was to put them in a position where they could adequately cope with this type of event. So it should not be necessary to think of the Defence Force as an additional player, an adjunct to that that would be regularly used.

Senator MARK BISHOP—So the summary of your answer is that there are in existence already sufficient, adequate and appropriate powers that allow state police forces to properly and fully carry out protections in the environment I outlined to you. Is that your short answer?

Mr Murphy—I think that there is adequate power in state and Commonwealth policing agencies to deal with those threats appropriately. I am worried that this legislation is providing the ability to have an ongoing policing role for the military in relation to what you describe as security threats. I do not believe it is appropriate for the military to be used in that manner.

Senator MARK BISHOP—You have answered the question. Thank you for that. You are arguing that there is sufficient existing state authority and power to carry out their functions effectively in such a situation. Do you then totally reject the proposition that it is legitimate to characterise an attack on persons or infrastructure in the Commonwealth—organised by, funded by or in support of overseas or outside activities—as a security matter? Do you believe that is totally inappropriate? Should it only ever be characterised as a policing matter?

Mr Murphy—We are talking about criminal offences. That is effectively what these are. They are criminal offences—whether they involve an ordinary person taking action or someone who is characterised as a terrorist taking action to maliciously damage infrastructure or to hurt somebody else—and that is the way these things need to be dealt with. Otherwise the danger is that you will create a two-tiered legal system where there is one type of response to something that is characterised as a security or terrorism matter and an entirely different criminal justice system for matters that are not characterised in that way, even though the facts or the nature of the offence may be virtually identical. That is the danger you end up with if you treat these things differently. As I say, these are primarily policing functions. There are criminal offences that may be committed by someone who is intent on perpetrating an act of terrorism. That person needs to be dealt with in the context of criminal law, not in the context of the military taking control of a situation.

Senator MARK BISHOP—Even though the person engaged in terrorism activities against individuals or against property would regard their actions as being political, in that it has a

political end—a political purpose or a set of political beliefs—as opposed to purely criminal action: common assault, murder and rioting after drunken behaviour? There is a qualitative difference between politically motivated behaviour and drunken behaviour.

Mr Murphy—I think that is an area where you are going to find great difficulty in defining the difference. One could argue that the recent Cronulla riots in Sydney had a political motivation behind them. That has certainly been the commentary of many radio personalities. There is evidence from police that there were organised racist groups behind the riots. That is not something that I would characterise as a security or terrorism problem, yet, if that were the definition that you used, it could fall into that category. Where do you draw the line? As I say, you are in danger of creating two entirely different responses: one that is a military or security response and another one that is a response using the ordinary criminal justice system.

Senator MARK BISHOP—Or having two different responses to two different situations?

Mr Murphy—I do not see it that way. I think that all of those acts are clearly criminal offences. That is why they are in the Crimes Act and that is the way they should be treated.

Senator MARK BISHOP—Okay. Can I switch to another issue I want to pursue. You have made some points in your submission about critical infrastructure. I think I am correct in saying that you objected to ADF involvement in protection of critical infrastructure where there was not a direct threat to life. Is that a fair synopsis of your argument?

Mr Murphy—I will let my colleague talk about that.

Mr Bhasin—Our objection is that the proposed amendments introduce the right for the ADF, in protecting critical infrastructure, to use lethal force to protect property where there is no direct threat to life. So there can be an indirect threat. I think the term is 'indirectly endangers life', which we say is too low a threat to start authorising the use of lethal force.

Senator MARK BISHOP—Let us take some worst-case scenarios: the occupation of coal and gas plants; the occupation of offshore oil and gas fields which have pipelines to the mainland that supply gas for generation in power stations and supply hospitals—that sort of down-the-system usage of gas. The interruption at supply can be immediately dangerous to a whole range of people, some engaged in industry and some engaged in health. Would you regard the illegal occupation of or the illegal interference with those sorts of facilities as being a direct or indirect threat?

Mr Bhasin—I think it is a question of how the ADF personnel, if they were involved in those sorts of call-out provisions, would proceed. If there is an automatic authorisation for the use of lethal force without any test of proportionality, it means that they do not have to even attempt to take over or detain people. In that situation, if they storm, let us say, the occupied premises and try to detain people, and then there is a direct threat to their own lives, obviously they are authorised to use force, as they are already. The problem is where you start to authorise the use of force without having exhausted other means of trying to end the situation.

Senator MARK BISHOP—You do not think there is a fundamental right on the part of the Commonwealth, or on the part of the relevant state to request the Commonwealth, to

intervene in order to guarantee the supply of oil, gas and the like to the mainland? Does there have to be an extended negotiation phase?

Mr Bhasin—No. I would say that there are situations in which perhaps the ADF could be involved. However, in those situations there should not be an automatic authorisation to use lethal force. We should not suspend our general civilian context in these circumstances.

Senator MARK BISHOP—If it is okay to authorise ADF intervention, why do you believe it is necessary to limit their on-ground activity? How would you do it? If you are sending in soldiers or joint soldiers and police to resume occupation of a range of critical infrastructure plants, how do they go about their job if they cannot use force?

Mr Bhasin—They can use force, but the problem at the moment is that the provisions authorise the use of lethal force to directly protect property when there is no direct threat to a human life. Under the current provisions, if they were to go in and be fired at, for example, then they could respond in that they are protecting life, including their own life. However, these provisions extend beyond that to protecting the infrastructure in the absence of a threat to life. What that implies is that you could have a sniper, for example, shooting someone without first attempting a non-violent resolution to the issue.

Mr Murphy—It is really about proportionality, where the legislation provides for the most extreme force to be used and does not dictate any level of proportionality. While there are always going to be examples that can be looked at where you might need to use the most extreme force to deal with the problem, our argument is that the legislation should be amended to include a level of proportionality so that you do not immediately go to that. The current legislation does not provide the ability for you to immediately use the most extreme response, but there may be an escalating degree of proportionality affecting the way you deal with the situation.

Senator MARK BISHOP—Is that decision to be made by remote officers in control or, if you like, the commander, or whatever he is called, of the force that is assigned responsibility for recovering the site?

Mr Murphy—That is why we say that in our view the legislation should include provisions that deal with those scenarios. There should be, for example, rules of engagement, processes that explain how the military interact with police and a basis that provides a framework for decision making, so that we ensure through the legislation exactly what sort of proportion is able to be used in different circumstances.

Senator MARK BISHOP—I have a final question. Can you comprehend any legitimate reason at all why an individual or a group would want to take over or take control of a gas field, an oil field, an oil plant or a coal station?

Mr Murphy—There may well be reasons why someone would want to do that.

Senator MARK BISHOP—Can you give me any legitimate reasons—something that is justifiable?

Mr Murphy—I am not in the business of dreaming up crimes, but I suppose people could say that as an act of terrorism someone might do that. You might also have someone who is a lunatic who decides to do that, or it might be done as an act of revenge. There are many

reasons why someone might commit a crime, so it is always possible that that would happen. As we say, in our view it is a criminal offence.

Senator MARK BISHOP—But not probable.

Senator BOB BROWN—What about the situation where there are repeated oil spills and people occupy an installation demanding that environmental standards be abided by, for example.

Senator MARK BISHOP—Senator Brown has asked the question: would it be acceptable to forcibly take over a site?

Mr Murphy—I think the big problem with this legislation is that it does not adequately deal with instances where you may have lawful or unlawful acts of civil disobedience. They may not pose a direct threat to infrastructure; they may pose an indirect threat. Industrial action might also do that. That is the problem with this legislation. You need to read it not in the context of what a sensible government or sensible people executing orders under it are going to do; you need to look at what the power is that is provided and look at the extent of it in a context where someone might attempt to use it to its extreme.

To give you an example, we have recently had the ACTU asking people to come out and protest. We had the government declaring that as an unlawful protest. Let's say that air traffic controllers decided to join that: would that pose a danger to critical infrastructure? Is that an incident that could trigger the call-out of troops in order to deal with that protest? Or, in the example that Senator Brown has given, if people are committing an act of civil disobedience in protesting an oil spill, it is unclear in the legislation what the scope of its use is. I do not for a moment think that a sensible government would use it in that manner. But you need to look at how it might be used in the future by a government that is not sensible, because there is no sunset clause on this and it is something that is likely to remain on the statute books for years.

Senator BARTLETT—Perhaps that scenario might be one to just focus on a bit more. I am no historical expert, but my understanding is that, going back some years, some of the few times troops have been called out have involved industrial situations. They might have even been called out by a Labor government, from memory—

Senator MARK BISHOP—In 1949—once.

Senator BARTLETT—Thank you, yes. In the context of the issues of the infrastructure and extra powers that have been put in place, obviously instances like that are rare and controversial. But there are extra dangers that we are opening up by putting through this legislation for circumstances like that. As you say, for any government down the track we need to put in place extra protections via amendments to not so much prevent the call-out perhaps but to ensure that the extra powers that are given here are not misused, open to misuse or what people might believe is unreasonable. I guess I am looking for more specific suggestions for amendments, beyond me pointing to the problem. Does it just go back to the infrastructure question or—

Mr Murphy—No. I think it is a broader—conceptual, really—issue of the way in which this is being sought to be used. The way the legislation started was really on the basis of one event: the Sydney 2000 Olympics, which was an extraordinary, special event. It was thought

we might need the military if things got out of control at that event. As I have said, what we see now is a view that it might need to be used more regularly than that or, certainly, that there should be preparation for that.

The power in this bill is being extended, where it is now contemplating a number of different areas in which troops may be deployed to operate alongside police or if state authorities cannot control a disturbance of some description. At the same time, there has really been no clear attempt in the legislation to set out the finer detail of how that is going to operate. How exactly are the troops going to integrate with the police? How is the chain of command going to operate in particular circumstances? How is proportionality going to be measured in the way that they respond?

While people are certainly going to argue that there will be things at a lower level, like rules of engagement that are put in place and possibly protocols that are negotiated between police and the military, I do not think that that is good enough in this context. In ordinary policing it is quite clear what the powers of police are, how they can operate, the extent of them and how the police go about doing their business. There is really nothing in this legislation that dictates that. If the military is going to be used in what is effectively a civilian context, then that should be clearly spelt out.

Senator BARTLETT—Thank you for that. I think we will tease out some of those points with future witnesses. You and a number of other submissions have raised the issue of constitutionality. I do not particularly want to get into a lawyer's debate about that. I want to get an understanding of what the practical consequence of that is. If it is the case that these provisions might be extending the powers of the Commonwealth beyond what is conferred in the Constitution, I presume that we cannot get around that by an amendment to this legislation. Also, what does that mean? Would it require somebody to test that via a High Court challenge, and would that have to be a state government? Would anyone else have that ability? And does that leave, in the perhaps unlikely circumstance of a state government actually taking the feds to court about this, members of the Defence Force in a very worrisome situation legally?

Mr Murphy—It does. The problem is that the legislation and the associated material do not clearly set out where the government see they have the constitutional power to implement this. They clearly and expressly have the power in the Constitution to defend the nation. The government clearly have the power to deal with a situation of civil disorder, when a request is made by the executive of the state to do it, under section 119 of the Constitution. But the legislation appears to go beyond that, whereby, if the Commonwealth are of the view that a state cannot handle a situation of disorder, they can simply send the troops in and take control. An article about this was written by Professor Tony Blackshield in the *Pacific Defence Reporter* after the 1978 Bowral incident, questioning whether a request had actually been made when the troops were deployed there. But the consequences of this are that, if the power is not clear, you may have troops deployed who are acting illegally and who have no power to take the actions that they do. They may be depriving people of their liberty by holding them and by ordering them to move to other areas, and they may be committing criminal offences, such as assault, wounding and so on. That is the position that the troops may be in if the legislation is found to be constitutionally invalid.

Senator BARTLETT—Accepting for the moment that it is at least arguable, is it feasible to at least reduce that risk by clarifying in the legislation the head of power or something?

Mr Murphy—I think it would be helpful if the government were to set out in the legislation exactly where the power is derived from as they see it. That would make it clearer. It may then reduce the debate about whether it is constitutionally valid or not. I also think certain powers could be set out more clearly in terms of where they derive from. At the moment, as I see it, there is clear power for the Commonwealth in terms of defending its own interests. I do not think that is the debate.

The debate is when you are dealing with something that is wholly a state issue and the Commonwealth seeks to deploy troops because it thinks that the state cannot handle whatever the disturbance is—for example, the Macquarie Fields riots or the Cronulla riots in New South Wales recently—if there is no threat to Commonwealth infrastructure, if a state does not request but the Commonwealth decides that it is out of control and the troops should be deployed to deal with it. That is the sort of situation that I think is constitutionally uncertain.

Senator BARTLETT—Can I just ask a second technical and final question? If such a circumstance arose to challenge the constitutionality, would only a state government be able to do that?

Mr Murphy—The problem it will have is that it will be determined after the event.

Senator BARTLETT—There is certainly that, but I am also trying to find out whether only a state government would have the standing to make that challenge, as opposed to—

Mr Murphy—The state government may be able to do that before an event occurs—

Senator BARTLETT—But you or I couldn't do it.

Mr Murphy—but in this case it is most likely that some affected individual is going to take action against the government once they are affected under the legislation. If someone is confined at gunpoint by troops who are used in the context of this legislation to remove them to a particular area, you may find an individual taking action after the event, and that is when it would be determined. So the more information that is provided now, the less likelihood there is of a challenge afterwards.

Senator MARK BISHOP—The states are very silent on this, Mr Murphy, aren't they?

Mr Murphy—They are not saying anything about it, in the same way that the New South Wales government was equally silent in Bowral in 1978.

Senator MARK BISHOP—I am not aware that they have put in submissions objecting at all to the proposed bill.

Mr Murphy—I understand that, but I think you need to look at it in its political rather than its legal context. It may be difficult politically for a state government to oppose anything that seems to be assisting the fight against terrorism. In its political context it may be difficult for the states to argue about that, and in its legal context I think it still poses a problem where there is no power for the Commonwealth to intervene in a wholly state matter unless the state requests it.

Senator BOB BROWN—Just going back to your suggestion that the bill should set out where the powers are derived from, I am interested in that because it does give at least a logical indication from the government of where the logic of the bill and its powers come from. I think that is something the committee might be interested in recommending on an important bill like this—one which one might imagine would ultimately be tested by the High Court. Would you see any difficulty in simply putting in the lead-in to the bill that it is dependent on section 119 of the Constitution, or wherever?

Mr Murphy—I think the first issue is that there are elements of the legislation that in our view are inconsistent with section 119 and section 51(vi) of the Constitution, because it clearly seems to allow the government to deploy troops without the requirement of a request from the states in circumstances where, as I said, the matter is a wholly state matter. Inserting something into the bill indicating where the powers are may clarify that, but then, if the bill itself is going to be inconsistent with that, I do not know that ultimately it is going to help. If there is no power in the Constitution to pass the legislation that parliament is seeking, fiddling with the wording is not really going to fix that problem.

Senator BOB BROWN—It may be that we can only try to seek information from the government on its legal advice that this does not fall foul of the Constitution.

Mr Murphy—I think the committee should be asking the government about that and getting them to clearly articulate exactly where they think they have the power to implement this legislation. The worst possible thing that could happen would be to have troops deployed, to exercise the powers that the bill, if it is passed into law, will confer on them, and then to have a problem afterwards, so that those troops that are simply doing their duty find out later that they had no power to be there, no power to follow the orders that they did. That is the danger, unless this is sorted out.

Senator BOB BROWN—With respect to the prime ministerial power to direct the call-out of troops, does that derive from the Constitution?

Mr Murphy—I think you need to ask the government where they think that derives from. I am not certain where they think it derives from. I think it would be prudent to require any power exercised in that fashion to be confirmed by somebody else. You do not want to give the power to any individual to call out the troops without at least having some form of review.

Senator BOB BROWN—The Constitution does not mention the Prime Minister, let alone confer powers.

Mr Murphy—That is right. Also, setting aside the constitutional issue, do you really want to confer that much power on an individual? Is it a decision that should be made by the government, by the cabinet, as a collective decision, or at least confirmed, if there is insufficient time to make a collective decision?

Senator BOB BROWN—The powers contained in the bill do not allow military personnel to stop or restrict protest, dissent, assembly or industrial action unless there is a reasonable likelihood of a threat to persons or property. The use of the word 'reasonable' there means that it becomes a political decision. I would foresee there being a reasonable threat to persons or property if one of us drives in a car from Sydney to Melbourne down the Hume Highway.

Mr Murphy—I think that is the problem—it could be widely interpreted in order to take action against most industrial action or protest, particularly if that action is unlawful. Quite often you have unlawful industrial action. For example, most of an industrial protest—say, the recent ACTU protest—might be perfectly calm and peaceful, but what if you have elements of that group that are threatening property? Does it then entitle the government to deploy troops and to take action against everybody involved in that? It is unclear.

