



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

FOREIGN AFFAIRS, DEFENCE AND TRADE
LEGISLATION COMMITTEE

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

FRIDAY, 21 JULY 2000

CANBERRA

BY AUTHORITY OF THE SENATE

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SENATE
FOREIGN AFFAIRS, DEFENCE AND TRADE LEGISLATION COMMITTEE
Friday, 21 July 2000

Members: Senator Sandy Macdonald (Chair), Senator Hogg (Deputy Chair), Senators Bourne, Ferguson, Payne and Schacht

Substitute members: Senators Abetz, Bolkus, Boswell, Brown, Chapman, Cook, Coonan, Crane, Eggleston, Faulkner, Ferris, Gibbs, Gibson, Harradine, Hutchins, Knowles, Mason, McGauran, Murphy, Tchen, Tierney and Watson

Senators in attendance: Senators Hogg and Sandy Macdonald

Terms of reference for the inquiry:

Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000

Committee met at 9.08 a.m.

JOHNSON, Mr Warwick Stanley (Private capacity)

CHAIR—I declare open this public meeting of the Senate Foreign Affairs, Defence and Trade Legislation Committee which is inquiring into the provisions of the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000. This is the first public hearing to be conducted by the committee on this matter.

In its 10th report of 2000, the Selection of Bills Committee recommended that the provisions of this bill be referred to the Senate Foreign Affairs, Defence and Trade Legislation Committee to provide the community with an opportunity to comment on the bill's contents. On 28 June, the Senate referred this bill to this committee for report by 16 August 2000. The inquiry was advertised in the press on 1 and 3 July. To date, the committee has received 13 submissions.

I welcome Mr Warwick Johnson to this hearing. The committee prefers all evidence to be given in public, but should you at any stage wish to give any part of your evidence in private, you may ask to do so and the committee will consider your request. The committee has before it a written submission from you. Are there any alterations or additions that you would like to make to the submission at this stage?

Mr Johnson—Not at this stage.

CHAIR—I invite you to make a brief opening statement and then we will proceed to questions.

Mr Johnson—I am here as a former member of the Army. I could perhaps read the first two paragraphs of my submission. It identifies why I am here.

CHAIR—We have read your submission, Mr Johnson. If you would like to read it in, please do so.

Mr Johnson—I thought it might be of interest for people who are sitting behind me to know where I come from.

CHAIR—Certainly.

Mr Johnson—I was a private soldier in the citizen forces in 1939 when called up for full-time duty about seven days before war was declared. This may be the only time the reserve forces have been called out for full-time duty in Australia's history in peacetime. After that war, I re-enlisted in the citizen force and served in that force until 1968. My final posting was in the directorate of infantry with the rank of major. In February 1955, when floods occurred in the Hunter River, I was appointed as the Army adviser to the civilian authorities in Maitland before the flood peaked and for some days thereafter.

The only thing that I would like to emphasise generally is the need for speed in calling on the forces. The procedures presently laid down are quite inadequate and out of date. Of course, in the states now we have emergency services organisations. My recommendation, which I commend to you, is that there should be a procedure whereby access to the armed forces is accelerated so that you can have instant, or almost instant, reaction. You will get no warning in an earthquake. An earthquake occurred in Newcastle. To use the permanent forces or the reserve forces in such an instant natural disaster is essential.

Speed is my theme and the greater use of the reserve forces, particularly in remote country towns in New South Wales. The floods in Maitland and Nyngan are perfect examples. The resources in those remote country towns are very limited. I am aware that in one case there was a minor flood in one country town where the local reserve forces were available to be used—and were dying to be used—but the approval was not forthcoming.

My recommendation to you, which is not in my submission but which is recent thinking, is that there should be delegation down from the civil authorities to people of relatively senior rank in the emergency services to give them the authority to deal with the armed forces at relatively senior rank. I can only add that the use of the reserve forces in remote country towns seems to be a great asset to the nation. It is particularly so in states like Western Australia in the north-west, which is sensitive at the moment. I believe the reserve forces are an asset that is not properly used. I have nothing more to add.

CHAIR—Thank you, Mr Johnson. You note in section 51D that the Chief of the Defence Force must utilise the Defence Force in such manner:

... as is reasonable and necessary, for the purposes of protecting the Commonwealth interests specified in the order, in the State or Territory specified in the order, against the domestic violence ...

Could you explain in greater detail why you think the word 'reasonable' is not necessary and should be deleted? Is the inclusion of this word simply not needed or does it create problems in your mind?

Mr Johnson—I believe it is not needed. I believe the all-embracing 'is necessary' is sufficient. It will go to precluding members of my own profession arguing before the High Court one day what is really intended by the section.

CHAIR—You have raised the very interesting point that the words 'defend or' should be inserted before the word 'recapture'. Could you explain in greater detail why you think this is necessary?

Mr Johnson—It is my experience that sometimes it is better to grab the higher ground first. If a building is even threatened, that is a situation which occurs before it needs to be recaptured. The thought I had was to give that authority to move in first.

Senator HOGG—How would you determine in that pre-emptive state what was a likely domestic violence situation as opposed to one which was not? This is the difficulty in giving the power under this legislation and just giving people carte blanche to determine that there might be a situation where there is domestic violence. How does one get around that problem?

Mr Johnson—I believe you just have to leave that to the discretion of the person in charge of the exercise at that moment. For example, about a year ago the American Consulate in Castlereagh Street in Sydney was under threat of domestic violence and rocks were thrown at it. What I had in mind was the power to move in to protect those obviously threatened premises.

Senator HOGG—I understand that comes under a different authority. I will be looking to the Department of Defence and A-G's for some advice on that when they come before us. I understand that is not territory which is territory of Australia and, therefore, this legislation, as I understand it, would not apply.

Mr Johnson—No.

Senator HOGG—The same applies to embassies, consulates and high commissions around here, so I understand your concern. We can address that with the Department of Defence.

Mr Johnson—Perhaps I selected a bad example in using a foreign embassy or consulate. I still think the same applies.

Senator HOGG—You suggest that in 51D the word 'reasonable' be dropped, as raised by Senator Macdonald. In 51D it says:

If the Governor-General makes an order under section 51A, the Chief of the Defence Force must—
so it is not optional for him or her—

subject to sections 51E, 51F and 51G, utilise the Defence Force, in such manner as is reasonable and necessary ...

Why would you want to see the removal of 'reasonable?' That would be seen by many people as being a safeguard against the Defence Force acting improperly or beyond its mandate in this sort of area. If the word 'necessary' only were left there, it may well end up in circumstances that people might otherwise not appreciate. So would you necessarily persist with the removal of the word 'reasonable'? Is there some fundamental, telling reason why the word 'reasonable' should not be there? Is it such an inhibitor to the operations of the defence forces that we should consider the removal of it when this legislation comes before the Senate? That is basically what I am asking.

Mr Johnson—It is my submission that it should stand. One is put in a dilemma by having to decide: firstly, is it 'reasonable' and, secondly, is it 'necessary'. To prevent any legal argument on the correct interpretation of the section, I submit that the word 'necessary' is the only one that is necessary. You cannot arrive at being 'necessary' unless you have already considered reasonableness anyway.

CHAIR—Could it not be that the word 'reasonableness' emphasises the need for troops to use the minimum force necessary to accomplish the task they have been sent to do? It is an indicative response.

Mr Johnson—It is my view that it has got to get to being necessary. Any rungs in the ladder, like 'reasonableness', are only part of the process of arriving at the 'necessary' level. I

was just looking forward to one day when there is an argument as to whether or not it was reasonable but not necessary. I think it makes it easier for people to decide under the all-embracing umbrella of was it 'necessary'. If it were unreasonable, you would not get to the necessary in the mental process anyway. I just think it would make it have greater clarity.

CHAIR—Yes. What is reasonable is what is commonsense, isn't it?

Senator HOGG—You note that the automatic appointment of members of the Defence Force as special constables was recommended by Mr Justice Hope in his 1979 report. You agree with his recommendation. In its submission, on page 10, the Department of Defence stated that it considered it desirable that the ADF should be 'granted all the same authorities as the police', as this would encourage the view that the ADF is a substitute for the police rather than a supplement. Further, it stated that it was more desirable to spell out as clearly as possible the tasks that are expected of the ADF and confine the extent of the authorities to this as a limitation of employment of the ADF. Would you like to respond to the Department of Defence's explanation as to why defence members should not have police powers?

Mr Johnson—No, I cannot respond to that. I have not had the benefit of reading that submission. I would like the opportunity to consider their submission instead of just answering it off the cuff.

Senator HOGG—All right. I think their submission is available over on the table there today. If you would take that away, have a look at the reference I have just directed you to and respond to the committee as reasonably as you can, we would appreciate that, because we are on a short reporting time frame.

CHAIR—I do not know whether Senator Hogg explored this. Mr Johnson, are there any particular powers that a special constable has that the ADF members under this bill would not have or should have?

Mr Johnson—I have not considered that.

CHAIR—Finally, the Victoria Police submitted that the legislation is unnecessary as the police are able to handle domestic violence if necessary with police brought in from other states or territories rather than resort to the ADF. Are you able to comment on these claims?

Mr Johnson—I find it difficult to do so, not having had the opportunity of reading other people's submissions, and I would like to reserve my comments until I do.

CHAIR—Mr Johnson, I have just a generic question to you as somebody who was involved in a civilian call-out as you were in 1955. As somebody who lived north of the Hunter I always grew up remembering or being told about that flood. I can remember as a small child seeing the mark on the telephone post where the water went up to. Do you see a problem where the legislation makes it clear that the local police are in command of the situation and the ADF have to work in cooperation? I know that commonsense would obviously conclude that, if there was an emergency type situation, they would cooperate. But can you see a problem of command if you have ADF who are under the authority of their commanding officer or upwards to the Minister for Defence and local police are in control of the situation?

Mr Johnson—No. The civilian authorities must be in command. My experience was that there was no problem. Legally, I was there to advise the civil authorities, including the police, and was nothing more than an adviser, as I said in my submission. It was either my brigadier or my general who gave me very firm instructions over the telephone that I was there purely as an adviser and I was not in command.

CHAIR—Who was your brigadier in 1955?

Senator HOGG—That is an unfair question, Senator Macdonald!

CHAIR—It was not Brigadier—

Mr Johnson—It was not Colonel Macdonald. It was either Brigadier, later General, Paul Cullen or Brigadier, later General, Denzil Macarthur-Onslow. I served with them at various times. I found that on arrival in Maitland, after an inordinate delay waiting for Canberra and Macquarie Street in Sydney to approve my going, there was no leader. There was no-one in command. Certainly, the police force were doing their very best with their limited backgrounds. They just adopted me as the leader of what was going on. They thought that I was in charge. With all the fragmented actions going on by all sort of charitable organisations and other state authorities, the policeman was not really trained to act in control of a multidisciplinary team. I suggest that all my advice in the heat of the kitchen was framed in the terms of an order and they all carried it out and wanted to do so.

Senator HOGG—You raised a good point: there is an assumption of who is in charge instead of necessarily knowledge of who is actually in charge. That can be brought about in some instances by virtue of the character or nature of a particular person—they may well be seen to assume command, when in effect they do not have the authority. This legislation needs to be able to clearly distinguish between those who have the authority and those who might otherwise maintain that they do or in some way, not in a devious way, pretend to have or think they have the authority. Part of the thrust of this legislation is to clarify those chains of command—those who have authority and those who do not have authority. A couple of nods from the rear every now and again would help me to know whether that is right.

Mr Johnson—I am not getting the benefit of the nod.

Senator HOGG—No, you are not getting the benefit of the nod.

CHAIR—You are not getting any noes at the back either.

Senator HOGG—I think that is the intended purpose.

Mr Johnson—Yes. I do not get the benefit of a mirror, Senator. I would love to see whether the fellows in uniform behind me are shaking their heads or nodding.

Senator HOGG—They have been holding their scorecards up high—they have been good scorecards.

Mr Johnson—I will go back to the police authority. As I pointed out in a very light way, the sergeant asked me what I wanted done about the looting. He wanted to pass the buck to me. He wanted me to say what he should do to correct looting. I dodged that and pointed out to him that it was his responsibility, not mine, as to what he did. But he tried very hard to get me to make the decision. It might be overstating it, but if someone without my legal background had been in my position—appreciating the niceness of the situation of being an aid to the state authorities—they might have been trapped by the policeman.

CHAIR—You might have been stringing them up left, right and centre!

Mr Johnson—Yes. To me it has to be very plainly stated, as it was stated to me, that you are there as an aid only. But where the civilian authority in a remote country town has no experience at all, if you do not step in and couch your advice in the form of fairly strong words, nothing gets done effectively. Take recent occurrences in some of the country towns where there have been riots. Hotels have been torched by some overexuberant people, usually on

pension day. The local authority, which is the police force, have not got the manpower. You get a town of three or four people headed by a sergeant who is on leave. When the accident happens you have a young constable as the most senior fellow, and he has had no background training at all.

Senator HOGG—But there are reserve police forces which can be taken into the situation in those circumstances. My interpretation of this legislation is that in the first instance it is always to be the civil authorities that try to address the problem that arises. It seems to me, again from my reading of the legislation, that it would be in only the most extreme circumstances that the powers would be brought into operation.

CHAIR—Mr Johnson, thank you for coming before the committee. We would be pleased if you would make a further submission on the points you raised in response to questions. We value your time.

Mr Johnson—May I apologise. There is one item I would like to raise here.

CHAIR—Certainly.

Mr Johnson—In the call-out of the armed forces there should be a direction as to whether they should be armed or unarmed. I do not think it is wise to throw the onus on the force commander to decide whether they be armed or unarmed. It is a matter for the Governor-General and Executive Council to make a decision as to whether or not the call-out should be armed or unarmed.

CHAIR—Using the force that is necessary.

Proceedings suspended from 9.36 a.m. to 9.50 a.m.

STRETTON, Major General Alan Bishop (Private capacity)

CHAIR—I welcome to the committee Major General Alan Stretton. The committee prefers all evidence to be given in public, but should you at any stage wish to give any part of your evidence in private, you may ask to do so and the committee will consider your request. The committee has before it a written submission from you. Are there any alterations or additions you would like to make to your submission at this stage?

Major Gen. Stretton—No.

CHAIR—I now invite you to make a brief opening statement and then we will proceed to questions.

Major Gen. Stretton—Thank you. You asked for details for the record. Would you like me to start with that?

CHAIR—Yes.

Major Gen. Stretton—I am a retired army officer—38 years in the Defence Force and 20 years as a practising barrister and solicitor. This is a private submission. I make the submission in response to a request from your secretariat to look at the amending bill and, if I wished to, to make a submission. I did look at that and decided to make the submission which you have before you. I am here in a private capacity. In my submission which you have there are five recommendations which I make. I am wondering whether you would care for me to deal briefly with each recommendation and unroll them rather than go to the whole five.

CHAIR—Please do.

Major Gen. Stretton—The first recommendation concerns the definition of ‘domestic violence’. Authorising ministers will have to decide what it means before they can invoke this section of the Defence Act. The draftsman obviously recognised that it would have to be defined and he defines it, as you have no doubt seen, in division 1 as ‘Domestic violence has the same meaning as in section 119 of the Constitution.’ It is very neat, very nice. He gets out of it. Then you turn to section 119 of the Constitution and you find, of course, that it is not defined at all. So why the draftsman would do that and not have a definition escapes me. I believe that a minister, in determining whether domestic violence exists, should at least have some definition of it. It is a very bad term anyway. If the Defence Force were called out in a hostage situation—say, overseas terrorists had grabbed Olympic supporters in some foreign plane at Sydney airport—it would certainly be violence but it could hardly be classified as domestic. ‘Domestic violence’, of course, has other interpretations in law. I have no idea why that term was used. It was mentioned in the Defence Act previously. The part it was in, section 59, is now being erased by this amendment so there was no need to use it at all. But it is used and, since it is used, I think it needs defining. Although I do not claim the expertise of the parliamentary draftsman, I have suggested it be defined as something like ‘Danger or threatened danger to life and property that is beyond the resources of state or territory police forces’. That is the first submission.

CHAIR—Thank you. Is there a danger that, in defining domestic violence in that way, circumstances that might in fact warrant Defence Force intervention might be excluded?

Major Gen. Stretton—Yes, that is another one of my submissions. As the amending act is framed now, domestic violence is the only reason that the authorising officers can call on the

Defence Act. That is what we are dealing with, and in those circumstances there is no other way. It is mentioned 15 times in division 1. The authorising ministers, under this portion of the act, cannot call out the Defence Force unless there is domestic violence. I think that is a weakness in the act that I will address subsequently. But as far as this amendment goes, it is all about domestic violence, and that is what has to be defined.

Senator HOGG—Do you have any knowledge of where the term ‘domestic violence’ in the Constitution has been tested at law?

Major Gen. Stretton—I do not, no.

Senator HOGG—I certainly do not know either.

Major Gen. Stretton—Protection of the states from domestic violence is mentioned in section 51 of the Constitution, but the section where it is mentioned is taken out of the Defence Act by this amendment, which replaces it. I know of no other place in the Defence Act where domestic violence is mentioned.

Senator HOGG—Do you know of any legal interpretations?

Major Gen. Stretton—No. Of course, domestic violence has another connotation in family law.

Senator HOGG—It certainly does.

Major Gen. Stretton—That is why I frankly think it is a most inapt term when it does not have to be used.

Senator HOGG—The Defence Force would be out all the time!

Major Gen. Stretton—Yes, of course. The Defence Force would have a full-time job. I am not sure they could handle some of the situations.

Senator HOGG—Nor would they want to. You said that your definition would be something like ‘danger or potential danger to life or property that is beyond the resources of the state’. When you talk of ‘danger or potential danger to life or property’, what are you envisaging? ‘Life’ I can understand. I presume you are talking about loss of life there. But what are you talking about with regard to ‘property’? Is it the destruction of property?

Major Gen. Stretton—Yes, I would believe that to be so. For instance, if terrorists stormed into Parliament House and were not holding any hostages but just sitting here, that would seem to me, under the property clause that I have suggested, sufficient to call the Defence Force out because there is the potential danger of damage to it. In fact, that has occurred.

CHAIR—You wouldn’t call out the great council of chiefs?

Major Gen. Stretton—The problem is that the great council of chiefs does not have a reviewing house.

Senator HOGG—I am just trying to get a handle on what you see as being the danger or the potential danger to property.

Major Gen. Stretton—As I said, I do not claim to be a draftsman.

Senator HOGG—No, I understand that.

Major Gen. Stretton—A draftsman could probably provide a much better definition than I could. But this is what came out of my head.

Senator HOGG—All right.

Major Gen. Stretton—I think you could have situations where life was not necessarily threatened but major damage to property was—for example, someone getting on the Sydney Harbour Bridge or on some vital communication.

Senator HOGG—What about infrastructure such as a telecommunications hub—telephone exchanges and the like?

Major Gen. Stretton—Yes, television places.

Senator HOGG—Some might agree with that!

Major Gen. Stretton—Yes.

Senator HOGG—Let's not be too flippant, but vital communication channels such as Black Mountain Tower.

Major Gen. Stretton—Yes, I think so.