Senator BOB BROWN—I have a final hypothetical along those lines. I have a recollection of a protest on the Franklin River 25 or so years ago, in which 1,600 people were arrested and 500 jailed for allegedly breaking the law to prevent a power station being built. There was widespread speculation and an insistence in parliament that violence was being threatened in that situation, although it never eventuated. Do you see any reason why a Prime Minister could not have called out the troops to intervene in that dispute under this legislation?

Mr Murphy—No. The whole objective of the legislation is to allow the Prime Minister to call out the troops in those circumstances. The problem is that if you look at this in a security context and in terms of acts of terrorism, you are also going to end up having exactly that sort of civil disobedience and that sort of protest—something that should ordinarily be expected in a democracy—falling into the same definitions of threats to critical infrastructure that you have in the legislation.

Senator JOHNSTON—Mr Murphy, can I take you to proposed section 51CB and this concern that you have about the designation of critical infrastructure. Can we go through the section, because I am having some difficulty coming to terms with your concerns. Subsection (1) of section 51CB states:

> The authorising Ministers ...

So it involves more than one minister, and my understanding is that it is the Prime Minister, the defence minister or the Attorney-General, or any two of them. So there is more than one mind involved. It continues:

> ... may, in writing, declare that particular infrastructure, or a part of particular infrastructure, in Australia or in the Australian offshore area is designated critical infrastructure.

Subsection (2) states:

> However, the authorising Ministers may do so only if they believe on reasonable grounds ...

There is a threshold question there—that is, not one but two have to be satisfied on reasonable grounds, firstly, that there is a threat of damage or disruption to the operation of the infrastructure or part of it and, secondly, that such threat of damage or disruption would—not may—directly or indirectly endanger the life of, or cause serious injury to, other persons. There are about four threshold issues there before critical infrastructure is declared. What could possibly be wrong with that?

Mr Murphy—That is the process of declaring critical infrastructure. It may well be that a serious threat is made against an item of infrastructure but the deployment of troops to protect that infrastructure may be made in the context of some other event—a peaceful protest or civil disobedience.

Senator JOHNSTON—That is unlawful, then. We cannot legislate to stop people breaking the law, can we?

Mr Murphy—What do you mean by that?

Senator JOHNSTON—The ministers can only use this power if there is a threat that would, on reasonable grounds, in their view, lead to an endangerment of life or the threat of causing serious injury to civilians.

Mr Murphy—I understand that. The issue, though, is that that is in relation to declaring critical infrastructure.

Senator JOHNSTON—Well, you cannot get the ADF out until you have declared it.

Mr Murphy—That is right.

Mr Bhasin—The example given in the explanatory memorandum in item 78 is power supply to a hospital. The problem is that, once you trigger the designation of critical infrastructure, you then authorise lethal force to protect that infrastructure. What we are saying is that it could endanger life, and it is too low a threshold to authorise the taking of life.

Senator JOHNSTON—So you want the ministers to look at the probabilities—the odds, if you like—relating to the risks to life in a hospital in making decisions about power going to a hospital. With great respect, that is not the real world.

Mr Bhasin—The section that authorises the use of lethal force—section 51T(2)—authorises the use of force to protect against the threat to critical infrastructure without there being a threat to life. In the circumstances where, on the ground, there is in fact a threat to life, the current provisions are sufficient. There is no need to lower the threshold further to say that this will endanger life, because the threat to a power supply would, I think, endanger life, and a broad range of examples is given. That is too low a threshold to then go and say that lethal force is now authorised to protect that infrastructure without any further test of proportionality. For example, if someone were to approach that infrastructure, lethal force would be authorised without there being any test within the legislation as to whether that response would be proportionate to the threat; whereas, if there is a direct threat now, the existing powers are sufficient.

Senator JOHNSTON—How do you weigh the proportionality of a threat where you perceive that it would directly or indirectly lead to the endangerment of life? How do you weigh that up?

Mr Murphy—It is something that needs to be done—

Senator TROOD—It is very rare that the police do it.

Mr Murphy—in the context of the event. The problem here is that you are authorising the maximum force to be used, to take somebody's life, to protect the critical infrastructure, without first requiring that reasonable steps be taken to ensure that that is what is necessary to deal with the threat. It may be that someone threatening a power plant or something can be dealt with without the use of lethal force, yet the legislation authorises the use of lethal force and does not require any proportionality in dealing with it.

Senator JOHNSTON—We are about five steps back from, firstly, domestic security on the ground in these installations; secondly, state police; and finally, as a last resort, you come to this sort of measure. The scenario you have painted is a classic state police scenario. The situation that is anticipated here is where there is a serious infrastructure threat that would directly endanger life. The provision would be used after all of those things have failed or when the situation is beyond the capability of those measures. This is not something to be used as a first resort. Surely this provision, as a last resort, is adequate and sensible: two ministers making a decision on reasonable grounds where life is in danger.

Mr Murphy—In our view, what you need to do is put in a further test that suggests that the response has to be proportional and does not directly authorise the most extreme power—the power to shoot to kill to protect the infrastructure—but requires that the military in that case take action that is proportional. They may well be able to deal with the situation without resorting to the power to shoot to kill, and that is what they should do in those circumstances before they resort to that power.

I would also say that the problem that is created is that you may have a series of concurrent events. For example, there may be a serious threat to the infrastructure—let us say from a terrorist organisation that is wanting to blow up a power plant—and at the same time you might have a peaceful group of protesters protesting some event at the same critical infrastructure. The way this is constructed does not adequately deal with those two events. You may find that one event triggers the critical infrastructure prevention and another event occurs in which those powers can be used that is concurrent with that. Without some degree of proportionality, you may end up with an order being given that there is a serious threat, it is correct, those checks and balances that you have taken me through have been met, and then there is an entirely different group of people who are there not to blow up the critical infrastructure or to commit an act of terrorism but to peacefully protest. Without proportionality, this power may be used against them.

CHAIR—We do need to wrap up this session.

Senator JOHNSTON—My last question is: do you perceive, in your experience, that state police forces have the capability to deal with offshore and airborne threats relating to radioactive, chemical and biological weapons; plastic explosives and all the derivatives of explosives; and weapons of mass destruction? Do you believe that state police forces have the capability to deal with those sorts of things?

Mr Murphy—I would have thought that the Federal Police are the appropriate body to deal with that.

Senator JOHNSTON—Do you believe the Federal Police have the capability to deal with that?

Mr Murphy—They keep telling us they have the capability and the powers to deal with terrorism. I have got no reason to disbelieve them.

Senator JOHNSTON—I am talking about just capability, not powers.

Mr Murphy—They say that they do, and I have no reason to disbelieve them.

CHAIR—Senator Ludwig undertakes to ask one question. I always believe Senator Ludwig.

Senator LUDWIG—With respect to section 51CB under schedule 2, I cannot find the words 'last resort' there. Are you familiar with whether or not that is in the legislation—in other words, the use of the power? It is the issue about incidents involving designated critical infrastructure.

Mr Murphy—That was our view of it: once they are satisfied about those measures, they can declare it as critical infrastructure. They do not have to wait until they have exhausted the use of the police or where it is in the middle of an event where action has been taken before that happens; but once they are satisfied about those tests that are listed there, then it can be declared. It does not require any earlier process.

Senator LUDWIG—Thank you.

CHAIR—Thank you very much for appearing before the committee today, Mr Murphy and Mr Bhasin.

[10.10 am]

KADOUS, Dr Mohammed Waleed, Co-convenor, Australian Muslim Civil Rights Advocacy Network

KHAN, Mr Zaid, Executive Member, Australian Muslim Civil Rights Advocacy Network

CHAIR—I welcome our next witnesses. The committee has received your submission, numbered 7. Do you wish to make any amendments or alterations to that submission?

Dr Kadous—Yes, we would like to submit a list of recommendations to the committee.

CHAIR—Thank you. I invite you to make an opening statement, after which we will go to questions.

Dr Kadous—I thank the committee for the opportunity to appear. From our submission we have formed a list of concrete recommendations for the committee's convenience. Our primary objection to this legislation is that it seems to be part of what is becoming a disturbing tendency with any piece of legislation that is claimed to be in some way related to terrorism. Each piece of existing legislation has a set of three consistent flaws, which I will outline. I know that the committee has done extensive work in ameliorating some of those flaws in previous legislation, especially that related to antiterrorism. The first flaw is that the laws are discretionary in their application and use broad language that encompasses activities not only associated with terrorism and related activities but also other ancillary activities that normal people would not think of as terrorism. The discretionary nature of these laws is problematic because it relies on the goodwill of the government and not the appropriateness of the laws themselves for their defence and creates a weakness exploitable by less than scrupulous people. In the case of these bills, the discretionary nature comes from poorly defined concepts like domestic violence and critical infrastructure. The result is that, despite the defences they contain, the laws could be used in situations not related to terrorism.

The second flaw is that they grant unprecedented powers that are not really consistent with a democracy—for instance, the shoot-to-kill powers that relate merely to the protection of property—and that the activities of the military are not subject to the normal laws of the country but rather to the Jervis Bay treaty. The original legislation of 2002 granted unprecedented powers applying, it was claimed, to a particular situation, but these new laws have expanded that even further.

The third flaw is the absence of mechanisms for accountability, transparency and review. These are fundamental aspects of a stable democracy. In the case of this legislation, the members of the military are not charged under normal offences, decisions around call-outs cannot be rescinded or affected by parliament and there are only minimal examinations available for the legitimacy of a call-out. The justification for these three flaws is always the same: we are in an age of terrorism and this requires a legal response. While preventing terrorism and coping with its effects may require some modification of the law, such measures need to be introduced carefully and with careful review, not through massive steps as is the case with this legislation. Terrorism should never be used to force our hand when considering laws such as these. The recommendations that we have provided are mostly directly related to the flaws that we see in these bills. Our view is that the legislation is unnecessary and

dangerous, but we hope our recommendations may address these flaws and be a step in the right direction. My colleague will outline the reasons for our recommendations.

Mr Khan—I would like to reiterate our thanks for this opportunity and give an overview of the basis of our recommendations. We ask for the justification for the legislation to be clearly articulated. The government has not increased the level of terrorism alert, which has remained at the same level—medium—for the last four years. During this time, no violent domestic situation has arisen, and yet these bills substantially broaden the powers afforded to the Australian Defence Force in the 2000 act. In our opinion it has not been demonstrated adequately that these powers are necessary. The extension is indicative of legislative creep. We recommend that the bill be afforded due scrutiny and its implementation be held back until a clear justification for the further broadening of the powers contained within the bill is put forward.

Definitions of terms contained within the proposed bill are vague and imprecise. The effectiveness of any legislation rests on the certainty of its content. The circumstances, persons, property and events that activate or bring into force the provisions of the bill must be clearly identifiable prior to those provisions becoming actionable. Any member of the public should know exactly under what circumstances and to whom this bill will apply. After all, one purpose of the law is to regulate the behaviour of its citizens. In its current proposed form we submit that this is clearly not the case. A clear example of this is the term 'domestic violence'. This is a vague expression which is undefined both legislatively and judicially. It is found in section 119 of the Constitution. Constitutional case law suggests the term is to be read extremely broadly, to encompass more than terrorism. Strikes, political demonstrations and industrial action may fall within its meaning. In fact, in the last 50 years the ADF has been used four times invoking this power and all four times it has been in industrial action. This raises the worrying prospect of any protest against government policy facing a broadly empowered ADF personnel.

Similarly, 'critical infrastructure' is loosely defined to conceivably include anything from a building to a computer, to a road, to a telephone network. In addition to this lack of clarity, the term 'critical' itself remains undefined.

Senator MARK BISHOP—Mr Khan, could I just interrupt you. Did I hear you say that in more recent years the Australian defence forces have been used four times in industrial action? Did I mishear you?

Mr Khan—No.

Senator MARK BISHOP—I am not aware of that.

CHAIR—I thought we would clarify that at the end, Senator Bishop.

Senator MARK BISHOP—Okay. We might come back to that point, Mr Khan.

CHAIR—We will let you have first questions, Senator Bishop. Could you finish your remarks, Mr Khan, please. Then we will go to questions.

Mr Khan—The PM, the defence minister or the Attorney-General may designate infrastructure as critical. We point to the Federation of Community Legal Centres of Victoria submission and the concern that by failing to define 'critical' we are left wondering for whom

it is critical. For the government or for the public are economic interests critical? These terms could be used to protect the interests of private profit rather than the broader public interest. What is economically essential may be found to be critical over what is critical for the community. We recommend the committee seeks further clarification of these terms in order to give certainty to the law they actuate.

AMCRAN recommend that mechanisms for review, transparency and accountability relating to the call-out provisions be provided for. Currently there is no provision for legal review. Section 51X provides for only limited scrutiny after the event. The defence minister need only within seven days of the call-out present the two houses with a copy of the order. This does not constitute a means by which the legitimacy of the call-out may be adequately and judicially tested. The government is doing nothing more than merely notifying parliament of what it has already done and is in no way being held accountable for the legitimacy of its actions. AMCRAN have made it clear we do not condone the use of ADF personnel within a domestic context other than as already provided for within section 119 of the Constitution.

Should the government pursue a policy of increased militarisation of our society, we make the following recommendations. ADF personnel should report within the criminal jurisdiction of the Commonwealth Criminal Code. This would remove the possibility of a lack of impartiality in a military trial held under the auspices of the law of the Jervis Bay territory. In addition, this would ensure that ADF personnel actions do not fall outside domestic criminal thresholds. We also recommend that the powers conferred on ADF personnel are not extended to reserve or emergency forces. These groups of personnel lack the experience, training and professionalism of full-time ADF members. They represent the clearest and most obvious potential for misuse and abuse of the proposed extension of ADF personnel powers.

The rules governing the use of force must also be clearly defined and readily available to the public. The government may not decide what level of sacrifice is justifiable to combat a perceived threat. Extension of the shoot-to-kill provisions to include the protection of property is a disturbing and unprecedented move. We also ask that Australia comply with its international obligations. It has numerous obligations, including under the International Covenant on Civil and Political Rights. Since this bill was implemented as a response to a specific set of circumstances, we recommend that it only be in force for as long as those circumstances continue to exist. Should this bill be passed, we recommend the insertion of a three-year sunset clause followed by a public, transparent and participatory review.

CHAIR—Thanks very much, Dr Kadous and Mr Khan.

Senator MARK BISHOP—Mr Khan, you might go back to that point I raised in your opening comments. You made a remark about ADF personnel being used in four industrial disputes, I think in more recent times. Did I hear you correctly?

Mr Khan—Correct.

Senator MARK BISHOP—Could you repeat what you said and develop it a bit, explain it a bit?

Mr Khan—Both the Labor and Liberal governments have used the ADF against strikers, in 1949 against coalminers—

Senator MARK BISHOP—We know that one.

Mr Khan—in 1953 against wharf labourers, in 1981 against Qantas and in 1989 against pilots.

Dr Kadous—There is a citation there of *Call out the troops*, a paper by Elizabeth Ward, which we can make available to Senator Bishop if he would like.

Senator MARK BISHOP—No. I am familiar with the first two and I am certainly familiar with the last one. I just wanted to get this on record. That is fine. Can I turn to the document you provided us with. Can you have a look at recommendation 6? You say there 'section 51AA(3) should be a blanket exemption from the use of reserved personnel'. Reserved personnel are not boys, old retirees or Home Guard. They are increasingly fully trained, fully renumerated, fully functional and integrated parts of the Australian defence forces. They are used regularly on deployments offshore—East Timor and the Solomons, both of which required degrees of firepower—and they are certainly comprehended to be used in situations further afield. That is, they are fully functioning parts of the military forces. On that basis, why should they be distinguished if the ADF uses them all of the time? If they are suitable, trained and available why shouldn't they be used in this type of situation in Australia?

Dr Kadous—I thank Senator Bishop for his question. Our concern on that particular issue is that, with due respect to what you have mentioned, those kinds of situations are inherently military situations. The situations that would occur in the application of these laws in a civil context are so unusual that it would be very difficult for reservists to know absolutely what to do. My understanding of most reservists is that it is training one weekend a month, two weeks a year. Given that this is a bill of last resort, we should at least put forward our most professional and our most highly trained staff.

Senator MARK BISHOP—No. I am making the exact opposite point to you, Dr Kadous. There has been a fundamental change in the nature of training and use of reservist forces in more recent years, and that fundamental change is going to continue.

Dr Kadous—Are they full-time staff?

Senator MARK BISHOP—No.

Dr Kadous—Are they trained to the same level as other officers?

Senator MARK BISHOP—Yes.