Senator HOGG—I was just trying to get a feel for what you are after there.

Major Gen. Stretton—I will proceed now with my recommendation concerning the powers of the minister. As long as I have been associated with Defence, it has always been the custom that the Defence Force has been given the task and the resources but how they perform that task has been a matter for the Defence Force. This legislation, which gives the minister authority to determine the way in which the Defence Force will be utilised, is, I believe, contrary to anything that I have ever heard. Surely the Chief of the Defence Force, with his experience and all the military resources at his command, is the one to determine how an operation is to be conducted. You cannot have, I believe, political interference in that, nor do I think that a minister would necessarily want those powers. If he has got the power to overrule the Defence Force, et cetera, he bears some responsibility for condoning what is going on. I do not think he is in the position of experience or anything else, no matter how bright he might be, to assume to have any knowledge of operational matters. I think that is entirely a matter for the Defence Force and therefore I believe that that section, which gives the power to the minister, should be taken out.

CHAIR—Might there not be political as well as military considerations? There may be international considerations.

Major Gen. Stretton—Yes, of course—that is a point that I concede. But there is a danger—as it is stated here—that it could be used by a minister to interfere in military operations. It says 'the way the Defence Force is to be utilised'. So if the military commander wanted to land the SAS on the rooftop and the minister said 'No, you won't do that, you'll do it in some other way,' that is the way in which the Defence Force is being utilised and the minister would have the right to overrule the military commander in that matter. That is what I think is a very dangerous trend.

Senator HOGG—You are saying that the ultimate responsibility should not lie with the minister, it should rest with the Chief of the Defence Force.

Major Gen. Stretton—Regarding the tactics of the operation, the overall responsibility rests with the minister. The military cannot move unless he is given the task and the resources to carry it out. The tactics of the situation is the way in which it is carried out and the minister has got overall control. He can stop it at any time by withdrawing the authority—no sugges-

tion. But this power has, I believe, never been in the Defence Act. Why do we put it in at this time? Why do we need it here? It is a new departure that, I believe, has been slipped in.

CHAIR—Why?

Major Gen. Stretton—You would have to ask the framers of the amending bill why.

Senator HOGG—Maybe the explanatory memorandum says something about it. The only reference to 51E in the explanatory memorandum says:

New section 51E provides that in using the Defence Force in accordance with the section, the CDF must comply with any direction that the Minister for Defence gives from time to time as to the way the Defence Force is to be utilised.

It does not expand beyond that and maybe that is something we can have an explanation on this afternoon when Defence and A-G's come before us.

Major Gen. Stretton—Yes. I think my meaning is clear. It is not control of the Defence Force; it is the political interference with military operations.

CHAIR—Do you think that is likely to happen?

Major Gen. Stretton—The power is in the act. Whether it is likely to happen or not, time would tell.

CHAIR—Can you foresee a situation where the political powers that be say, 'I would like to have some options from you military people as to how you might handle the situation,' and you provide two options, and then instead of taking the one that was the most preferable option in the military's view, the political leadership decided to take the less preferable option?

Major Gen. Stretton—Yes, I concede that point.

CHAIR—Therefore, that is not a satisfactory result—always bearing in mind that the government could say, 'Neither will take place; you will not do it.'

Major Gen. Stretton—Of course. Also, it is the government that is controlling the resources. There is no suggestion that the minister is not in control of the situation. I am just saying it is the manner in which it is conducted.

Senator HOGG—There is the right of revocation of the order, though, which is available to the minister should the minister not be satisfied.

Major Gen. Stretton—Yes, of course.

Senator HOGG—That is right. So you are saying that right of revocation is not protection in itself. You really need to clarify whether you are talking about the tactics in the way the force is being used or whether it is a broad overall operation.

Major Gen. Stretton—My recommendation is that 51E should be deleted. We seem to have got by for the last—

Senator HOGG—Given your concerns in respect of 51E, do you see a situation where 51E could remain but it could be clarified so as to avoid the difficulties that you raise? Is that a possibility?

Major Gen. Stretton—Yes, I think that is a possibility. It would have to make it clear that the minister did not have the right to interfere with military operations. But why put it in? He has got the power to stop it, he has got the power to make resources available, he gives a clear

directive to the military; as I say, he can withdraw that authority at any time. Why do you need 51E?

Senator HOGG—We will find that out this afternoon. It will be part of the excitement we have this afternoon.

Major Gen. Stretton—The next point concerns industrial disputes. I think we all know this a highly political matter. In his second reading speech, the minister said, and technically quite correctly, that:

The bill also preserves the current prohibition set out in section 51 of the Defence Act regarding the use of Defence Force elements in connection with industrial disputes.

This has got to be clarified. In the Defence Act there is no prohibition on the permanent Defence Force being used in industrial disputes—none at all. The restriction the minister refers to is elements, and those elements are the emergency reserve and the reserve forces. They are the only restrictions. There are no restrictions, of course, on the permanent forces being used. I think this form in the minister's second reading could give the impression of defusing any issue that might arise and give the impression that there is some prohibition on the Defence Force being used. There is no such prohibition; this applies to very minor elements of the Defence Force, which are really nothing when it comes to the resources the Defence Force has.

CHAIR—There is a prohibition on the reserve, did you say? Where is that?

Major Gen. Stretton—It is in section 51 of the Defence Act. It states:

Provided always that the Emergency Forces or the Reserve Forces shall not be called out or utilized in connexion with an industrial dispute.

That is left in; that is not taken out.

CHAIR—What do you think are emergency forces?

Major Gen. Stretton—I am a little out of date, but it is people who are probably retired and on some sort of emergency reserve. It is certainly not the permanent forces. It is just an element of part of the constitution of our Defence Force as a whole.

Senator HOGG—This afternoon I will be seeking clarification from Defence about that section.

Major Gen. Stretton—It is very clear that there is nothing to stop the Defence Force being used, and in fact it has been used on occasions short of domestic violence. I will get to that point in a moment. Relating to this, at 51G(a) it says:

Chief of the Defence Force must not:

(a) stop or restrict any lawful protest or dissent ...

It seems good bread and butter stuff on the face of it. But, if this applies only to domestic violence, under this bill the Defence Force can be called out only for domestic violence. If you have got domestic violence, that is not lawful protest. Once it becomes domestic violence, it is quite unlawful. I just do not see why it would be in there, except that it gives them a warm glow to stop or restrict any lawful protest or dissent. The Defence Force has been called in because it is beyond the resources of state and territory police forces. It is a domestic violence situation. That is why they are there. It gives you a warm glow to think that that is so, but I cannot see what it has got to do with the Defence Force being called out in domestic violence situations. However, my recommendation is that I just do not think it achieves anything. If it does not achieve anything, I do not believe it should be left in an act. We should

not put anything in an act unless it has got a positive theme. Otherwise you are going to get litigation and all sorts of things involved. If you say things that are not strictly necessary there is a great feast for the lawyers.

The other point—and I am sure Senator Hogg will be interested in this one—is that, in the past, the Defence Force has been called out in industrial disputes, not to deal with domestic violence; it is altogether a different situation. The Defence Force was called out—in about 1946, I think—when there was a coal strike. They were called out when there was a shipping strike. I can remember a company in my battalion going to Bowen to help unload ships. They could be called out for the maintenance of essential services. I think it is right and proper within all the restrictions that the Defence Force should have this. If they do not have it you would have a situation in East Timor, for instance—this is purely hypothetical—where wharf labourers and people would not load ships and supplies that were needed. There is no violence attached to it, but there has got to be some authority to use the Defence Force in those situations. Of course, it would be only in an extreme situation; the minister would realise this. But there is nothing in this part of the act that gives the authorising ministers the right to call out the Defence Force in those situations, and I think it should not be overlooked.

CHAIR—But you are saying that it is already there.

Major Gen. Stretton—No, I read section 51. It was in connection with domestic violence. The heading of section 1 is not there in these circumstances. Section 51 talks about the protection of states from domestic violence and says that the governor may call out the defence forces if he declares that domestic violence exists. What I am saying is that you could well get a situation with unions where there is no domestic violence—that is, they are acting in accordance with their own principles. Unless there is domestic violence, section 51 does not give anyone the power to call out the Defence Force. I think they should, with certain constraints, be given the power in circumstances less than domestic violence—for example, in extreme situations, which I think has been done in the past. That power should be put in this act.

Senator HOGG—You draw attention to the fact that 51G(a) says that the Chief of the Defence Force must not stop or restrict any lawful protest or dissent. How does one distinguish between lawful and unlawful? It seems to me that the way that is constructed—and I am not a lawyer—gives, by default, the right to interfere in unlawful protests. I am just wondering who determines what is unlawful. Is that a matter of judgment?

Major Gen. Stretton—I think it is. If it gets into a domestic violence situation—

Senator HOGG—It then comes to your issue about industrial dispute. Who determines whether or not an industrial dispute is unlawful?

Major Gen. Stretton—If an industrial dispute turns into domestic violence, I do not think domestic violence could be lawful. What we are doing here, if I might say so, is discussing a definition of 'lawful'. I am saying that this is the very thing that causes the problem. You are going to have these discussions not only here, where it costs very little, but also in courts and whatnot; so why put it in the act? It makes my very point about putting something in the act that is not necessary—that is, all it is going to do is to enrich the legal profession.

Senator HOGG—Sometimes what one person considers to be lawful another person may well consider to be unlawful.

Major Gen. Stretton—Yes.

Senator HOGG—The concern with this act is that people may use the nuances of words such as this to their own device. It does not matter which side of the political fence you are on.

Major Gen. Stretton—No, of course not.

Senator HOGG—That raises broader concerns out there with the public at large.

Major Gen. Stretton—Is it not better to remove the term if it is not necessary? If the Defence Force is called out only when it is beyond the resources of the state or territory police forces in a situation of domestic violence, what would be the relevance of having this in the act with all the discussion there could be over what it means?

Senator HOGG—Again I turn to the explanatory memorandum. Paragraph 23 says:

There are certain restrictions on the use of the Defence Force in assisting the civilian authorities. New section 51G provides that the CDF must not stop or restrict any lawful protest or dissent. Furthermore, the use of the Emergency or Reserve Forces is also restricted unless the Minister is satisfied that sufficient numbers of the Permanent Forces are not available. This limited use of the Emergency and Reserve Forces applies to the use of the Defence Force at the initiation of both the Commonwealth and the State or the Territory.

So that explanation does not satisfy you?

Major Gen. Stretton—No; because if it is called out in domestic violence it is beyond any lawful protest.

Senator HOGG—So you are saying that the test you are applying—if I am not misinterpreting what you are saying—revolves around the test of domestic violence.

Major Gen. Stretton—Yes.

Senator HOGG—Whether that domestic violence axiomatically implies that there is some degree of force, some degree of—

Major Gen. Stretton—It has to be a domestic violence situation that is beyond the resources of the state or territory police forces to deal with. That is what this is all about. May I just draw your attention—and I think this is just an anomaly—to the fact that, under section 51, the proviso about not using the emergency reserve or the reserve forces stays in the act. That has not been removed. I am looking at the statement now. I believe that it is in the amendment. It says:

This limited use of the Emergency and Reserve Forces applies to the use of the Defence Force at the initiation of both the Commonwealth and the State or the Territory.

But there is something in this section 23 of the explanatory memorandum that they can be called out if the permanent forces have not got the resources to handle it. There is a direct contradiction. Section 51 of the Defence Act says they cannot be called out. The amendment now appears to say that they can be called out if it is beyond the resources of the permanent forces. It has to be one way or another.

Senator HOGG—If there is an anomaly that will be pursued this afternoon. It seems, the way the current bill is constructed, that the section that you have just read out applies to 51B but does not apply to orders made under 51A or 51C. I do not know whether that is an oversight or whether it is an error in the drafting or whether it is quite deliberate. We will find that out this afternoon.

Major Gen. Stretton—But you still have the blanket in the Defence Act that they cannot be used at all.

Senator HOGG—That is correct.

Major Gen. Stretton—The proviso of 51 has been left in so there is an anomaly. It needs a very close reading of the act to quite understand what division 3 is all about because, if division 3 is put in the original order as to how they can act, that puts severe restrictions on the Defence Force. For instance, they have to wear uniform with their numbers on it. They cannot enter a building without showing someone the authorisation. The drafter of the act obviously thinks there is a possibility that in the original order both divisions 2 and 3—because it says ‘either one or both’—could be put in the order together.

Division 2 deals with a hostage situation and counter-terrorists. It becomes absolute nonsense to have anything to do with the division. For instance, if you had hijackers holding hostages in an aircraft at the Sydney airport, and negotiations are going on and the SAS are given the job to do something about it, if division 3 comes into it, the SAS would want to dress someone up as a mechanic and give him a spanner and grease and send him in with people that would be going into the plane to make a reconnaissance. If division 3 applies he has to put his uniform and name on. It is ridiculous.

Senator HOGG—As I understand it, division 3 does not apply under those circumstances. It is division 2. Division 2 expressly gives an exemption to the SAS from the wearing of a uniform or any identification to operate under those circumstances. I am getting some positive nods from behind you so I think my interpretation—

Major Gen. Stretton—Right, so why does the act allow both divisions 2 and 3 to be proclaimed in the order?

Senator HOGG—I am going to ask that question as well.

Major Gen. Stretton—And under what circumstances? If the Defence Force can only be called out in the event of domestic violence beyond the resources of local police forces, how does division 3 come into it? That sounds like just normal police duties: warrants and looking at houses and all of that. The question is: how could divisions 2 and 3 ever both be declared simultaneously? That is the first question because there is provision in the act to do that. Secondly, what relevance has division 3, with all these restrictions on the use of the Defence Force, got to do with an amending bill that is dealing with division 1 matters with counter-terrorists and this sort of situation?

It just seems to me that division 3 has no bearing on this bill. In domestic violence that is beyond the resources of the state; if you call someone out why would you be wanting to put people in uniform and have search warrants and do all these things that the police normally do? It is beyond the police resources, otherwise the Defence Force would not have been called out.

Senator HOGG—You raised an interesting point in respect of the production of the order. Under section 3, you have to show the order outlining the authority, as I understand it.

Major Gen. Stretton—Like a search warrant.

Senator HOGG—Yes. I can only presume that that covers areas where there are non-English-speaking background groups as well. If one were in an area where there are high concentrations of ethnic communities and this might be happening, it could well be that it might

be useless to have that form of order in an English format. You also raised the issue, validly in my view, of giving people copies of the order, given the circumstances as they emerge. I will look forward to hearing from A-G's and Defence this afternoon on that issue.

CHAIR—Your next point, General.

Major Gen. Stretton—My recommendation is that the whole of division 3 should be removed. I just think it restricts the Defence Force in the circumstances in which they are being called in. I just cannot believe how the authors of the act could ever think that division 2 and 3 could both be invoked in the one order.

Senator HOGG—So, when you talk about the whole of division 3 being revoked, you see no use under division 3 for the proclamation of a specified area such as a general security area or a designated area?

Major Gen. Stretton—Not in division 2.

Senator HOGG—No; not in division 2 but in division 3?

Major Gen. Stretton—Yes; but say there is an area with terrorists holed up and you designate it under division 3; once you designate that area, division 3 applies and all those restrictions on the Defence Force would have to be put into place. That is the whole point.

Senator HOGG—Yes; but division 2 does not apply, in so much as it pertains to the recapture of buildings and the freeing of hostages, as I understand it. As I understand division 3, it outlines the area of operation—the area within which Defence are able to operate the powers that they get under this particular act. Then, as I understand it, there is a further subset of that general security area which is a designated area, and the designated area, as I have read the legislation so far, is the area which would be the focus of the operation. It seems to me that it makes good sense to define the general area within which military operations are taking place—and that could be quite a large area—and then having a designated area where even different provisions apply. Are you saying you do not want that at all?

Major Gen. Stretton—I am saying that is not a bad thing but I am saying: if you want that and you invoke division 3, the Defence Force have got to wear uniform and go on with this—which would be absolutely ridiculous.

Senator HOGG—That would be, on my understanding of it, in the outer perimeter. That would be to establish the area of control. And if you had the SAS going into a designated spot, then they would not be subject to the provisions of division 3. Let us just for example use Canberra, and let us just say the general security area might be the whole of the parliamentary triangle. That might be the general area. It would seem to me that under this piece of legislation that area would be secured by the defence forces. But the designated area may well be Parliament House. Whilst the military who were operating in the general security area would have to be identified, for obvious reasons—so that those who were outside the area could identify who were in command and in charge of the area; that is what I understand that provision prevails for—when it came to someone trying to recapture Parliament House—and heaven would know why they would want to do that; someone from Defence and A-G's will provide us with an explanation this afternoon; that would be your SAS operation—they may well be dressed as the parliamentary attendant or the person delivering the bread rolls to Aussies, or whatever else it might be.

Major Gen. Stretton—But the point is that once division 3 is invoked, which includes the matters that you have just pointed out declaring the areas, there are these restrictions put on

the Defence Force. If you want to put in something about the designated areas and so on, perhaps that should be in division 2. Alternatively, you could leave the authority to designate those areas but take out the restrictions on the Defence Force.

Senator HOGG—There is a subdivision B in division 3, which refers to:

Powers that may be exercised anywhere in a general security area

And there is a subdivision C:

Powers that may be exercised only in relation to a designated area in the general security area

I must say that in reading the legislation, I had some difficulties in coming to grips with subdivision C—again, that will be pursued by way of explanation this afternoon—but the overall thrust I can understand and appreciate.

Major Gen. Stretton—If you look at 51S, which is part of division 3—it is on page 20 of the amending bill—it says:

While any member of the Defence Force is exercising powers under this division—

that is, the whole of division 3—

... he or she must at all times:

(a) wear his or her uniform ...

And it goes on further about other restrictions. So anyone operating under division 3, which is the promulgation of these various security areas, must wear their uniform. That is what this bill says, and that is my point, which is I think it is just not applicable.

Senator HOGG—I have got no problem with that—I have got another problem with that bit—but I take your point. I do not have a concern, because once you get to the situation of proclaiming a designated area you are in a very volatile, very confrontationist situation with another force, and it would seem that division 2 applies. My recollection was that in the minister's second reading speech or somewhere in the explanatory memorandum—I think it is in the explanatory memorandum—it clearly says that where division 2 applies, the provisions of division 3, particularly 51S, do not apply.

Major Gen. Stretton—He might say that in the memorandum, but there is a provision in the order under section 51A(4)(c) on page 6 at lines 4 and 5 that it—and I quote:

(c) must state that Division 2 or Division 3, or both, ... apply in relation to the order...

So it is quite possible in this act to have both division 2 and 3 as part of the order.

Senator HOGG—That is correct.

Major Gen. Stretton—Once you invoke division 3, you have all these restrictions on wearing uniform and everything else.

Senator HOGG—No. I hear what you say but I do not accept it. Paragraph 28 in the explanatory memorandum says:

Division 3 relates to 'general security area powers' and powers that may only be exercised in a designated area in the general security area. New section 51J provides for the application of Division 3 and Division 4 in relation to an order under sections 51A, 51B or 51C. However, it is the intention of the bill that powers under Division 2 prevail where both Divisions 2 and 3 apply.