Dr Kadous—How is that possible if they are not full time? How will they keep their skills as finely tuned? What we are talking about in the application in the civil space is a very unusual set of circumstances, and you need everybody that is there working as part of a team, as they would on a full-time basis, to minimise the probability of some kind of accidental harm. The police are trained to deal with civil situations. The military are not; they are trained to deal with military situations. The police are equipped to deal with civil situations; they are equipped with Glocks, which are more appropriate for a civil context. The military are not; they are trained to use submachine guns and high-powered equipment. I really do not think the skill sets that are appropriate in a military context are the same in the civil context. It is

important, in order for the minimisation of the risk of accidental harm, that we put forward the full-time staff, the most professional staff.

Senator MARK BISHOP—If they were appropriately trained to engage in this type of domestic activity, would you still have an in-principle objection?

Dr Kadous—If they were appropriately trained and working full time I would not have an objection to—

Senator MARK BISHOP—I did not ask you that. I said: if they were appropriately trained. They are trained to go to Iraq and East Timor and engage in military activities—

Dr Kadous—Yes, but are they fully aware of Australia's laws? It would be possible, for example, that you might have a group of ADF soldiers that are specialised in how to deal with civil situations. It might not be possible, or we cannot guarantee, that reservists, who do not have the same full-time commitment to the Army, would have the same kind of level of training. So the issue is really one of minimising risk of accidental harm. In a situation where you have people who are equipped with high-powered weaponry in a civil context you need your best, most professional and full-time staff—the people who are equipped to work and used to working with each other on a full-time basis. I really think that the approach is to minimise the probability of harm. The existing 2000 legislation already allows for the call-out of reserves, and to remove that is not something that this committee could recommend. But it is a last resort for when there are no other ADF staff available. To make it a par-for-the-course action is, I think, inappropriate.

Senator MARK BISHOP—Recommendation 4 says that, in order to ensure proper review transparency and accountability, decisions to designate infrastructure as critical should be subject to judicial review. A situation where critical infrastructure is proposed to be designated is in an emergency, instant situation where there is an immediate problem on the ground in one of the states or territories. Is your argument that the decision made by the Prime Minister or by two of the three ministers should be subject to judicial review? If your answer is yes, is that instant review or is it done over a period of time subject to normal appellate courts?

Dr Kadous—I think it would be close to the latter. We are not saying that we approve of the bill but, within the constraints of the bill, if an item were to be designated as critical infrastructure, we understand that there might be a need to make that urgent. But there should always be a capability, even if after the fact, but within a reasonable time frame, to take that to a court of law and say, 'This is not critical infrastructure.' The Attorney-General or the ministers who authorised that particular infrastructure being designated as critical should be amenable to having a review. We all know how easy it is for political needs to enter into the decision-making process on issues such as these. It is important for transparency that those decisions be amenable to review.

Mr Khan—If we are vesting this much power in the hands of essentially three persons, and maybe one, at some point the decision—perhaps not at the moment it is made—needs to be contestable. That is probably the thrust of our—

Senator MARK BISHOP—What would be the point in contesting it after the event?

Dr Kadous—For example, let us say the troops were called out today. If the matter could be taken before a court in the next week or so to basically enforce that that infrastructure not be declared as critical then that would be something reasonable. Perhaps 'during the event' is a better description or definition of what we have in mind, so that if a person feels that the designation as critical infrastructure is inappropriate they can take action.

CHAIR—Which person, Dr Kadous? Who has the standing to take this matter to a full appellate process, given that the critical infrastructure probably won't be standing at the end of it?

Senator JOHNSTON—A state attorney-general?

Senator LUDWIG—The difficulty is also that you are describing something that would be interlocutory in nature. The difficulty then is whether you intend to have merits review under section 39B of the ADJR Act or use the original jurisdiction of the High Court for prerogative writs. What you are trying to suggest is very hazy, unless you can bring to it a bit more sharpness. It does not seem to make sense to me, unfortunately, unless you can explain how you intend to define 'standing'. In other words, is 'standing', in being able to take an action—where that action is going to be interlocutory in nature because it is going to stop the military or the minister from doing some action or force the minister to revoke a ministerial decision—going to be based on merits review or law? And, if it is by operation of law, what you are saying should be reviewed is ministerial discretion, and that is very hard.

CHAIR—Perhaps, Dr Kadous, in terms of the complexity of the issues, you would like to consider that on notice.

Dr Kadous—That was going to be my suggestion. I will take that question on notice.

Senator MARK BISHOP—Concerning recommendation 7, which says that for the sake of transparency rules of engagement contained within the Army's *Manual of Land Warfare* should be made public, why is that? The police do not. Say the police were engaged in addressing a terrorist incident in the state of New South Wales involving a threat to life or a threat to infrastructure and it was just contained within New South Wales by the New South Wales police. Their instructions are not made public. Orders come down the line and the officers at field level carry them out and are responsible to their seniors—

Dr Kadous—I understand that.

Senator MARK BISHOP—If the military are invited to become involved, why are the rules of engagement so different?

Dr Kadous—I think that this is part of the problem. The military *Manual for Land Warfare* is just that: it is a manual for warfare. We do not feel that it is appropriate that that should govern the actions of the military within a civilian context.

Senator MARK BISHOP—But every time you deploy the military there are a different set of rules of engagement created that govern the conduct of the military when they are in the field. They are all different. If we deploy troops overseas to East Timor or Afghanistan or Iraq it is not the manual that tells them how they are to behave, it is the rules of engagement for that conflict.

Dr Kadous—Perhaps we should clarify this—and it may have been due to our misunderstanding of the nature of the operation of the military. What we meant was that there is a certain manual that defines exactly how troops should behave in warfare—is that not the case? These rules govern exactly how they should relate to the people that they interact with. This is being used as a basis for parts of the legislation and we think that, insofar as it relates to the application of the legislation, it should be made public rather than it being an act referring to a document that is not public in its nature. It is very unfortunate that the bill should refer to something that is not public because then it makes it very difficult to understand the law as it stands.

Senator BARTLETT—I have just one question on one issue and it goes a bit outside what you have put forward today and even the specifics of what is in the bill—

CHAIR—It is probably not in order then, Senator Bartlett, in relation to the inquiry.

Senator BARTLETT—It is relevant, though, based on the very positive recommendation the committee made in regard to the recent security legislation and the issues that have been raised in previous inquiries before this committee in regard to Muslim community fears that they are going to be particularly targeted. This came up with the ASIO laws and those sorts of things. Their concerns are quite legitimate and I think that the committee in its last report acknowledged that and put a recommendation to try to address some of those concerns. Assuming you feel able to comment, is this specific bill a source of concern amongst the Muslim communities? I must say it would be hard to see how it would specifically focus on Muslim groups but, given the broader climate, I can see how it might generate some apprehension. Does any of that apprehension exist and should we try to address it by seeking to ensure that reassurance is provided, or is the issue being raised through some of the communication and consultation channels that exist at the moment?

Dr Kadous—I have a couple of comments on that particular issue. Firstly, it is seen as a long chain of pieces of legislation, many of which have come before this committee. I am sure the committee is fully aware of them. I think that the application of the law would cause extreme reaction in the Muslim community. We are used to seeing people in blue and that is something we respect. We respect the law of this country, necessarily, of course. But, if members of the community were to see people in khaki on the streets with submachine guns or the military or ADF personnel in the streets, it has a different connotation to people and a different significance, especially if you have been subject to a military presence in civilian situations before.

Further, we think there is a risk, inevitably, of some kind of discrimination—although perhaps discrimination is too strong a word—or profiling or stereotyping occurring when people who are not trained to deal with civilian situations are used in civilian situations. We think there is a higher likelihood of accidental harm to people of Muslim background or people who appear Arab or Muslim. We have already seen instances of that in the UK, for instance.

I think that one issue, which I think is largely based on misinformation and misapprehension rather than the facts of the case, is that, when people hear that they are subject to the Jervis Bay Territory laws or that the military is not subject to the usual laws of

the country—again, I do not make this assertion—it may be perceived as Australia's own Guantanamo Bay in the sense that this body of law, which does not normally apply to personnel or Australian citizens, is now being applied and the military have a separate set of laws for themselves. I think on those aspects—

Senator MARK BISHOP—They always have.

Dr Kadous—Yes, but they do not usually interact with civilian populations.

Senator BARTLETT—So if this legislation goes forward there may be some benefit in ensuring that, as part of this process, some of those concerns in Muslim communities are addressed or some information is provided clarifying the reality of it in order to deal with some of those apprehensions?

Dr Kadous—Yes. I know that the community is apprehensive. Within our community we do as much as we can to ensure that they have a realistic picture and understanding of the legislation, one that is not based on distortion. We will do our part, of course, to prevent that distortion.

Senator MARK BISHOP—The Australian defence forces regularly engage with the Australian civil community in extreme bushfire situations. The military are called out to provide assistance. In drought situations the military are called out to provide assistance. The military, through the corps of engineers, has been for the last seven or eight years and is currently engaged in extensive road building, bridge building and supply of water and utility services all through the north of this country to remote Indigenous communities. They are part and parcel of our life in events of social and cultural significance. They attend every school fete via the marching band or whatever. It is incorrect to assert that the Australian defence forces are not part of our community and do not regularly engage at all levels with different sectors of our community in all states and territories.

Dr Kadous—If that is what the senator understood by what I said then I apologise. I totally agree with the senator, but none of those situations involves the potential use of lethal force. That particular scenario is a very different one to helping with bushfires or attending school fetes and having marching bands there. There is the presence of lethal force. You are only going to call these troops out when there is a situation of high tension. We are not talking about those kinds of normal circumstances to which the senator has referred. We are talking about very extraordinary circumstances where things go wrong. As I mentioned, we saw that in the UK. It is not the first instance of such an event happening.

Senator MARK BISHOP—No. I accept your comments entirely. The only point I am making is that the Australian military come from and are part of the entire community.

Dr Kadous—I totally and wholeheartedly agree with that.

Mr Khan—Yes, we accept that. In fact, the Constitution does provide for that.

Dr Kadous—I apologise if I inferred otherwise.

CHAIR—In fact, your submission infers otherwise, Dr Kadous. It is helpful that you have clarified AMCRANS's view on that matter. I wonder whether you have looked at the Department of Defence submission to this inquiry.

Dr Kadous—Yes, I have.

CHAIR—In relation to the observations you made recently about the application of the laws of the Jervis Bay Territory, can I ask you to have another look at part 7 of the Department of Defence submission, which sets out quite clearly the circumstances which obtain in that regard, and perhaps respond to the committee on notice clarifying your views in relation to that?

Dr Kadous—Yes.

Senator TROOD—Do I take it that you do not have any objections to the matters that Senator Bishop raised about the involvement of the defence forces in various activities, such as earthquakes, floods and things of that kind? That is not an objection you raise, is it?

Dr Kadous—No, of course not.

Mr Khan—Not at all.

Dr Kadous—Their provision with regard to lethal force and the potential for them to use lethal force is of deep concern to us.

Senator TROOD—With regard to recommendation 3 on the sheet you have just circulated, there seem to be at least two problems with this. One is the matter of timeliness—that is, that the procedures of the parliament can sometimes be rather slow in relation to what is obviously an emergency where this situation would arise. The other and more profound problem is the fact that the parliament has never had any kind of responsibility or power to check the executive in relation to the call-out of military forces; that particular role is an executive function of government. Have you turned your mind to how you think that particular constitutional issue can be overcome by this recommendation?

Mr Khan—Does that imply that it is unquestionable—that is, once this decision is made, it is unquestionable?

Senator TROOD—No, I did not say that but, constitutionally, it is an executive power to call out the military forces; it is not a legislative power.

Dr Kadous—We were faced with the same challenge that has previously been referred to with regard to the judicial review aspect—that is, that it would be difficult to make a decision of the executive amenable to a judicial review. That would obviously be inappropriate. What else is there to check the Prime Minister except the parliament that has elected him? I think it is important. Perhaps we have not fully examined the issue but, as I understand it, there is a process for parliament to be called within six days once a call-out happens.

Mr Khan—It is seven days.

Dr Kadous—Once that has occurred, why should parliament not have the power to examine that?

Senator TROOD—You seem to be implying in this recommendation that there is a need for a more urgent decision by the parliament. I would have thought that there would be a requirement that there be a more urgent decision. These are extraordinary circumstances we are talking about, and I would have thought that they do not admit of waiting six or seven days or for a period of time for the parliament to be recalled.

Dr Kadous—Yes and, in the spirit of making a concrete recommendation rather than one that was impractical, our thoughts were—and perhaps the recommendation did not make it clear—that, when that parliament is recalled within that seven-day period, that is the point at which the recall after the call-out could take place.

Senator TROOD—I just fear that this is probably too much time for what is likely to be an extreme situation.

Dr Kadous—As you have already suggested, it is hard to imagine an alternative. Perhaps one of the other presenters could come up with a more concrete alternative on that particular issue. It is a difficult situation, but there has to be at least some review, even if it is displaced temporarily for that decision.

CHAIR—Thank you very much. Dr Kadous, as ever, the committee has a very tight reporting timetable. In fact, we table the report on this particular bill a week from today. I think there are two matters which we asked if you would be kind enough to take on notice.

Dr Kadous—The capability for judicial review.

CHAIR—Yes, and Mr Khan indicated that would be the case. I wanted you to have a look at your references to the application of the laws of the Jervis Bay Territory and the points made in part 7 of the Department of Defence's submission to clarify the point that you were making, because I am not sure that I quite understood the detail of that. That would be helpful for us.

Dr Kadous—Yes.

CHAIR—Thank you both very much for appearing before the committee today and for your submission and supplementary submission.

[10.45 am]

O'BRIEN, Ms Julie Catherine, Senior Lawyer, Human Rights and Equal Opportunity Commission

CHAIR—Welcome. HREOC has lodged a submission with the committee, which we have numbered 13. Do you wish to make any amendments or alterations to that submission?

Ms O'Brien—No.

CHAIR—I ask you to make an opening statement, and we will go to questions after that.

Ms O'Brien—Thank you for inviting the commission to appear before you today. The commission notes that the purpose of this bill is to permit the utilisation of the Australian Defence Force to protect states and territories against domestic violence and to protect Commonwealth interests. New divisions 2A, 3A and 3B and the amendments proposed to division 4 provide additional powers to members of the Defence Force.

The commission's principal concern is that the new provisions may not adequately safeguard the right to life under article 6 of the International Covenant on Civil and Political Rights. The commission's principal submission is that, for Australia to comply with its international human rights obligations, additional safeguards should be placed on these new powers. Accordingly, the commission seeks to make some modest and practical suggestions as to how the bill could be amended so as to better guarantee the fundamental human right to life.

First, new divisions 3A and 3B set out the powers of the Defence Force when operating in the offshore area and in internal waters and when taking measures against aircraft. Under these divisions, a member of the Defence Force may order 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 onboard and potentially at the crash site. The commission acknowledges that the bill imposes conditions on the use of these measures but submits that these safeguards should be strengthened or clarified. In particular, the commission submits that a more stringent condition should be imposed for the giving of an order that authorises measures that may lead to the loss of life to adequately reflect the international law requirement of proportionality. That is, the process whereby the minister authorises the taking of the new measures should be subject to the condition that the minister is satisfied that the purpose for which the measure is authorised cannot be achieved by a lesser measure. The same condition should be imposed on the process whereby a member of the Defence Force gives an order that is to be implemented by another member of the Defence Force.

Secondly, proposed division 2A sets out the new powers of the Defence Force in relation to designated critical infrastructure. The use of these new powers, which includes the use of lethal force to protect such infrastructure, is limited principally by the command of the Chief of the Defence Force. The Chief of the Defence Force appears to be afforded a wide discretion as to the use of these powers, and the commission submits that this discretion should be limited by a condition requiring the Chief of the Defence Force in giving an order to be satisfied that no lesser action would achieve the desired purpose.

Finally, the commission notes that the bill proposes to weaken the existing restriction on the use of lethal force in division 4 of the Defence Act when a member of the Defence Force is exercising these new powers under division 2A, 3A or 3B. The commission submits that these proposed amendments impermissibly widen the circumstances in which the Defence Force is authorised to use lethal force and that they should be removed from the bill. The commission submits that existing section 51T(2) of the Defence Act appropriately restricts the use of lethal force in accordance with Australia's international human rights obligations.

CHAIR—Thank you very much. We will now go to questions.

Senator JOHNSTON—As I read it, you seek to put a check and balance in place with the use of the 'no lesser action' determination down the chain of command. What concerns me about that is that at the end of the day we have a system in Australia where executive power is used and exercised by elected parliamentary representatives as opposed to salaried unelected government officials and, in this instance, ADF members. How do you justify putting upon the soldiers of ADF members the arbitration and adjudication function of determining what is the 'lesser action', to use the words of your amendment? I find that a bit concerning in light of our system.