So that answers that question that you have quite rightly raised.

Major Gen. Stretton—It is the bill that we have to look at.

Senator HOGG—The explanatory memorandum does have some weight in the reading and the interpretation of the bill. It says:

Furthermore, any restriction on the use of powers in Division 3 do not apply when a member of the Defence Force is exercising powers to, for example, recapture premises and free hostages.

Major Gen. Stretton—That is contrary, in my view, to what the bill says.

Senator HOGG—There is another place in the explanatory memorandum which does specifically refer to the SAS, and it may be that in reading the explanatory memorandum in respect of 51S—no, it is not there. I am just going to 47—no, it is not there. There is something that I have come across that is really quite relevant. There is another view floating around that it might be in the Defence submission. The Defence submission to this inquiry says that ‘reflective of the accepted tasks expected of the ADF in this area’—I presume that is the designated area—the ‘bill sets out the authority for performing them’ in two divisions. Division 2 specifically deals with the issue of counterterrorist assault functions ‘residing within the capabilities’ of the SASR. No, that is not it. Major General Stretton, I think you have raised a valid point. We would expect the Attorney-General’s and Defence officials, when they appear before us this afternoon, to address the concern that you have raised.

Major Gen. Stretton—That concludes my submissions.

Senator HOGG—In your submission to us you make a recommendation that 51M and N be deleted, yet you have gone a bit further today in recommending to us that all of Division 3 be deleted.

Major Gen. Stretton—Yes.

Senator HOGG—Do you stick with your original submission?

Major Gen. Stretton—I am not being gratuitous, but there was merit in your point about designation of areas. I can see from a military point of view that there is a lot of merit in that. I see nothing wrong with that part of it. The only point is the paragraph that says that, if these areas are designated, the Defence Force must wear uniform, etcetera. It is those bits. I believe you could incorporate in Division 2 those designated areas and still delete Division 3 entirely. If it is, indeed, beyond state violence, beyond state and territory police forces, the restrictions set out in Division 3 are more like normal police work, rather than anti-terrorist operations.

CHAIR—Do you foresee any problems in coordination between the Defence Force and the police? The Victorian police submitted that because the Defence Force is called out they will remain under their own command, which is a requirement under the Constitution, and this will make any operation unwieldy. Do you agree with that, and do you have a comment?

Major Gen. Stretton—Yes I have, but not in a violent situation. I was Director-General of the Natural Disasters Organisation for four years. The whole of that time was preoccupied in working with the states—and state police forces, I might add—and coordinating the use of Commonwealth military forces with the state police forces and state authorities. So I have some background to address your question. There is no question that the state police forces—I will keep to the states and keep the territories out of it—have operational control of what is going on. The Commonwealth Defence Force is to aid them in that task. They cannot command the Defence Force because the Defence Act prohibits that. It has been my experience that where there is a life at risk—no matter whether it is a natural disaster or a hostage situation—all these so-called legalities of the operation of these forces just go out the window. Everyone wants to get on with the job in hand. After Cyclone Tracey in Darwin there was no

legal power whatsoever for the commander up there to exercise any power at all and yet it was not even queried during the emergency period.

So, practically, there might be objections now because the state police forces and state authorities are always concerned about a Commonwealth takeover of their powers. The way this is presented—it says somewhere in the amending act—the state or territory police will remain in command. They do, and they are responsible. The Defence Force are there to render assistance under their own command. I cannot see any objection to the way this is framed from any state police force.

They make the point, I am sure, but I do not think the point is there. I think they are perfectly protected. I am quite confident that in the event of some sort of tragedy there would be no problem at all.

Senator HOGG—Thank you very much. That was very good.

CHAIR—Thank you for your time.

[10.45 a.m.]

GREENWOOD, Mr John Ward (Private citizen)

JOHNSON, Mr Warwick Stanley (Private capacity)

CHAIR—I welcome The Honourable John Greenwood, QC. The committee prefers all evidence to be given in public but should you at any stage wish to give any part of your evidence in private you may ask to do so and the committee will consider your request. The committee has before it a written submission from you. Are there any alterations or additions you would like to make to that submission at this stage?

Mr Greenwood—Yes. I turn to page 8 of my submission. Subparagraph or point 4 refers to the authorising ministers. The final word in that paragraph is ‘Attorney-General’. That should read ‘Minister for Foreign/External Affairs’. I would like to make a second correction on the same page under subparagraph 10, ‘Practical problems’. At point (i), ‘nolle prosequi in a federal system’, ‘in a federal system’ should read ‘in our federal system’. At page 7, paragraph 8 refers to some developments in the relevant law since Sir Victor Windeyer gave his opinion. That section is awkwardly expressed and a little difficult to follow. The point I wished to make was that the Geneva conventions in large part, whether or not they have been enacted into a nation’s domestic law, now form part of customary international law and are therefore binding on the armed forces of civilised states.

I gave a reference there to the Delalic decision at paragraph 305 but that was a particular problem. It would have been better to give a reference to a more general proposition in two of the Tadic decisions, first of all the Tadic jurisdiction decision at paragraphs 79 to 85 and, secondly, the Tadic trial, the reference to which is IT-94-I-T, 7 May 1997, paragraph 577. That is authority for the proposition that the Geneva conventions are now regarded as part of international customary law, irrespective of whether they have been incorporated in domestic law by act of parliament. Those are the only three corrections.

CHAIR—I now invite you to make a brief opening statement and then we will proceed to questions.

Mr Greenwood—I would like to begin by referring to the practical problems that I mention in paragraph 10. The first one is the matter of a nolle prosequi in a federal system where it is the state police that have the duty to decide on the launching of prosecutions for murder, manslaughter or other crimes that may have been committed by the Defence Force. It is the state Attorney-General or director of prosecutions who might or might not decide to enter a nolle, yet it can be extremely harrowing, of course, for members of the defence force to be engaged in shooting civilians even if they are terrorists. The law about when it is and when it is not permissible to shoot a man dead is sometimes difficult to apply.

Typically, if I might use an aircraft hostage situation as an example, the SAS enter a plane and find as they look along the central aisle that they are confronted at the other end with a terrorist with his hand on the detonating device of a bomb. They have very little time in which to act. They are trained to put two aimed shots into his forehead. The question is: do they challenge him to disarm himself and vacate his position of threat or do they fire those two aimed shots? That is a relatively easy example because in that case there is obvious and imminent danger to the life of all those people on that plane. But you can come back from that situation in various respects in which you might have, for example, a terrorist standing close

to a hostage with a gun in his hand but not necessarily with it cocked and pointed at the man's head. Do you then say, 'Lay down your arms or I will shoot you', or do you react immediately?

These are difficult questions, and there is no easy answer and no comprehensive answer. Each one must depend upon the particular facts and on the good training of the soldier involved. But that soldier is there because we as a community have decided that it is beyond the power of the police force to deal with this situation and we are putting the soldier there to do it for us.

Senator HOGG—Could I interrupt for a moment? Are you saying that the provisions of the act, no matter what the provisions are, will not change the circumstances of that military person?

Mr Greenwood—Yes, sir, I am. I think that one of the delusions—I hesitate to call it a delusion—is that by changing the terms of the act we solve some of these problems. The framework of the act is appropriate and necessary, but it is not sufficient and it is not going to provide answers to some of these questions.

James II endeavoured to provide answers to this question of a soldier shooting somebody, in a difficult situation, by attempting to give a *carte blanche* blanket pardon or suspension of the laws with respect to that person. That solution was unacceptable now. It was unacceptable in the Bill of Rights. It has been unacceptable since. The practical solution in the United Kingdom is that the Attorney-General or the Director of Public Prosecutions has to decide whether, in all the circumstances, to prosecute a soldier who has murdered somebody is part of one and the same government structure that has brought the army in in the first place in an endeavour to protect society. The point I am making here is that that is not so in Australia. For example, I recall one exercise in which the SAS took part, and we found ourselves, at about twenty past five in the morning, down at CIB headquarters, and the CIB were giving the SAS a pretty rough time. These were fellows who, if the bullets had been real, would have needed a bit of psychological counselling rather than the sort of treatment that they were getting from the police.

I do not think there is a solution to this question. In a democratic society you cannot give a pardon in advance. You must allow the appropriate civilian authorities to administer the civilian criminal law. The High Court has told us that, at all times, an Australian soldier remains subject to the ordinary civilian criminal law. There is no escaping that.

Senator HOGG—And I think that is the intent of this act.

Mr Greenwood—I am sure it is. It could not be otherwise, because that is the constitutional position. I am just saying that that is a practical problem, and I cannot see any easy answer to it. It is something that will remain with us. That is point number one. At point number two I say, 'the need for a cordon with adequate powers, training and the ability to deploy very quickly.' And I say, 'The proposed amendments are useful in providing adequate powers. Mirror legislation by the states may, however, be needed.'

Gentlemen, for many years now the Army has been operating without any of the detailed guidelines that are now proposed in this very carefully constructed statute. What is happening here is that we are going from having nothing—when nobody knew what powers a cordon had to search premises and seize bombs and the makings thereof—to a system where the whole thing is being most carefully regulated. When I read it, my immediate reaction was, 'Well, this is a very carefully constructed piece of work. What I would like to do is to train

with this because you do not really see where the problems are until you train with it.' My wish would be to put a sunset clause on it for five years, subject to the fact that there may be some outstanding problems. There are a couple of outstanding problems I will talk about when I stop rambling on about these so-called practical problems. There may be some outstanding and fundamental problems but, apart from that, what I would like to see is a period in which the Army was given a chance to train with this legislation and a sunset clause, and then come back.

Senator HOGG—That is the first suggestion we have had of a sunset clause. You said five years. Is there any specific reason why you pick five? Why not three or why not ten?

Mr Greenwood—These things are a matter of money. The Army does not have much money to do this sort of highly specialised training. There was a flurry of activity about the time of Expo 88, and I was involved in that. I left the Army and retired in 1994. There was not an enormous amount that went on between 1988 and 1994. There has probably been a great deal in recent times getting ready for the Olympic Games. But these things come in bursts. You really have to have the framework there and then endeavour to train within the framework. I am quite sure that Lieutenant-Colonel Kelly will have a great deal to say which will be much better informed than my comments. As I say, I was out in 1994 when I reached my 60th birthday, so I have not had an intimate association with the Army since that time. Does that answer your question?

Senator HOGG—I am mainly interested in the concept of a sunset clause. It is not in the legislation and has not been canvassed by any submission that I have seen to date. I am curious as to the merits of it.

Mr Greenwood—This is very important and essential legislation, but it is also very dangerous legislation. It gives what I think are quite essential powers to cordons from a practical point of view. The immediate problem that confronts the Army is not bringing SAS from Perth because you can do that; you can put them in three Hercules and bring them over to anywhere and do it pretty quickly because they are used to it. The immediate problem is usually to get a well-trained cordon, put it around the area of danger and keep members of the public out so that they do not incur an unnecessary risk. The question has always been: where do you get a well-trained cordon? Training is very important. You might find that the only trained cordon you have got consists of a company down in Sydney. If you are confronted with a problem at midnight in Brisbane, you might need a cordon in place within hours and there is not enough time to get them out of Sydney. Ideally, what you need is cordon training in every substantial Army base.

Senator HOGG—Again, my reading of all these things is blurring. Whether it was the explanatory memorandum, the second reading speech or whatever it was, that seems to me to be the intent under this legislation—that there will be a corps trained in the various major centres. Let me put it as loosely as that.

Mr Greenwood—I would respectfully support any such proposal. That is probably about as much as I can say about the need for a cordon. But the reason I have not addressed in my submission the sort of detail that the general was talking about in the evidence that immediately preceded me is not because I necessarily disagree with the points that he is making but merely that we have done without it for so long that the Army really does need this amount of detail. I think the best way to achieve a satisfactory set of statutory rules is to put them in on a sunset basis and see how they work in practice.

Before I leave that, something that is connected with this is that there is a suggestion that the existing AMR&Os are out-of-date and have to be replaced. One of the important points in my submission is that the AMR&Os are of fundamental importance and that the Senate should be perhaps even more vigilant in monitoring any suggested changes in them, in the statutory basis in the Defence Act.

However, the third point that I make, under 'Practical problems', is the absence in Australia of the Australian counterpart of the English justice of the peace, who makes a request. The third step, the call-out requisition request, is the thing that must happen before the final application of force. The safety catch might have been taken off by the Governor-General or by the requisition. But the trigger is not squeezed until the request is made. In the United Kingdom, that request is made by a civilian magistrate, who is there with the troops. That person is usually a local person, a justice of the peace, who is identified with the community, who has friends and relatives, perhaps, in the crowd that is being disciplined and who, at least for the most part, can be counted upon to act as one of the safeguards of civil liberties. We do not have that. We use high ranking police officers or ordinary civilian magistrates. There is no solution to that problem because we do not have comparable type of person. But I think we should recognise that a safeguard on the pulling of the trigger, which the Brits possess, is not possessed in this country. Those are really the three practical points that I wanted to mention.

CHAIR—Can I just go back to your suggestion of a sunset clause. It would of course require that this legislation be revisited in five years time. It is a difficult question, but do you think it is likely to be revisited in five years time if there was not a sunset clause or would that depend on the political and international environment?

Mr Greenwood—It would depend on a lot of things. It might depend to a very large extent on whether the Leader of the House thought that the minister in charge of the proposed bill deserved a bit of parliamentary time.

CHAIR—The sorts of political and strategic emergencies that we have had in the in the last five years from 1995 to 2000 that I recall are very small in number, if any. If that was the position for the next five years, legislation would not be revisited in five years time. In your view, regardless of whether there were any incidences of the legislation being used over the next five years, is it important that it should be looked at again in five years time, with the intervening period being used, if possible, and if funds are provided for training exercises to determine whether there should be some review?

Mr Greenwood—That would be my recommendation to your committee, with as much force as I could muster. It is really very difficult to form a view about how good the provisions in this act are until you have worked with them on the ground. All we can do is use our own limited experience to speculate and try to use our imaginations to put ourselves into those situations.

Senator HOGG—Is that best handled, as Senator Macdonald said, by a sunset clause or by an undertaking that there will be a review of the operation of this legislation by this committee or the mirror committee of this committee, which is the Senate Foreign Affairs Defence and Trade References Committee? If there is a review guaranteed to take place by either the legislation or the references committee, it may well achieve what you want to see achieved anyway. I am not against a review process. That has not been a part of the legislation. But it seems to me to hold some merit that the committee of this parliament would want to review the legislation.

It may well be, though, that it wants to review the legislation but not see it necessarily come to an end because sometimes reviews in this place can stretch over a period of time. For example, we just tabled a report before the President of the Senate today of the references committee that has stretched over two parliaments because an election interrupted the parliament and the continuation of that inquiry whilst it was re-established. Your intent is good but it may well be, from the practical purposes of the running of this committee in this parliament, that we go down that path of a review. If we can get an undertaking of the review from the minister when this is being addressed that might be the out for your situation.

Mr Greenwood—I am not really qualified to comment on the likelihood of guarantees of review being met. There is only one point—

Senator HOGG—There could be a second reading.

CHAIR—But do you think the governments legislate themselves to review things? They would say, ‘We review at the time.’

Senator HOGG—I do not think they will legislate, but I have found in this place that, if the minister undertakes that there will be a review of the legislation in three years time, then the appropriate steps are taken to ensure that that review takes place, and the opposition of the day will ensure that that review takes place. Your point is well made. I just have my concerns about a sunset clause.

Mr Greenwood—Sunset clauses are of course inherently dangerous in that they tend to create a hiatus if the replacement is not ready when the sunset occurs and night fall on us.

Senator HOGG—I have been in the dark a lot.

Mr Greenwood—There is one point that perhaps should be made here. That is, that all this very useful, detailed provision is something that the army has operated without for many years. So the worst that could happen to us if a five-year sunset clause comes into effect without a replacement statute is that we go back to operating in the way that we have always been operating—without the assistance of these detailed provisions. That is perhaps a factor which is not always found when one is considering the desirability of a sunset clause. I really cannot take it any further, usefully.

Senator HOGG—That is fine. That has been helpful.

Mr Greenwood—Those are the three points that I make of a practical nature. I now turn to my critique of the structure of the bill. I make a few points at the bottom of 7 and on page 8. Points 1, 2 and 3 are pretty self-evident. The weight to be given to them is really a matter for the committee. Points 1 and 2 are connected in a way, because at present section 51 requires the existence of domestic violence in a state before a state call-out is able to occur. To evidence domestic violence—the definition of which has been neatly sidestepped in the definition clause—requires the proclamation by the governor of the state that there is in fact domestic violence there and so on.

Senator HOGG—Do you have any literature that might be made available to us on the case law of testing of the definition of domestic violence?

Mr Greenwood—Not off the top of my head.

Senator HOGG—If you take that on notice it would be interesting.

Mr Greenwood—But 51B has been extended so that as well as a call-out to aid a state for existing domestic violence the new section allows a call-out for violence that is likely to occur.

CHAIR—Are there are doubts about the constitutional basis for the extension of that power?

Mr Greenwood—The constitutional basis depends upon the meaning of section 119. Section 119 is a bit wider than the detail of section 51 in the Defence Act. I have not got section 119 with me. You start off asking, ‘What is the content of the concept of domestic violence?’ When you answer that question to your own satisfaction, you then ask yourself the question, ‘When does it begin to exist?’ It is at least arguable that a man with his hand on a bomb’s plunger, before he actually plunges it down and explodes the bomb in the middle of the Olympic stadium, could be regarded as participating in domestic violence—at the time when he is sitting there with his hand on the plunger. The question of when violence exists and when there is merely a threat of it is a pretty grey area.

CHAIR—We cannot answer those.

Mr Greenwood—There used to be a lot of difficulty with section 92 in its old form as to when interstate trade began and ended, the question of beginnings and ends. The guarantee of section 92 started at the beginning of interstate trade and started at the end. Here is a better point: you are protecting against domestic violence. To protect somebody against something has a concept of futurity in it. If you give me a bulletproof vest in the morning knowing that I am going to put myself in a public place in a position of danger in the afternoon, you are protecting me against domestic violence. Probably the simple answer to this question is to be found not in isolating the words ‘domestic violence’ and analysing that concept, but in looking at the phrase ‘protect against domestic violence’, in looking at that concept. Once you do it that way it is very persuasively arguable that the likelihood of domestic violence, or whatever the phrase is, comes within the constitutional authority given to the Commonwealth to protect a state against domestic violence.

That was a rather long-winded answer, I am sorry. That was for 1 and 2; they are inter-linked. But it does take out the part of the governor and leaves it to the politicians a bit if—and I make the point in paragraph 3—‘state government’ does not mean executive government of the state. The only reason I make that point is that the constitution of the Republic of Ireland uses this expression ‘government’ in a way that does not include the President. That is probably the fundamental flaw in the constitution of the Republic of Ireland which removes many of the checks and balances which we enjoy.