Ms O'Brien—The bill contemplates the chain of command and imposes conditions at each level of the chain of command, right down to the member of the Defence Force taking the actual measure. The bill contemplates that that actual member of the Defence Force taking the measure must consider whether the measure is reasonable and necessary. The commission welcomes the approach within the bill—in certain divisions but not all divisions—such that the member of the Defence Force giving the order and the member of the Defence Force taking the measure is required to consider what is reasonable and necessary. The commission's submission is that in view of the fact that these orders authorise measures that may well lead to the loss of life, 'reasonable and necessary' is not a stringent enough condition to reflect the international law requirement of proportionality. What is required is that the member or the minister consider the least restrictive means. So it is about increasing the proportionality.

Senator JOHNSTON—I do not have a problem with the minister; all I am worried about is the soldiers. You are asking them to make a determination with the benefit of hindsight—when we go back and look at what they did—as to whether or not that was the lesser version of the use of ultimate force.

Ms O'Brien—I should say that the proportionality test for members of the Defence Force already exists in the bill and the commission is just asking for a more stringent proportionality test. What I would say is that we are not asking the member to necessarily consider it with the benefit of hindsight, although that is probably involved; what we are asking the member to consider when they are giving an order is whether the measure they are ordering is the least restrictive action. That is not the member actually taking the measure. You will note in the commission's submission that it restricts this more stringent proportionality test to the member giving the order rather than the member taking the measure, even though the bill already contemplates a proportionality test for the member taking the measure.

Senator JOHNSTON—I am fine with the proportionality test, because that is an operational matter which is a matter of course and not so open to retrospective interpretation with the benefit of hindsight. But when you say that the individual member has to make a decision and has to adopt the least aggressive course of action and use a minimum of force in each opportunity, from whose perspective are you speaking?

Ms O'Brien—The perspective of the person who is giving the order.

Senator JOHNSTON—Right.

Ms O'Brien—I do not understand how the concerns in relation to the benefit of hindsight are any different for the reasonable and necessary test than they are in relation to the least restrictive means, especially given that the submission is that the member—

Senator JOHNSTON—One is potentially subjective and one is potentially objective.

Ms O'Brien—I suppose that depends on how 'reasonable and necessary' is interpreted in the legislation.

Senator JOHNSTON—Correct.

Ms O'Brien—It is the member giving the order who must be satisfied. They must be satisfied at that point in time.

Senator JOHNSTON—We could go on about this all day—

CHAIR—Actually, we can't!

Senator JOHNSTON—I will finish on this point. The problem that I have with your submission is that we all, I think—I hope—see that the abuse of human rights, and particularly the human right to life, around the world flows in many respects largely from the exercise of power by military personnel that is beyond what is reasonable in terms of a decision to shoot or not to shoot. Where you impose this quite complex matrix of adjudication of what is the lesser capability to be employed, it worries me that you are saying to serving officers and personnel, 'You are charged with a lawful duty to interpret your orders and then carry them out in a way that has to be evaluated, adjudicated and assessed,' in circumstances where I think that is potentially very unrealistic.

Ms O'Brien—In my submission, adding an additional safeguard of 'the least restrictive means' does not add a level of complexity and analysis but rather clarifies for the member giving an order in the circumstances that you describe what exactly we are talking about by 'reasonable and necessary'. It just means that the member must then turn their mind to the question of what the least restrictive means is.

Senator MARK BISHOP—Is that subjective or objective?

Ms O'Brien—The 'least restrictive means'?

Senator MARK BISHOP—Yes.

Ms O'Brien—The submission is that the member must be satisfied, which will be a subjective test.

Senator MARK BISHOP—If it is a subjective test and it is the officer or soldier engaged in doing the urgent, quick thought action as to the type of behaviour he must engage in and he

comes to a view in that environment that the course of action he proposes is the least restrictive means, how can that in either a legal sense or a practical sense be the subject of interference or review by someone else after the event? You have to rely on his expertise, training and skill in making that subjective decision.

Ms O'Brien—In the bill, there are a number of conditions imposed on the use of the measures—one of which is that the member is satisfied that the measure is reasonable and necessary in the circumstances. I do not see how that is—

Senator MARK BISHOP—If the member has made that decision—and that is a subjective call—is that not then the end of the discussion?

Ms O'Brien—The end of the discussion with regard to 'reasonable and necessary'?

Senator MARK BISHOP—Yes.

Ms O'Brien—No. In the commission's submission, the least restrictive means test is a more stringent proportionality condition than 'reasonable and necessary'.

Senator MARK BISHOP—So it is not a subjective call of the member; it is an objective test after the event?

Senator JOHNSTON—That is right.

Senator MARK BISHOP—Do you see the conflict that we see?

Ms O'Brien—No, I am not sure that I can.

Senator MARK BISHOP—I asked you whether the application of the 'least restrictive' test was subjective or objective. You responded that it is subjective; that it is subjective by the actor in the environment—the soldier engaged in the activity.

Ms O'Brien—It is subjective in that it is the member who must be satisfied.

Senator MARK BISHOP—Yes, it is the member who must be satisfied and it is the member who must make the decision. But, if you are going to apply an additional overlay in reviewing his instant subjective test, by definition, his instant subjective test could not have been subjective; it has to have been—

Ms O'Brien—Made on objective grounds.

Senator MARK BISHOP—Ab initio and at review.

Ms O'Brien—It has to be made on objective grounds at the time it is made, in the same way that the 'reasonable and necessary' test would be interpreted.

Senator MARK BISHOP—So it is not subjective?

Ms O'Brien—It is subjective in that it is the member who must be satisfied. It is not a reasonable person who must be satisfied that the member took the action that was the least restrictive means; it is the member who must be satisfied.

Senator MARK BISHOP—But it is subjective on reasonable grounds.

CHAIR—In the spirit of happy intervention, Senator Johnston has a point to make.

Senator JOHNSTON—I would like to continue this because I think it is interesting. If, on your analysis, a person was shot and killed by a member of the ADF, is it not, on your

amendment, always going to be open to have someone say, 'Why did you not wound the person? That is the lesser of the two alternatives'? At the end of the day, is this what we really want?

Ms O'Brien—Yes. If a vessel travelling towards Australia is considered to be a real threat of a high order, do we want people to consider whether it is reasonable and necessary to destroy the vessel—perhaps it is reasonable and necessary to destroy the vessel—or whether it is possible to contain the vessel by capturing it and detaining the people on board? I would certainly want the members of the Defence Force and the minister providing the authorisation to consider whether there were a least restrictive means of achieving the aim, which is to avert the threat.

Senator JOHNSTON—If a member of the Defence Force is confronted with a reasonable threat to life or the endangerment of life and injury to civilian personnel and the person is in fact holding a replica weapon, under your analysis that person should have been wounded; he should not have been killed.

Ms O'Brien—Sorry; I do not think I understand the question.

Senator JOHNSTON—The person was a purported threat, not a real threat. Because, with the benefit of hindsight, the lesser of the two means available, shoot to kill or wound—

Ms O'Brien—The test is not one with the benefit of hindsight.

Senator JOHNSTON—It is going to be. Your situation is going to make it that way, because he should have employed the lesser—

Ms O'Brien—I am not sure that I can agree.

Senator JOHNSTON—We are going to second-guess every bit of action as to whether it was the least lethal.

Ms O'Brien—The member at the time of taking the order is to second-guess whether there is a lesser measure that could achieve the aim, and I think that would be a welcome amendment to the bill. The member should do that at the time of taking the order rather than with the benefit of hindsight a couple of weeks later.

Senator BARTLETT—I have two questions. I think you mentioned putting notes in specifying the ICCPR in a few contexts. I understand that and I am wondering what the practical legal impact of that would be. Would folding the specifics of that into the decision-making guidelines just be an extra encouragement or would it have some legal effect?

Ms O'Brien—It would not have legal effect in that obviously you are already required to comply with the International Covenant on Civil and Political Rights, as we mention in our submission. In view of the fact that it is already in the legislation—and we welcome it—that the minister is required to have regard to international law—I think that is the expression in the legislation—it would just draw to the attention of the legislature the jurisprudence under the ICCPR. I think that could be done in a note to the section. I think it could be done in the explanatory memorandum.

Senator BARTLETT—Flowing on from that, you suggest, I think, that sections 51T(2A) and (2B) may potentially breach article 6 of the ICCPR, if I am reading the right notes. I

suppose this is a purely technical question. If there are sections that you think breach the ICCPR and other sections that you are required to have regard to, does that create some sort of problem in a legal sense or nominally?

Ms O'Brien—The commission's submission is that those provisions that may breach the ICCPR be removed from the bill. If the commission's submissions are accepted, those provisions will be removed.

Senator BARTLETT—If we accept the first one and not the second one, even without putting in the note about the ICCPR. I guess that is my question. I think we are required just to give regard to rather than comply with international obligations.

Ms O'Brien—The legislation says 'have regard to'.

Senator BARTLETT—In that sense I suppose my specific question is, if on one hand we are supposed to give regard to international obligations, and I think you are saying there is a part of the bill that potentially breaches the ICCPR, where does that leave that obligation? Is it the commission's view that those two sections clearly breach ICCPR or may breach it in certain circumstances if they are used in a certain way?

Ms O'Brien—I think that those provisions run a real risk of breaching the ICCPR. I suppose that is as high as the commission could put it.

Senator BARTLETT—I think you have suggested that the considerations that apply under divisions 3A and 3B should also apply under division 2, which deals with recapturing buildings and freeing hostages. Could you expand a bit more on why you see that as necessary? Is it just an extra protection?

Ms O'Brien—Yes. I think the bill in divisions 3A and 3B contemplates the chain of command and the different conditions that should be placed on members giving orders and on members taking the actual measures, and these appear to be entirely absent in division 2A. The commission's view is that those safeguards which consider real possibilities or probabilities of there being a mistake of fact or a change of circumstances should also apply to the designated critical infrastructure powers.

Senator BARTLETT—Are you aware of any reason why they are not there with regard to 2A?

Ms O'Brien—I am not. There was no comment on that in the explanatory memorandum as far as I am aware.

Senator TROOD—Concerning recommendation 8 in your submission, with regard to the international covenant, I am just a bit troubled by the fact that you would have the Chief of the Defence Force exercise this responsibility when he in fact is in a chain of command relationship to the government. It seems to me that you may potentially put him—or her, at some juncture in the future—in a position where he is required to reassess decisions that have been made at the political level in relation to this matter. Is that not a difficulty?

Ms O'Brien—That is an interesting point, Senator. The reason the commission made the submission that it be the Chief of the Defence Force who considers the obligations under the ICCPR is because in relation to the powers for designated critical infrastructure the minister does not authorise the taking of the measures. The minister's role ends once the infrastructure

is declared critical infrastructure and then the power goes to the Chief of the Defence Force. In all the other divisions of the bill the Governor-General acts on the advice of authorising ministers or the minister makes the order to call out the Defence Force. Then there is another safeguard, where the minister actually authorises the taking of the particular action. It is in providing that second authorisation that the minister is required to take into account the obligations under the ICCPR. This division is drafted a little bit differently—I am not sure why. One of the safeguards they take out, amongst the others that I was speaking to Senator Bartlett about, is the provision that the minister authorise the taking of the particular measure. So there is no place for the minister to take into account the obligations under the ICCPR.

Senator TROOD—Would not the better idea be for the minister to take that into account, rather than give that responsibility to the Chief of the Defence Force?

Ms O'Brien—Sure, if there—

Senator TROOD—If indeed this recommendation were to be seen to be a good one.

Ms O'Brien—If this recommendation were seen to be a good one, I suppose that would also involve the minister authorising the taking of the particular measures, which is absent from the bill at the moment.

Senator TROOD—I prefer that kind of responsibility to be in the hands of the political authority rather than the Defence Force authority.

Ms O'Brien—Sure. Although, of course, in authorising measures that may lead to a loss of life the Chief of the Defence Force should be cognisant of the obligations under the International Covenant on Civil and Political Rights.

Senator TROOD—'Cognisant' is different from your particular—

Ms O'Brien—'Having regard to'.

Senator TROOD—Yes. In relation to recommendation 7, what would be achieved by that particular satisfaction being achieved: that no lesser measure would achieve the desired purpose? How do you think that would enhance the use of the power?

Ms O'Brien—Perhaps it would not enhance the use of the power; perhaps it would restrict the use of the power. This is a curious provision of the bill, but there is no restriction on the use of the powers by the Chief of the Defence Force. Those protections that exist in all the other divisions are absent from this division. Accordingly, in the commission's submission we say that this runs the risk of breaching the ICCPR, which provides that no-one shall be arbitrarily deprived of their right to life and that the circumstances in which someone could be deprived of their right to life must be strictly controlled and limited. In my view, affording the Chief of the Defence Force with a power with a very wide discretion and no test as to proportionality runs the risk of breaching the ICCPR. There has to be a proportionality test and the commission's submission was that the proportionality test be that used under article 6 and article 9 of the ICCPR, which is the least restrictive means.

Senator LUDWIG—Recommendation 8 in your submission includes the phrase 'to have regard to Australia's international obligations.' I am curious as to why you chose 'have regard to'. The previous witness Dr Kadous had the view that we should comply with the ICCPR, but that would be incorporating international obligations into domestic law. You say that the

Chief of the Defence Force should 'have regard to.' How would that interact with Teoh's case or with the legitimate expectations that the Chief of the Defence Force would, when making decisions of this type, have regard to international conventions in any event? How would putting that into domestic law interact with that case? Would it change that case or would it tie the High Court in the sense that they would then have a different view?

Ms O'Brien—I do not think so. It is just a reminder, rather than a change in the law, that the minister—

Senator LUDWIG—If the Chief of the Defence Force's decision were reviewable—and I suspect it would be as a prerogative writ—then on that basis he would have to have 'regard to'. How would the Chief of the Defence Force be able to demonstrate that?

Ms O'Brien—That would be a matter for the Chief of the Defence Force.

Senator LUDWIG—Yes, but you have put the phrase 'have regard to,' so how should he be able to do that? Should he then have a copy of the ICCPR to be able to demonstrate—

Ms O'Brien—I should hope so.

Senator LUDWIG—He might be familiar with it.

Ms O'Brien—Is your difficulty with the phrase 'have regard to' or with it being the Chief of the Defence Force rather than the minister?

Senator LUDWIG—I am interested in why you have chosen the phrase 'have regard to.'

Ms O'Brien—It is for a very simple reason which is that it is the phrase used throughout the rest of the legislation.

Senator LUDWIG—So you have incorporated that—

Ms O'Brien—It was missing from that division and so the commission sought to extend it to that division.

Senator LUDWIG—In extending it to that division, why then is that linked to the Chief of the Defence Force?

Ms O'Brien—Because there is no ministerial power in that section to authorise a taking of measures. The power resides with the Chief of the Defence Force.

Senator LUDWIG—That is helpful to clarify that. Thank you.

Senator BOB BROWN—I have a question about the authorisation by the Prime Minister for action to be taken. Do think that should be reviewable by the parliament or each house of parliament?

Ms O'Brien—The commission has not made any submissions on that point so I would have to take that question on notice.

Senator BOB BROWN—Thank you.

CHAIR—You have just taken a question on notice, Ms O'Brien. As you have heard me say to earlier witnesses, we have an extremely tight time frame so a response on that as soon as possible would be greatly appreciated.

[11.14 am]

JAMES, Mr Neil, Executive Director, Australia Defence Association

CHAIR—Welcome. The Australia Defence Association has lodged a submission with the committee which we have numbered 11. Do you need to make any amendments or alterations to that submission?

Mr James—We need to change one word. In section 61 we talk about 'Crown privilege'; in fact we meant to say 'Crown prerogative'. There are no substantial changes.

CHAIR—Thank you, Mr James, for appearing at short notice. I indicated to members of the committee privately that we would be providing the ADA with an opportunity to appear at this point in the program, and we are grateful for your attendance here today. We apologise for any confusion in the process of organising that. Would you like to make a short opening statement? At the conclusion of that we will go to questions from members of the committee.

Mr James—Thank you for inviting the ADA to make a submission and to appear here today. The Australia Defence Association, being the main community based public interest guardian on defence and national security issues, is obviously very interested in this bill. We believe that this is certainly a matter that requires considerable scrutiny by legislative committees. Just in case you think we are here as some tame cat lobby for the Defence Force, I assure you that that—

Senator LUDWIG—We have not heard that.

Senator MARK BISHOP—We have never known you to be tame, Mr James.

Senator TROOD—That is news to me.

CHAIR—Please go on, Mr James.

Mr James—Thank you for the flattery, Senators. The ADA has long been very careful in its appraisals of the use of the Defence Force in domestic law enforcement. In fact, we have long advocated a coast guard, mainly on the grounds that the Navy should not be used for barrier law enforcement. We notice that in the last election a number of parties finally adopted our platform. We hope that by the next election all parties will. It is not as if we have not considered this aspect of using the Defence Force for domestic law enforcement in a quite serious matter.