I did not want to spend much time on 1, 2 and 3. Four is the point that is, on some views, a very, very serious flaw in the construction of this bill. That can best be illustrated by what recently happened in Fiji, and the ultimate example, of course, was Grenada. Grenada is worse because pretty well the whole cabinet was murdered—the Prime Minister, Attorney-General and just about the whole lot. Fiji is a little bit more recent and there I am not altogether clear on which of the ministers were locked up. There were a couple who were sick and they were let go. But, as I recall it, the Prime Minister was certainly locked up and was incapable of authorising anything, the Attorney-General likewise and I am not quite sure about the minister for defence. When you look at the way this act is structured, you see that everything really depends upon the authorising ministers. If the authorising ministers do not pull the trigger, nothing happens. That is a very serious flaw. When you look at section 51A—

‘Order about utilising the Defence Force to protect Commonwealth interests against domestic violence’—you see that it says that subsection (2) applies if the authorising ministers are satisfied under (a), (b), (c) and (d). That subsection says:

(2) If this subsection applies, the Governor-General may, by written order, call out the Defence Force...

If you have a situation as they had in Fiji—and we know that in Fiji the President, for reasons which are not altogether apparent, decided to vacate his office—and if this were to apply, the authorising ministers would not be there to authorise, and that is a very, very serious fault. The other thing—and this is a lesser aspect of it—is that presumably they are meant to be unanimous in this, so that you have to get a situation where the Prime Minister, the Minister for Defence and the Attorney-General are all unanimous in wanting the call-out to take place.

Elsewhere in my submission I mention the importance of the staged approach, the call-out, the requisition, the request and the capacity that gives the Army for reflection to make sure that, at each stage of the process, those who might legitimately wish to reverse the process can either confirm the process or reverse it. But there is a pretty good argument that the initial call-out should be able to happen pretty quickly. Usually these things occur quite unexpectedly. They are often in the middle of the night. What you need is flexibility. If you need flexibility at any stage, you need flexibility at the call-out stage. My submission says to make it conditional on the acquiescence of these three ministers is a very serious flaw. It really pervades the whole act.

CHAIR—What is your suggestion?

Mr Greenwood—I would think that it should be a matter for the executive council if the executive council is satisfied. All you need is a quorum.

Senator HOGG—What is a quorum for the executive council?

Mr Greenwood—I think it is two or three.

CHAIR—Is every member of cabinet a member of the executive council?

Mr Greenwood—I believe so.

CHAIR—Is every member of the ministry and parliamentary secretary a member of the executive council?

Mr Greenwood—I am not sure about that.

Senator HOGG—I am going to have some questions to raise on that this afternoon with Attorney-General’s. It is an important issue that Mr Greenwood raises and I think we need to pursue that this afternoon.

Mr Greenwood—If I might say so, without necessarily criticising any incumbent of the position of Prime Minister, historically the problems arise frequently when the Prime Minister has delusions of grandeur and attempts to take over the government of the state. This is not the sort of thing that one thinks about in a country like Australia but this legislation that we are talking about here is legislation for the long haul. You have to think about places like Grenada, where everybody was murdered or went to ground and nobody was authorised, or Fiji, where people were all imprisoned and unable to authorise.

From first to last, this whole statute has this concept of authorising ministers presumably unanimously acting. I heard the general talking before about division 3. You get into that very important part of division 3, the declaration of designated areas—51Q. The authorising min-

isters may in writing declare that a specified area. I said before that what I would like to see is all this detailed material put into practice and for the Army to train with it. I really think that this question of the authorising ministers is a fundamental flaw in this act and one which has to be addressed.

Senator HOGG—I think you raise a very valid issue there.

CHAIR—Thank you, Mr Greenwood. I think we should try and finish quite soon because we are running a little behind time and we have some Western Australians we have to speak to.

Mr Greenwood—I really think they are the important points. The fundamental point is that the Governor-General has to be free to act on the advice of the Executive Council. Provided you protect that, then I think everything else falls into place. But if you endeavour to modify that in any way then that is when you get into trouble. One of them there, of course, was that business about calling back the troops—that the Governor-General must act when these three bring it back. That is a significant problem for the same reasons that I mentioned.

CHAIR—Gentlemen, you have made some very important and valid suggestions and points and we value your time.

Senator HOGG—I want to thank Mr Greenwood, as I have done with the other witnesses. I think they have all put valuable evidence before the committee this morning.

CHAIR—Mr Johnson, would you like to comment.

Mr Johnson—The advice of Mr Garran, relating to the matter of definition of domestic violence, was annexed to my submissions. It is referred to on the top of page 2, in paragraph 4, but apparently it is not with my submissions. I have a copy here.

CHAIR—We can remedy that. Thank you.

[11.38 a.m.]

HALLIGAN, Ms Lucy Elizabeth, Principal Policy Officer, Federal and Constitutional Affairs, Western Australian Ministry of Premier and Cabinet,

JUDGE, Mrs Petrice Anne, Assistant Director General, Federal and Constitutional Affairs, Western Australian Ministry of the Premier and Cabinet

THOMSON, Dr James Austin, Legal Officer, Western Australian Ministry of the Premier and Cabinet

CHAIR—I welcome to this hearing, via telephone line, officers from the Western Australian government, in particular Ms Lucy Halligan, Mrs Petrice Judge and Dr Jim Thomson. The committee prefers all evidence to be given in public but should you at any stage wish to give any part of your evidence in private you may ask to do so and the committee will consider your request. The committee has before it a written submission from the Western Australian government. Are there any alternations or additions you would like to make to the submission at this stage?

Mrs Judge—We would like to make some additional comment at the end of our submission in relation to the effect on the Western Australian criminal code.

CHAIR—Would you like to do that now?

Mrs Judge—We would prefer it if we could just make a general statement first and then follow it with that comment.

CHAIR—That is what I would suggest. Please go ahead.

Mrs Judge—Could I introduce Lucy Halligan who is going to make the opening comments for us. Thank you.

Ms Halligan—Thank you for the opportunity to make a submission to this inquiry. Western Australia welcomes the amendments to the defence bill—in particular the updating of the powers of the Defence Force in dealing with an emergency situation. It appears that the proposed provisions have been drafted with a real concern about not being seen to exceed what would be considered a rational response to an emergency situation. However, Western Australia wishes to raise some constitutional issues in relation to the proposed sections 51A and 51B. As our written submission highlights, the proposed section 51A allows the Commonwealth to make a unilateral decision to enter a state to protect Commonwealth interests. Commonwealth interests are not defined and therefore may go beyond the Commonwealth's constitutional power. In our view, Commonwealth interests should be defined as this will clarify the situations in which the Defence Force will be called out.

Western Australia also has concerns about the calling out of the Defence Force under this section without the consent of, or request from, a state. In our view, the Commonwealth should not be able to call out the Defence Force unless the relevant state agrees or, at the very least, is consulted about the Commonwealth's intention to do so. The proposed section 51A allows the Commonwealth to call out the Defence Force in situations where domestic violence is not even occurring. This expands the current section 51 of the Defence Act 1903 and section 119 of the Commonwealth Constitution.

Moving now to the proposed section 51B, this section does not impose a mandatory obligation on the Commonwealth to comply with a state's request for assistance; therefore, this

section may be inconsistent with section 119 of the Constitution which requires the Commonwealth to assist the states. Section 51B also requires the authorising Commonwealth ministers to be satisfied of certain matters. These additional requirements are not contemplated in section 119 of the Constitution. Western Australia does support the retention of the prohibition against the use of the Defence force in connection with industrial disputes.

Mrs Judge—We would like to add a comment in relation to the criminal code. Jim Thomson will now do so.

Dr Thomson—Western Australia considers the relationship between the operation of the provisions in the bill, which confer powers on, or grant authorisations to, members of the Defence Force to do certain activities or to carry out certain acts, which might have the effect of rendering state criminal laws or associated state legislation inoperative—that is, there may be some scope for inconsistency, particularly in the operation of provisions between the Commonwealth provisions and state legislation. We have not investigated that aspect in any great detail but it is matter we think ought to be given some further consideration. We can elaborate on that as we go on.

Mrs Judge—That concludes our opening comments. We are open to further questions.

Senator HOGG—I have a general question to start off with. What has been the level of consultation between the Commonwealth and your state on this particular piece of legislation?

Mrs Judge—I am responsible for federal and constitutional affairs. I would normally expect that consultation on this sort of a matter would come through my section, and there has been no consultation that I am aware of. I do understand there has been some consultation through SAC-PAV, but that has not been referred to my section at all.

Senator HOGG—So that could be as much an internal problem in Western Australia as anything else.

Mrs Judge—It may be, but I would expect that something that has these far-reaching implications should have been formally referred to the Western Australian officers.

Senator HOGG—So there has been no formal referral to the Western Australian government but there may well have been some degree of consultation in SAC-PAV or one of those forums, but no formal consultation as such?

Mrs Judge—Yes.

Senator HOGG—Does that surprise you? Given that, as I am led to believe, the drafting of this legislation, or the putting together of this legislation, has been in progress now for some 2½ years, does it surprise you that you have not been consulted?

Dr Thomson—It is maybe not surprising given that the two issues that are concerning us are not particularly obvious. The first one is the constitutional issue, particularly the relationship between section 119—which, as you will appreciate, is a fairly obscure provision in the Constitution—and the provisions, particularly 51B. Secondly, the obscure aspect is the effect on Commonwealth/state relations even if one concedes that the Commonwealth has constitutional power—that is, what should be the state's role in these matters? By 'these matters', I mean the matters dealing with the Defence Force. At first blush, one might say that the states have nothing to do and no concerns with the Defence Force. It might not have come to Petrice Judge's attention at her level because those issues are fairly much hidden underneath the draft bill and the whole process.

Senator HOGG—On the issue of the obscurity of section 119 and the fact that it is not overly defined, might that not be a good thing rather than something that could be seen as a negative?