We have also raised with state police forces and the Department of Defence on a number of occasions how it is absolutely wrong for the special operations group of the state police forces to dress in DPCU uniform, the same as the military now do. Getting back to the point raised by the gentleman from AMCRAN, confusion in the public eye about who is a policeman and who is a soldier cannot be a good thing in counter-terrorist type situations.

That said, what worried the ADA most about a number of the public submissions, particularly those made by the civil liberties lobbies and by AMCRAN was that they were reasonably 'ahistorical' and did not look into the true history of what is actually involved. Since our form of parliamentary government started to develop after the English Civil War there have been hundreds and hundreds of years of common law precedent in legislation and

practice and that appeared to be ignored by a number of the submissions. That worried us greatly.

There seemed to be major confusion between the use of the Defence Force in situations requiring the Defence Force to use force and situations where the Defence Force is not required to use force. There also seemed to be a considerable degree of lack of research about the issues of last resort and minimum force. The point we make is, quite simply, that since Federation on only three occasions—the Victoria Police strike in the mid 1920s, the Commonwealth Heads of Government Regional Meeting in February 1978 and in the Territory of Papua New Guinea on New Britain in 1970—has the Defence Force actually ever been called out to provide aid to the civil power in a force situation. In fact, in New Britain in 1970, while the call out was proclaimed, the troops were not actually used. In 1978, while the troops were called out and were used, no force was actually applied to anyone. In the Victoria Police strike of the mid 1920s the limited numbers of troops then available to the Victorian government were provided by the Commonwealth at the Victorian government's request when there was reasonably serious rioting in the centre of Melbourne, and much looting. So in 105 years there have only been three incidents of this type of activity being required and all of them in quite extreme circumstances. A number of the public submissions made to the committee did not reflect that.

There are two more quick points that we would make on the historical side. One of the very strong doctrines that have always been applied within military training and military procedures, for instance, is that when troops are called out in aid to civil power situations, they never take automatic weapons unless it is a counter-terrorist assault. Again, that type of fact, which is clearly demonstrable to anyone who studies their history books, was not reflected in a number of the submissions. We thank the committee for securing the withdrawal from AMCRAN of some of their more offensive comments about the Defence Force and the police forces, which we thought were unnecessary in a submission to a parliamentary inquiry.

Finally, there is one quick point that we would make about the reserves. There seems to be in a number of the public submissions—and I think Senator Bishop's question has brought this out quite well—a complete misunderstanding of the new, modern, integrated structure of the Defence Force. It is simply not operationally possible to make very strict definitions about when you can and cannot use part-time and full-time forces, because a number of the units are now so integrated that it would just be operationally ludicrous to try. But as we did say in our submission, it is our understanding that this bill does not change the current prohibition on using the reserve forces in strike breaking, and we think that is a good idea. That should be the one area where reserve forces should continue to not be used.

Just to finish up, the bill is obviously aimed at counter-terrorism situations. Whilst the scope of that has increased noticeably over the last five or 10 years, it is still clearly an amendment aimed mainly at counter-terrorist situations. The only other situation in which the provisions of the bill could be called into use is, quite frankly, serious rioting on a scale where the Defence Force would be called in. A number of the public submissions had a great number of irrelevant examples ranging from *Tampa* to you name it which really do not apply under the provisions of this bill. On our study of the bill, we think it is justified. We have a couple of

minor doubts about one or two minor provisions but, on the basis that it is a total package, we think it should be supported. Thank you for having us here today.

CHAIR—Thank you very much, Mr James, and, again, thank you for appearing at short notice.

Senator MARK BISHOP—One of your points was that on only three occasions have the ADF, when they have been called out to assist state authorities in civilian matters, been authorised to use force. Is that correct?

Mr James—Yes.

Senator MARK BISHOP—One of the previous witnesses referred to four instances of industrial action in which the ADF had been called out. He mentioned the coal lumpers' strike in 1949, a wharf dispute in 1953, a Qantas dispute in the late seventies and the air pilots' strike in the middle or late eighties, from memory. On those four occasions when the ADF were used, do you recall if they were authorised to use force and if they did use force?

Mr James—No. In each of those situations—three of them under Labor governments and one under a conservative government—they were uses of the Defence Force to resolve an industrial dispute. None of them involved the Defence Force using force. In only the coal dispute in 1949 and the wharf dispute in 1953 or 1954 was there violence involved. In each case, the Defence Force provided the labour force only and the relevant state police force, which I think was New South Wales in both cases, provided the protection and what you would loosely call the 'violence-diminishing capability'. The Defence Force was not called upon to use force in those situations. The only aspect that could have involved a member of the Defence Force using force was for their own personal self defence or for the defence of other people threatened. In that situation, their rights are no different from any other Australian citizen's.

Senator MARK BISHOP—There has been a fair bit of discussion about this concept of proportionality. There has also been discussion about the appropriate level of response by a senior officer. The argument that has been put is, essentially, that the most preferred option is the least violent option. Do you have a comment on either of those propositions: what is proportionality and how it works, and what is the least worst option?

Mr James—To offer some examples from personal experience, in the days of the Bowral incident in February 1978—some time ago—I was an infantry platoon commander. I was in Malaysia at the time. Companies deployed to Malaysia did significant anti-riot training before they went, because part of their job there was to protect the Australian facilities at the airbase from possible civil disturbances. It was my clear experience as a 21-year-old platoon commander that any Australian officer who thinks that Australian soldiers are going to fire willy-nilly on an Australian crowd has another think coming. The questions asked by my soldiers during the training were incredibly perceptive, and they knew full well that, should they be required to put down a riot, the full weight of the law would bear on them if they did not do the right thing.

The biggest problem we had getting across to them—and the training systems have taken this fully into account—was changing them from a military situation, where you often apply maximum force, to an aid to the civil power situation, where you have to apply minimum

force. You only use the minimum amount of force necessary to resolve the situation and then only for the minimum time required. With the right amount of training, this is not hard for soldiers to absorb, so long as they have the confidence that the procedures are clear.

Again, in the mid-1980s I was the senior intelligence officer for the Army in Victoria and the Riverina, and we did an extensive number of counter-terrorist exercises with the Federal and Victoria Police. Our defence instructions at the time were about half an inch thick, full of erudite legal opinions written by QCs on what was and was not justified by common law precedent. I can remember during these exercises that the Victorian government's lawyers just could not get over this. They kept saying, 'Why doesn't the federal government just pass a law regulating all of this in a statute? Why do they make the Defence Force continue to rely on the reasonably dense legal opinions of QCs?' I have to admit that was a very good question. The advantage of the bill that came in for the Sydney 2000 Olympics was that it fixed up part of this situation. The great advantage of this bill is that it regulates in a statute lots of things that have depended on common law precedents and QCs' opinions stretching back to the 1970s. On that point alone, the bill is a significant step forward. It is not part of the militarisation of Australian society. To answer a point made earlier as to why the Federal Police cannot do this, to handle lots of things that you would call on the military to do, you would have to militarise the Federal Police—and we do not see that as necessarily being an advantage in Australian society.

Senator MARK BISHOP—There has been a lot of discussion about this. The argument put by the Council for Civil Liberties and the other groups earlier is that it is inappropriate, unnecessary and counter to our long history and tradition in this country to involve the ADF in civil action, civil misbehaviour or civil disturbance, and that it is singularly wrong to characterise a lot of activity as security or terrorist activity when it is in fact breaking the criminal law. What is your response to that argument? From your organisation's position, is there any reason at all as to why it is inappropriate for the military to be involved in this type of behaviour?

Mr James—We would argue that the argument put by the civil liberties organisations is partially right and partially wrong. The ability to use the military to assist the civil police as a last resort in dire emergency has always existed in our system. It is a testament to the nature of Australian society that it has been used so rarely. We see that is an advantage, not a disadvantage.

It would be silly to believe there will be no circumstances ever in Australia that will be fully within the abilities of the civil police forces to handle. There will always be situations where they will need to call on the resources of the rest of the government apparatus. In some of those cases, many of the resources they need can be provided by other than the military. But in the final analysis, if they require assistance in a situation requiring the disciplined and controlled use of armed force beyond the capabilities of a police force, then where else in the country are they going to get it but the Defence Force?

That is why our national antiterrorist plan, which keeps having its name changed over the years, since about 1972 from memory, has always allowed for the possibility that a close assault of a terrorist stronghold that is beyond the capability of a state police special operations group will be done by a tactical assault group provided by the Defence Force, but

within a very strictly governed situation of the primacy of civil power and the civil political authority always being in charge.

You cannot have martial law in our system. You can have martial law in the American system, ironically enough, but it is impossible to have martial law in the legal system as we have it in Britain, Canada, Australia and New Zealand—and that is a good thing. It is wrong to think that there will never be a situation where the police force might not require military assistance. It might have only happened three times since Federation, but it has happened three times.

Senator MARK BISHOP—Senator Brown referred to his earlier life when he was involved in some protests concerning the Franklin River issue back in the late seventies, early eighties or whenever it was. I have been involved from time to time in a number of nasty industrial disputes which involved picket lines and the like. That was non-violent protest behaviour by organised groups to essentially put an argument in a different way—a way that has been long tolerated in our community. Does this bill anticipate military involvement in those types of processes, as I defined them? If it does, is it appropriate?

Mr James—The focus of this bill as we understand it would not apply to that situation. They are purely exercises of legitimate political dissent. They do not involve violence. In all the cases you have cited, the state governments involved did not even contemplate calling on the military for assistance. There are lots of other things they could do. Just one example is Tasmania, because it is a good one—not just because Senator Brown comes from there. It has the smallest police force and has the least resources available to it. It is the only police force that does not have a full-time special operations group. For instance, when we had the massacre at Port Arthur, the Victorian police special operations group were flown in, sworn in as Tasmanian policemen at Hobart airport and deployed to Port Arthur, when they thought Bryant was still there and had not realised he had left to go to the other area where he killed the second lot of people. That was a commonsense reaction using entirely civil police resources. There was no concept of the fact, once they realised they had a lunatic on their hands and not a terrorist, that it involved the national antiterrorist plan, although ironically enough it did involve some of the procedures that had been developed for that plan, but only within a civil police capacity.

To us it just seems ludicrous that anyone could think that this bill would allow an Australian government to deploy the military to violently break a strike using armed force or to suppress what is legitimate peaceful dissent. Back here on planet earth, it is theoretically possible that it could occur, but in 105 years it has not happened, has it?

Senator MARK BISHOP—Thank you, Mr James.

Senator BOB BROWN—In our democracy as it functions, what is the association's position on the potential for either or both houses of parliament to overrule prime ministerial or ministerial discretion to bring out the defence forces in the circumstances you have been talking about?

Mr James—As I understand it—and there are better and more eminent legal brains on the committee than me—I am not sure it is actually possible for parliament to overrule the Prime Minister in that situation for the simple reason that call-out of the armed forces within the

circumstances envisaged within this bill comes under section 61, 'Crown prerogative'. It is the same as the war-making power. Parliament does not declare war, the executive does. I am not actually certain that parliament could overrule the Prime Minister in this situation, except for the limited grounds given in the bill of requiring a number of ministers to stand in for the Prime Minister if he is not available.

Senator BOB BROWN—The bill could be altered to give parliament that power. Parliament has primacy here. Parliament is described under the Constitution but the Prime Minister is not, so it would be a direction from parliament to the executive. Surely it is a democratic safeguard that ought to be available against the misuse of a very important power like this by an individual.

Mr James—When the association has addressed this issue in the past it has basically been on the question of whether our participation in an overseas conflict has been justified or not. The association's position has long been that the war-making power should remain an executive prerogative for the simple reason that they may be able to take the country to war but they cannot sustain it because parliament actually controls the purse. We think that is, within the Westminster system, an appropriate balance because, if you had to take decisions like this to parliament, particularly when the Senate was fairly evenly balanced in numbers, we might never make a decision as a country. In an emergency, particularly if it is a terrorist emergency, the requirement for timely action would probably override the requirement for this to be debated in parliament.

Senator BOB BROWN—No—you misunderstand me. The Prime Minister has made the decision in a timely fashion, but there is huge public uproar about that decision having been made and the troops having been deployed in a way that may be highly unpopular. What is the association's view on parliament—all the elected members of parliament—being able to be a check on that and to have the troops recalled, to have the prime ministerial direction negated?

Mr James—In the situation you describe, Senator Brown, we do not have an established policy. I would have to go back and discuss it at some length with our policy-making bodies, but I would suggest to you in principle we would probably have some severe doubts about parliament being able to have a check on the executive in that regard, but the normal parliamentary processes are probably a sufficient check.

Senator BOB BROWN—The normal parliamentary process is that parliament can move to check on what the executive does but it ought to be written into the law. The question really is: ought not that be written into this piece of legislation?

Mr James—The association does not have an opinion on that at this stage, but I think it is likely that we would probably oppose it being written into the law.

Senator JOHNSTON—Thanks, Mr James, for your submission. It is a very helpful, very practical submission—very down to earth. Section 51WB of the amendment sets out the defence of superior orders in certain circumstances. I note your submission appears happy with that defence. Can I go through this with you, because when I read it I was a little concerned? A criminal act carries criminal responsibility by a member of the ADF. That is in subsection (1). Subsection (2) says that it is a defence to a criminal act done, or purported to be done, by a member of the Defence Force under this part that the criminal act was done

firstly by the member under an order of a superior. That is, I think, acceptable, and logical. The member was under a legal obligation to obey the order. I think that also is fine. We then come to 2(c): 'The order was not manifestly unlawful.' What concerns me about the quality of being 'manifestly unlawful' is that what might seem obviously unlawful to a constitutional lawyer is never going to occur to a member of the ADF.

We go on in this vein with a couple of other matters relating to mistake of material fact, reasonable and necessary et cetera. The defence needs to be strengthened. Indeed, has your association considered issues of indemnity and immunity? Bearing in mind the chain of command and the sorts of circumstances that you and I can envisage where this very rarely used legislation would be used, have we given consideration to providing immunity to members of the ADF who have followed orders?

Mr James—The association's position on this has always been that as far as possible a member of the Defence Force providing assistance to the police should have the same rights as every other Australian citizen, no more and no less—that is the overriding principle. They should not be policemen. In our consideration of the amendment we were a little bit worried about the defence of superior orders, but it is a qualified defence and not an absolute one, and it is only a defence.

Senator JOHNSTON—What worried you? What concerned you?

Mr James—What worried us—and to some extent this has been borne out by subsequent events—was the possible public reaction to it. As an aside, when you hear emotive phrases like 'shoot to kill', we generally switch off because anyone who says that generally has not read the bill or knows nothing about the circumstances. By giving a defence, qualified though it is, to servicemen and servicewomen in this situation you run the risk of giving the impression that the soldiery are being given a get-out-of-jail card, perhaps unnecessarily. However, our legal experts who looked at the bill—and one is a senior counsel in Queensland and the other one is a QC in Victoria—both decided on balance that it was a pretty reasonable proposition.

Looking at it from the military side, it is really no different to the dilemmas faced by servicemen in lots of offshore situations under international law. It is an offence to actually obey an illegal order, so if you were told to go and shell a refugee camp that would be a manifestly unlawful order and you would not carry it out. It is not as if this type of moral dilemma is not imposed on operational Defence Force personnel on a reasonably regular basis. Given that situation and given that background—and I imagine that the Department of Defence have a voluminous brief on why they think the qualified defence is necessary—the association's position on balance is that we will live with it.

Senator BARTLETT—You have set out quite well in your submission the history and underlying philosophy of this, and indeed the view, not least of ADF people themselves, that the ADF is there to deter and win wars, not to undertake aid to the civil authorities. I have taken from some of your remarks this morning that you see this and previous legislation of a few years back as in some respects actually clarifying and codifying powers that were there in a more common law sense. Nonetheless, it does seem to me that in a few areas this bill expands existing powers. Are my assumptions correct there? It codifies and clarifies and

addresses some anomalies, but it does also expand the opportunity for the ADF to be used in some circumstances, doesn't it?

Mr James—We would agree with that interpretation, but it expands powers in areas that have been forced on us by circumstance, particularly the aviation and maritime applicability. Twenty years ago—and even five years ago—before the rise of the modern strain of Islamist terrorism people probably would not have bothered putting this type of thing into the act. Again, the provisions of the bill are proportional to—I hesitate to use the word 'threat'—the current situation and the likelihood of such an eventuality. Certainly the legal dilemmas that we faced over the Commonwealth Heads of Government Meeting in Brisbane about whether we could actually shoot down an aircraft that was determined to plunge itself into the site concentrated people's minds wonderfully. From that point of view, while the bill envisages an expansion of powers, it is really only to cope with an expansion of the threat situation.

Senator BARTLETT—Given what you have mentioned about the current threat situation, do ADA have a view about the desirability of a sunset clause or an automatic review, or something like that?

Mr James—Our position on the counter-terrorism bills was that there should have been a sunset clause, and the sunset clause should have been somewhere between five and 10 years. Our position on this bill is that it does not need a sunset clause. There are so many other checks and balances in it, and they really are just a commonsense extension of the existing situation. With a long legacy stretching back centuries, we do not think a sunset clause is required for this amendment.

Senator BARTLETT—I will just touch a bit more on a few of those issues we have been discussing. You mentioned the nature of the current threat of terrorism. The main public justification for this has been in that context. It seems to me that, even if that evolves in certain directions down the track, you are always going to be open to nutters, international criminals or whatever, perhaps without that political overtone that people see terrorism as having or presenting, with some serious risks to critical infrastructure or whatever. That being the case, is it perhaps better to be discussing these sorts of powers just in that wider context of any sort of threat rather than necessarily focusing on the current terrorism dangers?

Mr James—Our understanding of the bill is that the amendment is heavily focused on counter-terrorism, with some allowance for very widespread, serious, last-resort breakdowns in civil order on a scale such that a police force could not handle it. Our understanding of the bill is not that it is some great leap in either the existing power or the philosophy of how existing powers should be applied. Given the nature of the current terrorist threat, particularly since the bombings in Great Britain in July last year, it is not out of proportion to the circumstances.

Senator BARTLETT—Does this bill raise any issues with regard to the entitlements of defence personnel who get injured whilst they are called out in this regard? It is an issue that comes up in other contexts about service personnel who get injured and whether they are in a war situation or a civilian situation. What is your understanding of any injuries that happen in this sort of circumstance?

Mr James—I would really want to take that question on notice to answer it in detail. My preliminary thought would be that the normal peacetime compensation rules would apply because they are not deployed overseas in a warlike situation. They are deployed in Australia in a domestic law enforcement situation. I am not certain that any special compensation would apply or, indeed, would need to apply.

Senator BARTLETT—I just thought I would ask you that while you were here. We can ask the Department of Defence to confirm that.

Mr James—It is theoretically possible, though. If the Defence Force was called out to assist the police with the resolution of a major siege/hostage incident that turned into a prolonged battle, the parliament might later on have to give consideration to the fact that this was actually a reasonably warlike situation.

Senator BARTLETT—Let's hope we do not have to think about that.

Mr James—It is a reasonably hypothetical situation and hopefully it will never occur.

CHAIR—Thank you very much, Mr James. As there are no further questions, the committee thanks the ADA for its submission. Thank you very much for appearing today and for your assistance in the circumstances.

Mr James—Thank you very much for inviting us to put in a submission and to testify to the inquiry.

[11.50 am]

CUNLIFFE, Mr Mark, Head, Defence Legal, Department of Defence

DUNN, Colonel John Andrew, Director of Operations, International Law, Defence Legal, Department of Defence

PEZZULLO, Mr Michael, Deputy Secretary, Strategy, Department of Defence

CHAIR—Welcome. Do you have any comments to make on the capacity in which you appear?

Mr Pezzullo—I appear as the lead witness for the Department of Defence, in which I am responsible for the group that has carriage of all domestic security matters.

CHAIR—Thank you. I remind senators that, under the Senate's procedures for the protection of witnesses, departmental representatives should not be asked for opinions on matters of policy. If necessary, they must also be given the opportunity to refer those matters to the appropriate minister. The department has lodged a submission with the committee, which we have numbered 6. Do you need to make any amendments or alterations to that submission?

Mr Pezzullo—No.

CHAIR—Mr Pezzullo, do you wish to make an opening statement?

Mr Pezzullo—I thought that, further to the submission that we have already provided to the committee—plus the background materials that no doubt you have seen in terms of the explanatory memorandum and the like—it might assist in the committee's consideration of this matter if I were to group the nine areas of amendment that the government is seeking through this bill. Essentially, what we are seeking, as you would see from our submission, is to extend the domains in which the current part IIIAAA arrangements apply into three new domains: one relates to aviation matters; one relates to offshore maritime matters; and the other relates to a domain that we describe as 'designated infrastructure'.

We are also seeking to improve several procedural aspects of the current operation of the act. One relates to what is known as 'expedited call-out'. That would apply with a series of arrangements in urgent and unforeseen circumstances. The other relates to having a common basis for dealing with any possible breach of the criminal law during the conduct of these actions by the ADF by having a standardised approach to prosecution. So we have domain changes and some process changes.

The third class of change relates to recognising the tactical and operational realities that our forces face but also the capabilities that they constitute and represent. We are seeking several changes to the legislation that concern operational realities. They include: recognising that reserves are very much integrated into certain parts of our force structure and, therefore, we think it is no longer logical to seek an extinguishment of the use of permanent forces before we can use reserves; tidying up the identification of members, particularly those who are in the special forces; recognising that modern threats can sometimes be mobile and not fixed in terms of premises; and, finally—recognising that on occasions, as a matter of tactics and operational procedure, you would not necessarily want to broadcast in advance the areas where military action might be taken—change to some of the broadcast arrangements in

relation to designated areas. It might help the committee to think of it in terms of changing or expanding some of the domains, tidying up some of the process issues involved and recognising some operational and tactical realities of how our forces operate.

CHAIR—Thank you very much, Mr Pezzullo. Mr Pezzullo, the first thing I would like to ask the department to do, if you are agreeable, is to have a look at the HREOC submission to the inquiry if you have not already. The HREOC submission makes 10 recommendations which are broadly linked on similar areas concerning the right to life, the ICCPR and some clarifications and qualifications in relation to the question of whether lesser action would give the same effect in relation to superior orders and so on. I would be grateful if the department would provide, on notice for the committee, brief comment in relation to those 10 recommendations.

Mr Pezzullo—Certainly, Madam Chair. I can deal with some of those matters now if you wish or I can—

CHAIR—We might come to those in due course, but could you take that on notice to start with?

Mr Pezzullo—Sure.

CHAIR—The fourth paragraph of the first page of your submission, Mr Pezzullo, says that the use of the ADF in domestic security will be a last resort only. This is a matter which has been discussed by other witnesses and in other submissions. What part of the bill do you point to to support that statement?

Mr Pezzullo—In terms of the actual construction of the bill, I will immediately call on my learned friend Mr Cunliffe—

CHAIR—Don't we all?

Mr Pezzullo—Yes—who will no doubt, as the chief legal officer, point to the particular clause of the bill.

Mr Cunliffe—Notwithstanding the ready referral, it seems to me that the real test in all of this is the processes that are in place for any of these uses to be done in a way that is accountable and involves the decisions by ministers through that process. That is ultimately the test: that there is a series of steps, depending on which avenue you go down, which basically involves either a state request or some other consideration where the language of the act, together with the real world, ensures that that is the case. I do not believe that there is an explicit provision in the bill which asserts whatever that would actually entail.

CHAIR—Thank you, Mr Cunliffe. Let us take the suggestion that you make in relation to other circumstances. There are a number of examples in the legislation. Say we go to 51AA(4)(b), which in relation to incidents in the offshore area says:

> ... the State or Territory is not, or is unlikely to be, able to protect the Commonwealth interests against the domestic violence;

I understand for constitutional reasons and others why domestic violence is not defined and I appreciate that although it has been raised with the committee. How will it be determined that the state or the territory is unable to be or likely to be unable to be capable of dealing with the emergency in question?

Mr Pezzullo—Before I ask Mr Cunliffe to reflect on the particular clause that you draw attention to, I might comment. In terms of policy and just taking a step back to the domestic security arrangements we have with the states and territories, you would be aware that in 2002 at an intergovernmental level the Commonwealth, states and territories agreed to tighten up the consultative emergency procedures and protocols that we have in this country to deal with incidents that were variously defined. A 'national terrorist incident' was one of the pieces of nomenclature used at the time.

You are right, Madam Chair, to say that the expression 'domestic violence' has not been particularised. But there are, in my view, sturdy and robust arrangements in place that I think predated 2002 but have now been codified and formalised through the intergovernmental agreement that are now practised regularly: we have a major multijurisdictional exercise. I think that it would emerge through the consultative processes of the heads of government of the jurisdictions—their senior advisers, the ministers, the defence ministers, the attorneys-general, the police ministers—through the various consultative mechanisms that we have stood up under the national counter-terrorism arrangements.

I think it would become a matter of common view that an incident was about to occur, was likely to occur or could be anticipated to occur and that ministers in all jurisdictions would give quite clear guidance—to the ADF in our case at the Commonwealth level and no doubt to the police forces at the other levels—as to where the different capabilities that each jurisdiction had were applicable. So it seems to me the short answer to your question is that I think we have got robust intergovernmental arrangements in place that would answer the question that is in a sense premised in your question to me that would work their way through either in advance of a threat, as a threat was unfolding or indeed after an initial incident had occurred to deal with follow-up threats.

CHAIR—So, in terms of the process of bringing this bill and its development together, what has been the process of consultation with the states and territories?

Mr Pezzullo—There was a series of official level dealings towards the end of last year and there is another more operationally focused dealing that is set to occur within the next week or so. The states and territories were sent a position paper on the central underpinnings of the gaps that we thought needed to be remedied in the current legislation. That was followed through with those official level discussions in November-December of last year, and, as I say, there is going to be a follow-up meeting to further discuss some of the operational details in the next week or so.

CHAIR—As another example of this particular issue I point to clause 51AB(3)(b), which is under the schedule relating to aviation incidents. It says:

> ... if the Government of the State or the self-governing Territory does not request the making of the order, an authorising Minister must consult that Government about the making of the order before the Governor-General makes it.

Does consultation imply agreement?

Mr Pezzullo—No. To be even more emphatic about that: if it was the government's intent that it would signify agreement, then the bill would have been drafted accordingly.

CHAIR—I just wanted to clarify that. As you said, it was discussed earlier in background material. The Cabinet Office in New South Wales sent a brief letter in relation to our request for a submission from them, which you may have seen.

Mr Pezzullo—Yes, I have.

CHAIR—It raised five points. The committee has addressed some of those in its discussions already today, but can you give some brief responses, probably on notice, to those five points?

Mr Pezzullo—We can take that on notice, along with the HREOC points.

Mr Cunliffe—There is one issue that is raised in the letter from Mr Wilkins which is perhaps worth mentioning briefly. We will respond in more detail, but there seems to be an interpretation there that all matters would be prosecuted or considered for prosecution in an ACT court, and that is not in fact the intention of the bill. The structure creates Commonwealth offences in a similar way to some other Commonwealth legislation, such as the Customs Act. They are not ACT criminal offences, and they could in fact be prosecuted wherever. The law that will apply will be the law in the Jervis Bay territory. That in actual terms is ACT criminal law, but the prosecution might be in Queensland, Western Australia, Tasmania or wherever it happened to be. It is perhaps helpful to clarify that now. We can provide some more detail of how that happens.

CHAIR—Moving on from those state and territory issues, the expedited call-out regime in schedule 4 refers to 'a sudden and extraordinary emergency'—again a term not defined but I think not limited by the constitutional limitations that apply to domestic violence under section 119. Why is that term not defined, and what circumstances is it envisaged would need to exist to trigger a call-out under a sudden and extraordinary emergency?

Mr Pezzullo—I would not necessarily want to be too precise about the sorts of scenarios that we have in mind and that we would plan for, other than to say that the explanatory memorandum itself alludes to fast breaking developments. Let us take a broad example. Say the ADF was cooperating with civil authorities in relation to quarantine issues, people-smuggling issues and fisheries compliance issues and, under the cover of offshore maritime activities, a terrorist group decided to attack infrastructure, hijack craft, take people hostage and the like. Those developments might well break very quickly on you. Given the speed with which these things can unfold and the capabilities terrorists have these days in terms of communications and means of transportation, we think that in terms of combating that threat we need to have a circumstance where members of the executive, who are much better connected these days than they have ever been with secure communications, can quickly give effect to a call-out by doing something as simple as making a secure telephone call which can be properly and duly recorded later.

I will answer the other part of your question. Because we do not seek to pre-empt, in an intellectual sense, every single contingency or scenario that might unfold, given the global terrorist threat that we face, the government's view is that we do not want to be too particular about putting a definition around 'urgent' and 'unforeseen'.

CHAIR—I understand that—it is a matter that the committee and others have discussed at length in the last four or five years—but this expedited call-out bypasses the Governor-

General. Is he or she not equipped with appropriate secure communications to be part of this process?

Mr Pezzullo—This does not preclude a call to the Governor-General; it just creates, for redundancy and other reasons, a circumstance where—

CHAIR—The redundancy of the Governor-General?

Mr Pezzullo—Redundancy of communications. Some of the scenarios that we potentially face could be quite grave in that regard. I do not want to go too deeply into matters that might be of interest to people who monitor these proceedings. My job is to plan for the worst, and in those circumstances I need to plan for circumstances such as, not necessarily the incapacitation of the Governor-General, but, let us say, the incapacitation of our ability to talk to him or her, and this creates a more flexible set of arrangements for redundancy.

CHAIR—That leads me quite neatly to my next question, which is: if the Prime Minister and the authorising ministers are also not contactable in the event of a sudden emergency situation—

Mr Pezzullo—The Governor-General plus all three ministers?

CHAIR—Yes. Do we then end up with acting minister arrangements? If we do, what is the constitutional power of an acting minister?

Mr Pezzullo—I will leave the second part of your question in abeyance for a moment. To answer the first part of your question, you might have noticed or you will recall that in the second reading speech Minister Coonan made reference to an additional tier of redundancy that the government is considering. That is a matter still under active consideration. She made reference in the second reading speech, which is on the public record, to a circumstance where one authorising minister plus one of three designated very senior ministers—from memory, the Deputy Prime Minister, the Minister for Foreign Affairs and the Treasurer—could also give effect to a call-out procedure.

CHAIR—And they would not be described as acting ministers in that context; they would be doing it in their own capacity?

Mr Pezzullo—If we go down this path and the government gives approval to this, the second reading speech foreshadows that those ministers or persons holding those offices will have that capacity by right of them holding that office.

CHAIR—Mr Cunliffe, are there any legal implications in that which you would like to address?

Mr Cunliffe—I do not think so.

CHAIR—You disappoint me!

Mr Cunliffe—Especially if the matter were dealt with through legislation, it would not seem to raise any particular issue that I could suggest. I stress, of course, that as a member of Defence's legal area I am not the government's constitutional legal adviser—that role sits elsewhere—

CHAIR—We do not often get to talk to that person, so we take it from where we can find it.

Mr Cunliffe—but to me it would not seem to raise particular concerns.

CHAIR—In terms of the role of the Governor-General as the commander-in-chief under the constitution, constitutionally and legally, where does the expedited call-out process leave that position? I am not sure that I am confident about the constitutional underpinning of this process.

Mr Pezzullo—I could address that in general terms and Mr Cunliffe may wish to address any specific legal issues or aspects that arise. As a matter of policy—and I am not going to fine legal opinion—I think it is well established and understood that the commander-in-chief role that is vested in the Governor-General by virtue of section 68 is a titular capacity. I am not aware of any circumstances where the Governor-General has acted autonomously in relation to commanding and controlling the military forces of this country. Without going to fine legal opinion and legal argument, it is generally understood that the executive has control over the employment and deployment of military force in this country. Obviously the Prime Minister sits at the apex of the executive system and he has ministers—you know how the system works. So I do not know that the expedited call-out procedures in any way offend the vestige, if you like, that the Governor-General has out of section 68. Again, I do not want to give you a legal interpretation of that, but to me that just seems to be a commonsense understanding of how section 68 is meant to work.

CHAIR—We could have a long discussion about implied and reserve powers, but I might have to rule myself out of order if we were to do so.

Mr Pezzullo—We could, and I would call in aid Sir Ninian Stephens's excellent article on the matter from some two decades ago.

Mr Cunliffe—In fact I was hoping to make reference to that article just as a general background. I think it is also possibly useful to draw the committee's attention to the fact that the framing of subsection (1), paragraph (a) of section 51CA speaks of it not being practical for an order to be made under that section. That is, of course, referring back to the sections which would usually involve the Governor-General where, clearly, again, the thought had been turned to. It might also be useful, in terms of the role of the Governor-General and the other matters that Mr Pezzullo has referred to, to draw the committee's attention to, as one example, something that is in the current part IIIAAA which, for instance, in certain circumstances would enable authorising ministers who have changed their view on a particular matter to in effect direct the Governor-General to revoke an order. So there are a number of things within the existing body of the act which in effect do perhaps reflect that view as well as the range of other writings which are around.

CHAIR—On the question of what I think are now perhaps informally described as mobile terrorist incidents—that is, events which happen in more than one location at or around the same time—the bill, as I understand it, endeavours to deal with those by moving away from the current provisions in part IIIA in relation to specific premises and so on. Have we adequately covered-off that area of concern in this bill in terms of a London-style event?

Mr Pezzullo—We certainly believe so. Obviously we would not be proposing the terms of the bill in the way we are if we were not confident about it. We think that this will give sufficient legal cover to the ADF being called in aid of the civil authorities in a mobile

situation, which, as you say, could involve a London-type scenario. Another scenario might well be where there is a terrorist incident playing itself out—where there is a threat to our citizens or infrastructure and the like which is moving around our society, either in an urban setting or otherwise—and the ADF is called in to assist with some of the special capabilities that they have in the tracking down of that threat. We could not possibly begin to nominate the premises, and we believe this gives us adequate cover to operate in a mobile way.

CHAIR—In relation to the role of the Commonwealth DPP and the issue of prosecutions that may arise under domestic security operations, one of our submitters has noted that the explanatory memorandum states that state or territory police would investigate criminal acts done or purported to be done by ADF members. There is a suggestion in that submission from the Police Federation that that provision should in fact be expressly stated in the legislation. This committee has a tradition of preferring that as much material as possible be in the legislation and that minimal reliance be placed on explanatory memoranda. That would probably be a matter we would agree with.

Mr Pezzullo—That it be stated explicitly in the bill that state and territory police would conduct investigations?

CHAIR—So there is more transparency in the process.

Mr Pezzullo—Yes. Sorry—I just wanted to make sure that I understood.

CHAIR—What would be your view of that?

Mr Cunliffe—Ultimately, I think it is probably a mixture of a legal and Realpolitik view. I think there is a policy call, which may be a matter not for either of us but for ministers, because I think that to some extent the Commonwealth generally, including through legislation, is reluctant—if I can put it like that—to compel a state entity to do something. One view is that that would be involved. On one level, there are state resources. There may be circumstances in which the state for some reason chooses not to do so. This would be an issue of some concern in terms of state-Commonwealth relations, which perhaps are partly legal and partly political. I think it is probably an issue that ministers would need to take into account, including in terms of the intergovernmental considerations. Presumably it would be affected by the views of the states, which so far seem to be supportive of them undertaking that role. That is my understanding from the meetings.

CHAIR—My second-last question applies to operational matters between the state and territory authorities, the Federal Police and the ADF in this context. Mr Pezzullo, you have mentioned some of the processes of consultation that are going on between the Commonwealth and the states and territories. What is the plan to ensure that there is operational clarity in the extreme circumstances where this extreme legislation may be brought to bear?

Mr Pezzullo—The meeting with the states and territories that I have foreshadowed and which is coming up in the next week or so is designed now that the shape and framework are starting to emerge—obviously without pre-empting or prejudicing the operations of the parliament. We do want to start engaging the states and territories on precisely that level of operational planning, so that we can start to shape exercises and start to shape doctrine. Clearly, there is a very close consultative arrangement already in place in relation to the

Melbourne 2006 games, which are coming up very shortly. The government's preference would be for this legislation to be in place in time for that. So, without pre-empting the actions of the parliament, we would start to talk to the states and territories about the kind of operational framework that we would want to have in place to deal with air incidents, mobile incidents and whether or not the legislation is in place—to be blunt. The preference of the government would be that there be the codification for which this bill provides, but we would want to proceed independently anyway, as we did with CHOGM and the Olympic Games. Remember that the way part IIIAAA was enacted in relation to the Olympic Games only provided for designated security areas and specific premise operations. A whole lot of other things were already dealt with by the states and territories—

CHAIR—Before.

Mr Pezzullo—before, in relation to mobile incidents and other incidents.

CHAIR—The bill provides powers to members of the defence forces that are usually provided to members of police forces, such as powers of search and seizure and a power to require a person to produce a particular document. The bill gives no indication in relation to the protection of privacy, for example, in relation to production of documents and no indication in relation to the return of seized property or documents. I also seek some information in relation to training that will go into ensuring that members of the ADF who are required to exercise search and seizure powers are appropriately trained, particularly for the search of a person.

Mr Pezzullo—I guess this is part of the reason why the government is seeking codification of what it believes to be generally available to it anyway under the executive power under section 61. It is precisely to achieve better doctrine, better training, and the articulation of the sorts of matters that you raised in your question about rules of engagement and our standard operating procedures. It is precisely for those sorts of reasons that the government feels the codification would be better than not having these powers codified. As to some of the precise issues you raised, of privacy and the rest—subject to Mr Cunliffe's different view or any advice I get from my advisers and remembering that these are not powers that are permanently, if you like, 'ascribed' to an ordinary member of the ADF; it is not like you become a sworn constable for the rest of your life—

CHAIR—That is my point exactly.

Mr Pezzullo—Therefore, we would see the operation of the powers codified in this bill, were it to be enacted, as being, like any other military operation, the subject of detailed military orders which we could then train for well in advance. If we could get our doctrine and our manuals right, we could have liaison with Attorney-General's and other competent authorities on issues pertaining, say, to the privacy of a person when being bodily searched, the privacy of their documents and the return of documents. We would write all of that into our doctrine and training precisely to avoid some of the perils I think you are pointing to in your question. This is time limited. I do not see a circumstance—and Mr Cunliffe will correct me if I am wrong. It is not as though these powers can be invoked permanently, but the capability they give to the ADF would become enshrined in law permanently, unless it was repealed, and therefore we could train for it.

CHAIR—Mr Pezzullo, would the procedures you refer to in that process and the development of doctrine take account of cultural and gender sensitivities, ensuring that women are searched by female officers—female members of the Defence Force—and aspects like that, which are part of, for example, what the Australian Federal Police would put forward as normal procedures?

Mr Pezzullo—Perhaps the best way for me to answer a question of that level of detail is to say that I cannot imagine why those issues would not be taken into account, given the policies and the laws that the Australian government observes in that regard. Frankly, it is no different from the laying down of the rules of engagement and standard operating procedures for forces deployed, which are quite separate from domestic security situations. But let us say that, when we deploy in counter-terrorism operations offshore, we already have regard to the laws of armed conflict—a whole lot of strictures that derive from various bodies of law. Frankly, I do not see why we would not take those sorts of things into account. In terms of the detail in writing the manuals, we are at a level probably below my pay grade, as it were. I do not know, but Mr Cunliffe might have a view about how we would go about drafting that level of procedures.

CHAIR—You might say, Mr Pezzullo, 'I don't see why we wouldn't;' whereas we would be seeking an assurance that you would.

Mr Pezzullo—Sight unseen, I have not thought of the question in quite the way you have framed it. I think there would be a general expectation from the government that we would have appropriate rules of engagement and standard operating procedures that would be applicable. Are the people who run our military training doctrine system going to be directed in such a fashion? I think they will, and I cannot see any reason why they would not be.

Mr Cunliffe—I understand the concerns that have been raised. My expectation would be that members of my staff would be involved in this work. They are involved in some preliminary work related to the bill now. It would be fair to say that those within my area are all conscious of these issues. That would certainly be reinforced by the questions today and, no doubt, by any comments the committee might make.

Senator MARK BISHOP—I have one issue to pursue, Mr Pezzullo. It arose out of some of the submissions from earlier witnesses today, addressing the application of the bill—or the act when it is proclaimed. Your submission succinctly points out the intent of the government and the amendments sought. In what circumstances, if any, would this bill have application in terms of a protracted industrial dispute involving pickets and the prevention of the right to work and the like, which occur from time to time, or in an environmental type dispute where a group is seeking to prevent the building or construction of a particular plant? Does it have any application to such a generalised situation which could involve breaches of the law or deliberate civil disturbance in pursuit of a defined purpose?

Mr Pezzullo—I will give a general answer and then I might hand over to Mr Cunliffe. The amendments being pursued through the bill before you do not change the Defence Act, including the provisions enacted in 2000 in relation to part IIIAAA about the preclusion of these powers in industrial disputes or legitimate political dissent. That was dealt with in 2000,

and there are quite specific preclusions there. The amendments before you today do not seek to either retract or expand on those.

Mr Cunliffe—Section 51G is the provision that deals explicitly with this area. Its language is that the Chief of the Defence Force must not stop or restrict any protest, dissent, assembly or industrial action, except where there is a reasonable likelihood of the death of or serious injury to persons or serious damage to property. That is the constructor in the current act. This bill, if enacted, would sit within the current act, so that is the protection.

Senator BOB BROWN—Will the operating manual, which will be developed for the guidance of Defence Force personnel and brought out in this domestic situation, be made available to parliament?

Mr Pezzullo—I would have to take advice from my military colleagues as to whether they would seek to embody all of the guidance, including addressing some of the issues that Senator Payne raised before, in a single document. The three single services conduct what is known as single service training and the Vice Chief of the Defence Force is responsible for joint and collective training. Whether they will codify it in one document or not is something that I would have to take advice on. Those manuals tend to be classified for a whole range of reasons. In particular, rules of engagement tend to be highly classified as, if disclosed publicly, they could give clues about our operating procedures and tactics to persons that we would not necessarily want to give that tip to. I have to take the question broadly on notice, but my gut instinct is that those sorts of training manuals are classified at least as restricted if not higher than that. 'Restricted' itself is a security classification that we would not normally tip out into the public.

Senator BOB BROWN—The difficulty here is that police manuals are available to the public in general and the Defence Force personnel are not engaged here in the defence of country or invasion outside the country; they are engaged in a domestic situation on Australian soil. It is a different set of circumstances.

Mr Pezzullo—Perhaps I could just comment on that. It is absolutely true to say that these powers, by definition, are for domestic security contingencies. The sorts of threats we think it likely that we need to be prepared for would relate possibly to hardened terrorists who operate very much, from their perspective, in a war-fighting mode. They would be interested in our operating tactics, procedures, training doctrine and rules for fire—when to open fire and when to hold fire. They would be as vitally interested in that body of doctrine, procedure and the like as would be the Taliban in Afghanistan.

Senator BOB BROWN—That is a problem for the police forces though, isn't it? It is one that they live with.

Mr Pezzullo—Indeed, and I am not giving you an absolute answer as to whether ministers would be inclined to release some of that material into the parliamentary sphere. I guess I am giving you a two-part answer. I would have to take on notice, first of all, the question of classification.

Senator BOB BROWN—Thank you.

Mr Pezzullo—That is an issue. Secondly, there is what the intent of the government would be with releasing such material to the parliament. It is not something that I can determine.

Senator JOHNSTON—Mr Pezzullo, regarding the orders, we have the concept of 'manifestly unlawful': 'The defences that service men and women are able to avail themselves of are not there if the order is manifestly unlawful.' What does that mean?

Mr Pezzullo—I might call immediately for aid from my colleague.

Senator JOHNSTON—What lawyers might see as obviously manifestly unlawful I would think a corporal would have some difficulty with.

Mr Pezzullo—We have pretty smart corporals, but even so—

Senator JOHNSTON—I am certain we do. They are very smart and professional in what they do but constitutional and other law is not their first priority or discipline.

Mr Pezzullo—I will ask Mr Cunliffe to respond.

Mr Cunliffe—I think I might repay the generosity and call on some assistance because I was not directly involved in the decision about that wording and I do not know whether there was a particular choice in mind. I think that it is a concept that is reasonably well known. Colonel Dunn might be the right person. Colonel Dunn is the Director of Operations and International Law in the Defence Legal Division.

Senator JOHNSTON—What do you understand by the expression 'manifestly unlawful'? It seems to me that each of the various powers that flow, be they from the Governor-General or from the ministers or be they with respect to infrastructure or even section 51G, are predicated on the fact that the person seeking to carry out the order has to make the determination that they are not manifestly unlawful, because if they are he has got no defence. Is there a body of law or have we got the High Court or even another recognised legal jurisdiction's adjudication on the words 'manifestly unlawful'? If the constitutional power is not there—and enough has been said today to cause me to worry about it—doesn't that ring an alarm bell for a corporal?

Col. Dunn—The term 'manifestly unlawful' stems from the law of armed conflict from the Nuremberg trials and those following tribunals that dealt with it. Soldiers were expected to act under orders because they are trained to act and react. They do not know all the circumstances and if they do not react to orders their efficiency goes down and they may not do the mission. However, you cannot have them complying with every order from a public policy point of view. The term 'manifestly unlawful' has not been defined in the sense of case law in Australia in relation to this. In the Nuremberg trials the term was used in the sense that any reasonable man or woman would know that a certain act was against the laws of humanity—

Senator JOHNSTON—The man in the back of the Clapham omnibus is our touchstone.

Col. Dunn—Yes. So 'manifestly unlawful' relates to things which obviously violate the law of armed conflict in the context of the Nuremberg situation such as orders to kill civilians or orders to rape women. Those sorts of orders are manifestly unlawful to the reasonable man. You have to impose that upon the soldier based on his normal training. So an order to do something which a reasonable man would think would be manifestly unlawful is not a defence.

Senator JOHNSTON—We get into the realms of hideous reality here in shooting down civilian aircraft and all that sort of stuff. I do not want to go into that necessarily because just thinking about it is anguish enough. Is there not some way that we can indemnify or provide some protection for service men and women? It worries me that we have had the Human Rights and Equal Opportunity Commission wanting soldiers to make evaluations of what is the lesser level of force—I do not know whether you have been listening to what has been going on here today. I find these quite unrealistic concepts when life is being threatened imminently. To be asking a soldier, who is a highly trained professional good at what he does, to evaluate law is, I think, ridiculous. In all of these circumstances we are sticking with this concept that he or she must be certain that the order is not manifestly unlawful. You tell me that dating back to Nuremberg there is a whole body of law. In our Australian federal system—which was not scrutinised greatly at Nuremberg, thankfully—I want to know whether a constitutional defect is going to be manifestly unlawful or not. Is that going to render an order manifestly unlawful or not?

Col. Dunn—No.

Senator JOHNSTON—What authority do you have to say that?

Col. Dunn—It is the 'reasonable man' test. Going back to the point about 'less than lethal force', I should add that the concept of proportionality was not drawn to attention in that in the actual act, the current act—not the amendments that go with it—you can only use reasonable necessary force, which is the same concept as proportionality. So the fact that you can use lethal force does not mean you have to, and in fact you are not authorised to. You have to act reasonably and necessarily in the circumstances, and that is a normal self-defence type test.

In actions like shooting down the aircraft, your action still has to be reasonable and necessary. In deciding whether your action is reasonable and necessary, one of the issues is the manifestly unlawful. You normally do not consider manifestly unlawful because it is a defence to you. Remember there is the defence of superior orders—you may raise that as a defence later on: 'I was following an order.' You do not have an out if it is manifestly unlawful. At the time you are considering whether it is reasonable and necessary to do what you have been ordered to do. An open order per se like 'Shoot down that civilian aircraft' you might argue is manifestly unlawful. But in the circumstances—you have been called out, you have been briefed on what is happening, you have been put up in the air to protect, say, an event—

Senator JOHNSTON—Is it likely that a pilot who has been up there for three hours monitoring an aircraft is going to be fully briefed on what is known on the ground?

Col. Dunn—No, but he would have been briefed about why he is up there so when he receives an order to, for example, shoot down aircraft X because it is travelling towards a particular place, he could, in the context of why he is up there and what he has been told, assume that that is a reasonable order and that it is not manifestly unlawful.

Senator JOHNSTON—Do we want him anguishing over whether it is manifestly unlawful? Do we want him thinking about it?

Col. Dunn—I do not think he will be thinking about it—

Senator JOHNSTON—If he is not thinking about it, why is it in there?

Col. Dunn—It is in there as a defence, in case—

Senator JOHNSTON—I know. He has not got the defence if it is manifestly unlawful. He has been told to shoot something down and he is thinking, 'Crikey, is this lawful or not?'

Col. Dunn—What he has to think about is whether it is reasonable and necessary. It is there to stop people going off at a tangent. For example, he may see an aircraft going away from where he has been told it was going and he might decide to shoot it down. That is not reasonable and necessary and if he then shot it down he could be charged and he could not rely on the defence of it being not manifestly unlawful because in that case it clearly was.

Senator JOHNSTON—All right, I will wear that.

Col. Dunn—It exists in the law of armed conflict in the current DFDA and it does not cause problems to the soldier on the ground because he makes that decision on whether it is reasonable and necessary and in effect not unlawful based on his training and the circumstances that surround him.

Senator JOHNSTON—We probably do not have too many soldiers whom we can talk to who have been in this position, thankfully. The reasonable grounds concept is also peppered throughout these amendments. For example, in 51CB, where the minister is designating critical infrastructure he must do so on reasonable grounds. That is just one example. Reasonable grounds appears throughout this. What do we understand are the thresholds of reasonable grounds? Who is the person who is determining what is reasonable? Is it post facto subjective, objective or what?

Col. Dunn—In that situation the minister has to have a reasonable belief.

Senator JOHNSTON—The minister can exercise subsection (2) of 51CB only if they—the two ministers—believe on reasonable grounds. Tell me about reasonable grounds. What are going to be reasonable grounds? In politics, let me tell you, what Senator Brown thinks is reasonable and what I think is reasonable might be very different things.

Senator BOB BROWN—That is reasonable.

Col. Dunn—The concept is the same. The concept of the use of reasonable force is the same concept. It is a concept that is introduced to allow the person to make a reasonable decision based on the information around him. It is a subjective test in that sense. It is whether they believe it was done on reasonable grounds. They cannot not have reasonable grounds if it is obvious that they have ignored something and it is not reasonable then you may say that they have not acted on reasonable grounds.

Senator JOHNSTON—Are you saying that the threshold is very low?

Mr Pezzullo—I do not think it is right to say that the colonel's evidence points in that direction.

Senator JOHNSTON—Good.

Mr Pezzullo—It is not a low threshold; it is an appropriate threshold. The ministers are at the top of the executive decision-making chain. They issue orders to the CDF who then issues further detailed orders. As you cascade down you get further definition of the nature of the

problem, the nature of the mission that is put into effect through those orders, the rules of engagement and the targeting policies and thresholds. As you cascade down you get an accretion of detail and definition.

At the time that the contingency is being played out, I think it is—dare I say—reasonable to expect that people will apply their best judgment, based on the information that is to hand about the nature of the threat. So ministers are acting on intelligence or advice from their officials that something is about to happen, is likely to happen or could happen. They give—

Senator JOHNSTON—'Likely to happen' does not apply, does it?

Mr Pezzullo—In some cases this bill does provide for anticipatory action. The infrastructure example that you are pointing towards—the designation of uninhabited infrastructure that requires protection—is in fact an anticipatory action. What I am saying—

Senator JOHNSTON—I am interested to hear you say it. 'Authorising ministers may do so only if they believe, on reasonable grounds, that there is a threat of danger or disruption.'

Mr Pezzullo—Absolutely.

Senator JOHNSTON—So the threat must exist. Not a likelihood of a threat; it must exist.

Mr Pezzullo—If they have actionable intelligence that says that event X is likely to occur—you can never be precisely definite, but if there is credible evidence to suggest that a group is moving towards a particular objective with a particular mission in mind—they are entitled to act reasonably under the provisions of the infrastructure section of these amendments. The point Colonel Dunn was making and that you are engaging on is: in whose eyes does 'reasonable' stand? I think the commonsense test there is that, on subsequent scrutiny in subsequent defence of those actions, actions have to be able to stand up to scrutiny. I think there is no objective test there unless it is trailed out through the courts of law, and even there there is argument to and fro. That is why you have lawyers who argue cases for you. There is no panel that sets out an objective test; it is in the eyes of someone else.

Senator JOHNSTON—All I want is for you to tell me the way the act works—the scheme. What are the steps? For example, the way I read 51CB, the ministers have to be satisfied that there is not just a likelihood or there is not just good intelligence; there has to be a threat.

Mr Pezzullo—That is the nature of intelligence: that you would receive information that says, 'Group X is moving with intent Y to do Z.' You are not going to wait until they actually do it, which is the realisation of the threat. You are anticipating the threat being carried out.

Senator JOHNSTON—But he has to be certain that, for instance, there are personnel in existence with the capability and the intent; not that they are some distance away and they are thinking about it and intelligence says they are planning, but that they are doing it—that there is a present threat. Hence we get into this business about reasonable grounds.

Mr Cunliffe—Senator, you said he or she has to be certain and, again, I think it is a step short of certain. He believes on reasonable grounds there is a threat—

Mr Pezzullo—We have satisfied that.

Mr Cunliffe—It is clear that in time other information may come to light, which can be seen if you turn to subclause (3). That state of belief may change. It is not certainty, but it is something beyond a sniff.

Senator JOHNSTON—Okay. I like to hear you say that, but what worries me is that I think we are left wondering in the legislation. That is all right; it is relatively semantic. As for the definitions: what are 'Commonwealth interests'? Is that term defined anywhere? Is it a goldmine in the Kimberleys? Is it oil and gas infrastructure? Is it a dam full of drinking water? What are these interests?

Mr Cunliffe—I expect that the answer to that is that it would change over time—out of those examples that you have just identified.

Senator JOHNSTON—That is a very broad concept.

Mr Cunliffe—Yes, it is. I think that is—

Senator JOHNSTON—In fact I do not think it could be broader.

Mr Cunliffe—That is probably a fair comment.

Senator JOHNSTON—The national interest; what is the national interest?

Mr Pezzullo—I think it is also fair to say that, unless the government were to propose them and the parliament were to list them, I do not think there would be merit or value in trying to list them. I think it is ultimately a matter for judgment by the executive of the day and they are held to account and scrutiny. The Commonwealth interest in that regard should be whatever the elected government defines it as—again, on a reasonable basis—with external scrutiny.

Senator JOHNSTON—You would understand my nervousness and the nervousness of the population when we have this as a trigger threshold: Commonwealth interests. Goodness me! We could bring out the Army!

Mr Cunliffe—It has been lived with since 2000. It is in existing provisions, of course.

Senator JOHNSTON—I was not in parliament in 2000, forgive me.

Mr Cunliffe—It is not novel.

Mr Pezzullo—I do not think it is a great jump to concede that a government would be entitled to make a judgment that, let us say, the massacre of a visiting group of heads of state and government in a CHOGM type scenario would be most certainly contrary to the national interest in terms of giving people confidence that we can protect dignitaries, that we can engage in international diplomacy and that we can engage in the conduct of complex and high-security events. A government would be entitled to say it is in the Commonwealth interest to protect that event.

Senator JOHNSTON—The Franklin Dam was not in the Commonwealth interest, or was it? Tell me.

Mr Cunliffe—I do not know that this is the right venue to rerun the issues from the 1980s.

Mr Pezzullo—I would be very happy to hear from Senator Brown on that.

CHAIR—You might be, Mr Pezzullo, but happily I am in the chair.

Senator JOHNSTON—It is a pretty grey area between what is in a state's interest and what is in the Commonwealth interest. By saying Commonwealth, you immediately define that constitutional body.

Mr Cunliffe—It would not be my decision, but I would not necessarily assume that they are exclusive of each other. I think there would be a great range of issues where they would be in the interests of both.

Senator JOHNSTON—Some premiers might not agree.

Mr Pezzullo—If I can take you back to some footnotes, there are established procedures at the intergovernmental level where there would be discussion around that. Each jurisdiction would be ultimately accountable through the democratic process for the judgments that they made. I do not think it is too esoteric a point.

Senator JOHNSTON—Okay.

Senator BARTLETT—On the issue of constitutionality, which has come up in some submissions and came up today with the civil liberties people, rather than getting into some of the lawyers' arguments that you can get around these sorts of things, is there anything in this amending bill that opens up that constitutionality debate that is not already able to be debated under the act as it exists and the call-out powers that exist?

Mr Pezzullo—If I could give a policy response to that, we do not believe that this breaks any new constitutional ground in that sense. The enactment of some codified powers around designated security areas and the ability to move in relation to specified premises went to the constitutional capacity of the Commonwealth to do that in 2000. We do not believe that this breaks further constitutional ground. We think the existing framework of the act that is currently in place lays out, if you like, the constitutional framework in which the ADF would be employed. This is really about improving techniques, procedures, communications arrangements and the like.

Senator BARTLETT—Inasmuch as that is debatable, that constitutionality has been debatable for the last five years.

Mr Pezzullo—I would contend that, yes.

Senator BARTLETT—I know you will reply in more detail with regard to HREOC's recommendations, but I would like you to elaborate briefly on one now. A few of HREOC's recommendations seem to go as much to consistency throughout the bill and about the need to have regard under various sections to international obligations. I want to ask specifically about their recommendation 9.

Mr Pezzullo—Is this in the HREOC submission?

Senator BARTLETT—Yes. That recommendation goes to the use of powers in divisions 3A and 3B. According to the HREOC submission, as the bill is currently drafted these considerations do not apply to matters in division 2, which deal with the power to recapture buildings and free hostages. You can address this on notice if you like, but do you have a quick answer as to why it was present in those areas but not in division 2?

Mr Pezzullo—I will give you a conditional answer, if I may. I am advised that the proposition contained in the recommendation is under consideration by Defence. No doubt at some point advice will come up to me, and then I can advise the government. Just reading the recommendation, I would want to unpack it a bit. It states:

The Commission recommends that the Bill be amended to provide that the conditions regulating the use of the powers in Divisions 3A and 3B ...

Is that the one that you are referring to?

Senator BARTLETT—Yes.

Mr Pezzullo—I will not trail out the various subsections, but the recommendation goes on:

... also apply to regulate the use of the powers in Division 2A.

That is noted and we will have a look at it. I would want to unpack that a bit.

Senator BARTLETT—That is all right. I just thought you might have a quick response to that off the top of your head, but that is fine. For the record, can I please get an answer to the question I asked the previous witness? If there are defence personnel injured in these call-out circumstances, is it the case that any entitlements flowing on from that would not normally be a wartime injury entitlement; it would be the normal injured personnel entitlement?

Mr Pezzullo—We have a regulated scheme for military compensation and safety et cetera. The nature of the operation would be determined in advance. Just because you are not employed in an operation deemed to be warlike does not mean you are not entitled to quite generous support, rehab and other entitlements.

Senator BARTLETT—But, as I understand it, there are distinctions between injuries suffered in—

Mr Pezzullo—Operations have to be classed under the statutory code that we have. With the enactment of the Military Compensation Act, there are various classes of operations, such as warlike and the like. The operation would have to get classed. If you get injured or in the sad event that you are killed, various entitlements flow down depending on which head of operation has been classed as being in effect.

Senator BARTLETT—Is that determined on an operation by operation basis?

Mr Pezzullo—It is on an operation by operation basis. From memory, it is on the advice of the Chief of the Defence Force to the minister, so it is done by operation and then the nature of the operation is determined by the government on advice.

Senator BARTLETT—Off the top of your head, in the very sudden call-outs, those sorts of determinations would possibly be made retrospectively. It would not be what you would be thinking about first. Is that right?

Mr Pezzullo—I would want to take that on notice. There is a machinery question there about how our personnel system would grapple with that. I just do not know the answer off the top of my head. There might well be a standing arrangement. I would want to look at how the tactical assault operations work. I do not think that the personnel folk sit up in the middle of the night when a TAG is called out and do a precise determination. I suspect there is some kind of standing arrangement. I need to take that on notice.

Senator BARTLETT—If you could detail that, that would be good.

Senator LUDWIG—I just want to clarify something. You indicated that you were going to take on notice the questions or issues raised by the HREOC recommendations or some of the issues raised there—and I think Senator Bartlett dealt with one there, so I will not go over those again. The other matter that I note is that, in subdivision E, 'Other powers,' provision 51SO, 'How to require persons to answer questions or produce documents,' is a very broad power. It seems to have its ability to operate under 51D. Would that include any officer or soldier as the case may be charged with that power? In other words, when a sentry person asks a question and the other person does not answer it, how do you intend to use that power? What you have done is given use immunity but not derivative use immunity.

I will give you a scenario, and perhaps you can tell me if I am really off the mark. A person is detained or comes to a checkpoint and is questioned by a soldier. They may say, 'I am not going to give you my name.' The soldier gets curious and says, 'Pass me that satchel and the documents in your hand.' They say no. On reflection, the soldier says, 'If you do not do that, I am going to detain you, arrest you or otherwise.' The person then says, 'I'll comply,' and hands them the documents. The documents then outline serious offences. Have they then obtained use immunity of those documents? In other words, those documents then cannot be used.

Mr Pezzullo—I will check with the lawyer.

Senator LUDWIG—For argument's sake, the documents might detail a mobile threat of some description—where it is going to happen, and how it is going to happen.

Mr Pezzullo—But in your scenario, the person initially refused to yield them up.

Senator LUDWIG—They may have, or they may have recognised the—

Mr Pezzullo—Or chose not to.

Senator LUDWIG—Or the gig was up, so they handed them over on request.

Mr Cunliffe—I am afraid I am behind the game. Can I clarify which provision it was?

Senator LUDWIG—Subdivision E, 'Other powers,' provision 51SO.

Mr Cunliffe—Okay. This may not fully answer your question, but subclauses (4) and (5) of the provision do attempt to deal with it in a way which is relatively familiar in Commonwealth legislation, which requires a person to produce, even if in doing so they may incriminate themselves, but then limits the usage that can be made to prosecute. That is, for instance, something which royal commissions act as.

Senator LUDWIG—It is a significant power to have.

Mr Cunliffe—It is, yes.

Senator LUDWIG—Police do not have that power.

Mr Cunliffe—Not generally, no.

Senator LUDWIG—The ACC—the Australian Crime Commission—has it, but in limited circumstances, and it is an examiner who determines how it is going to operate, whereas there does not seem to be any limitation upon how this is going to operate. If you talk about mobile

security threats or mobile terrorist scenarios, there may be a case where a person has documents which are significantly incriminating, and the police may want to arrest them for the mere possession of those documents because those documents might detail a significant criminal activity. Then, if someone asks for the documents and they hand them over, you have given them use immunity on those documents.

Mr Cunliffe—You have given them immunity from the basis that that transaction would not entitle a prosecuting authority to progress, and that again is similar to a royal commission structure, which has some similar procedures so that a royal commissioner—if I can put it into an idiomatic sense—can get to the bottom of the matter. But then there may well be issues for potential prosecution in relation to the content of the documents where an investigator would need to separately confirm the facts and progress the matter. If your concern is that you may in effect make it more difficult to prosecute the person, I suppose that is a view. The alternative view is that, if you did not have the document in the first instance, you might not even know where to look, and so perhaps you are better placed on one view.

Senator LUDWIG—But who makes that decision? In a normal ACC examination for the use of that power, they have trained persons who determine when they will ask the question, what questions they will ask and what documents they will call for. There does not seem to be any limitation on how that power will operate. It is called subdivision E, 'Other powers'. It seems to be a soldier on the beat, so to speak.

Mr Cunliffe—It is in subdivision D, which is only in an offshore designated area in the offshore general security area, so it is limited geographically. Within that, the answer would probably go back to training. The context is probably the other thing which is likely to limit it. I do not expect that this is a setting where people are going off into general interrogations. I would anticipate that the situation in which the person is, where the power exists, is already somewhat fraught and that they are attempting to do a particular exercise, not something which is a general investigation.

Mr Pezzullo—This is offshore, isn't it?

Senator LUDWIG—Why do you say it is limited to offshore?

Mr Cunliffe—This is subdivision D, if I am looking at the right thing.

Senator LUDWIG—Subdivision E.

Col. Dunn—But it only applies in the division—

Senator LUDWIG—It applies to incidents in the Australian offshore area—schedule 1.

Col. Dunn—It is designed to deal with situations where you board a ship and ask someone to produce a document. The situation, of course, is still a police argument.

Senator LUDWIG—But the same thing could occur. The soldier asks for the captain to produce the documents, and they do.

Col. Dunn—They can do that now under the current Customs Act and things like that, for example. It mirrors those provisions, but it does not apply on land.

Senator LUDWIG—The short answer then is that you are satisfied that it will operate successfully and use immunity will be given in those circumstances which will not otherwise

avoid criminal sanctions, and you have taken cognisance on derivative use immunity and ruled it out.

Col. Dunn—It is to deal with the immediate situation of resolving a threat. You might need to produce a document and answer some questions so you can resolve that offshore threat. That is what it is designed for, not to elicit criminal evidence for a charge later on. It is designed to deal with that threat. If that person gives you information, you can deal with the threat in the offshore environment, and the quid pro quo is that that person is protected from criminal prosecution.

Senator LUDWIG—I understand the quid pro quo. Thanks.

CHAIR—Thank you very much. Gentlemen, thank you for your assistance with the committee's hearing today. A number of matters have been taken on notice by you today. You would be more aware than most of the committee's tight time frame for reporting on this bill. We would very much appreciate your assistance with a swift response in relation to those matters. It may also be the case that there were matters raised by other witnesses during the evidence given this morning that have not been raised in this engagement and that officers of the department view as requiring some response. If you would turn your attention to the *Hansard*—we will provide it to you as soon as it is provided to us, and Hansard are always very helpful in these matters—then that would also be helpful. I do not think there are any further questions. I thank you all very much for appearing today. I thank all of the witnesses who have given evidence to the committee today and all of my colleagues who have attended. I declare this meeting of the Senate Legal and Constitutional Legislation Committee adjourned.

Committee adjourned at 1.00 pm