Dr Thomson—I think from a state's perspective—and again I speak as an officer—section 119 might be seen in a sense as a state power—that is, the state can request the Commonwealth and, if you read the word 'shall' to be mandatory, the Commonwealth must then do something at the behest of the state. So its obscurity in that sense is not a good thing because the state might see section 119 as a positive provision assisting the states.

Senator HOGG—Do you know of any case law on the interpretation of section 119, particularly in respect of the term 'domestic violence'?

Dr Thomson—No, I do not. I did some work some years ago on section 119, following the 1978 Bowral incident, and there is not much written. There was an article written by Professor Tony Blackshield a little bit after that incident. I think it was in the *Defence Reporter* or something like that. There is nothing much on it. As you know doubt know, there is a little bit of American authority on their Constitution. Just off the top of my head, I do not know of any. Unfortunately, we have, from Western Australia's position, realised the implications of this bill only fairly recently. That is why we have given you a submission which, in a sense, is not completely fleshed out with footnotes and things like that.

Senator HOGG—To your knowledge, are any of the other state governments sharing the same concerns that you are expressing to us today? I am not asking you to speak on their behalf, but maybe in discussions with them or in communications with them you have had some indication as to whether or not they share your concerns.

Ms Halligan—I have spoken to some of the states and I understand that New South Wales, Victoria and Tasmania have concerns about the provisions.

Senator HOGG—But the states have not come together to meet specifically to discuss the implications of this particular bill?

Mrs Judge—No, the states have not got together. In most of the formal forums that we convene as states and territories this bill has not been mentioned. Also, I am responsible for chairing the defence consultation process in Western Australia, and that has been going for a period of three years, but this bill has not been mentioned in that forum either.

Senator HOGG—If I can turn to a comment made by Ms Halligan in her statement, she mentions that at least the state should be consulted if it was not to get absolute consent. Who did you have in mind as being consulted at the state level? Would it be the Governor or would it be the premier of the state? Who is it you have in mind?

Mrs Judge—The Premier of Western Australia or the premier of the relevant state.

Senator HOGG—And what would that necessarily do? If there is a situation of domestic violence, it is necessary to call out the Defence Force. There are a number of hoops that have to be jumped through to call the Defence Force out. Is putting in place another hoop to be jumped through necessarily going to assist the process?

Dr Thomson—There are two provisions, as you know, 51A and 51B. In both of those situations there are two situations: either domestic violence is occurring or domestic violence might be likely to occur. If I can take the 'likely to occur' scenario, and take 51A, where domestic violence is likely to occur involving Commonwealth interests, it would seem to me

that at least it would be useful and appropriate and maybe helpful for the Commonwealth if the premier was consulted and at least advised. When I say helpful and useful, he might have some intelligence or information. Because the likely events are going to occur within the state, his police commissioner might have notified him about something and he can pass that on to the Commonwealth. So I do not think we would necessarily see it as a veto mechanism or step; it could also be seen as a step that might assist the process. I can see a range of incidents where the domestic violence is occurring, where it is very imminent, to where it is likely to occur but might not occur. In all those situations, 51A, and, particularly so, 51B—at least at officer level which at least I am talking at, and as I think the others are—we would see it as useful for the Commonwealth, and also I think it would be useful for the states and useful for federal-state cooperation, if the premier, on 51A, was at least consulted and, on 51B—and here we tread into the relationship between 51B and 119—the premier at least had to consent or request, and it was not totally the Commonwealth's decision.

Senator HOGG—In respect of 51A, why would the consultation not take place with the minister for police or the appropriate police chief in the state in which the call-out was going to take place, rather than the Premier?

Dr Thomson—For two reasons. Firstly, the consultation would be between Commonwealth Defence officers and state police forces or state emergency officers. State officers are responsible to the Premier and, presumably, at least they would want to get the Premier's authorisation for the state officers to discuss matters with the Commonwealth and, presumably, to pass information across to the Commonwealth. Secondly, if the Premier is consulted he can give an authorisation to those state officers to so consult. He might give a general advance authorisation saying, 'If these situations occur, you have the authority to consult and divulge a range of information.'

Senator HOGG—Are you talking about a consultative process prior to the order being made by the Governor-General?

Dr Thomson—Yes, there are two, in fact—

Senator HOGG—Or are you looking at a two-stage consultative process?

Dr Thomson—I am looking at a consultative process before the order is made. I am talking about 51A. I understand and I recognise that 51A has more of Commonwealth interests and Commonwealth overriding authority and 119 may not be involved there, so I would see an initial consultation process before the order was made. And, of course, there may be circumstances where the order has just got to be made—you cannot get the Premier; you cannot get the relevant state officer.

The second consultation process, which we have not mentioned in the submission but we picked up last night, is the revocation process at the other end and the state involvement in that. On that point, 51B(5) has provision for the Governor-General to revoke the order if the state withdraws its application. But 51B(6) seems to take away the force of the word 'must' in sub-paragraph (5) by saying:

... the Governor-General is to act with the advice of:

(a) ... the Executive Council ...

Also on 51A there does not seem to be any input at this stage for the state to have some say or consultation on the revocation. It may be that either the state either wants the order revoked or the state does not want the order revoked, and the Commonwealth may take a differing view

in both situations. I think Western Australia would like some consultation mechanism on the revocation of 51A orders and would like to clarify the relationship between 51B(5) and 51B(6) on the revocation of 51B orders.

Senator HOGG—Are you seeking consultation there but not necessarily the power of veto?

Dr Thomson—On 51A, at least consultation. On 51B, we have firstly got to clarify 51B and 119. And, having clarified that, I think Western Australia would be saying that in situations where there is domestic violence in the state involving a state matter, we would want a veto of the Commonwealth coming in. Secondly, we would want the Commonwealth to come in when we asked. Thirdly, we would want the Commonwealth to leave and the order be revoked when we asked.

Senator HOGG—Could you just go through those points again. You want to veto them coming in?

Dr Thomson—Yes, veto them coming in. That is the first point. Secondly, we would want them to come in when we asked—that is, we would put a good deal of emphasis on the word ‘shall’ in section 119 of the Constitution. Thirdly, we would want the Commonwealth to go when we said to go—that is, to revoke the order—or to stay even if they wanted to go. We see all of this discussion being driven not only by constitutional law—and that might be least of it—but much more importantly by federal-state cooperation in a federal system.

Senator HOGG—I think you said, Dr Thomson, there was scope for inconsistency between 51B and 119. I think that is correct, isn’t it?

Dr Thomson—Yes, I think there might be.

Senator HOGG—Can you elaborate?

Dr Thomson—The reason I say that is that, at least on its face, 119 seems to be mandatory. It states:

The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.

It seems to be that when the Commonwealth gets a request, it must—that is, ‘shall’—protect; whereas 51B seems to have at least two elements to it. The first element states:

... applies if a State Government applies to the Commonwealth Government to protect the State against domestic violence that is occurring or is likely to occur ...

The ‘likely to occur’ is not under 119, of course, but 51B(1) states, firstly:

... a State Government applies to the Commonwealth government ...

Then it adds the second element, which states:

... and the authorising Ministers are satisfied that: ...

Firstly, the authorising ministers are Commonwealth ministers, and then there are three criteria—(a), (b) and (c). If you look to subsection (2), it states:

If this subsection applies, the Governor-General may, by written order, call out the Defence Force ...

So the culmination of all those elements seems to be that 51B is saying that the Commonwealth has a discretion as to whether or not to call the Defence Force out when a state applies under 51B, whereas 119 seems to indicate that it must come to the assistance of the states.

Senator HOGG—I think I understand what you are saying, even though I am not a lawyer. That is probably one thing in my favour, I think. But having said that, it may well be that that has always been the case, as I understand it from my reading, and that that is desirable because there have been previous instances—whilst they are limited—where the Commonwealth has been called upon by states to intervene in what was perceived to be domestic violence in a particular state and the Commonwealth has refused to exercise that authority. And in exercising that authority not to comply with the state's request, it has been shown to be the right judgment.

Dr Thomson—I do not doubt that. If you look at the current provision in section 51 of the Defence Act, again, it does give discretion to the Commonwealth. It states:

Where the Governor of a State has proclaimed ... and may call out the Permanent Forces ...

So it seems to be a discretion of the Commonwealth. The mere fact that that has always been the situation seems to me helpful in the sense that it brings up this possible inconsistency with 119.

I can see that section 51B may be based on the defence power 51(6), and 51B—and I say this hesitantly—may be constitutional. But even if it were constitutional, we in Western Australia would not want it to override, if it could override, section 119. I am not at all doubting the sensible approach of 51B and the need for the Commonwealth to have some discretion, but 119 may not give them any discretion and 119 was one of the elements that made the states join the Federation; that is, the Commonwealth would protect them when it was asked to do so.

Senator HOGG—One thing I should point out to you, and I do not know if you are aware, is that in the hearing room here today we do have officers from the Department of Defence and the A-G's listening to your comments, and they will appear before the committee after lunch this afternoon.

Dr Thomson—The Commonwealth Attorney-General's department has always been most helpful in these issues—

Senator HOGG—I understand that, but I am just making you aware that they are here.

Dr Thomson—I am very interested to hear what they say. This is such a novel area of law. But it is not only the constitutional law position, it is also the federal-state relations cooperation position as well.

Senator HOGG—I understand that. The reason for my comment is that I would expect them to make some comment on your issue this afternoon when they appear before the committee. They will not be doing so now but later—

Dr Thomson—I am sure that would be very helpful, and, as always, I would take very great heed of what they said.

Senator HOGG—You can read the *Hansard* and either be more excited than what you are now or completely satisfied.

Dr Thomson—I am not excited—we have just got a beautiful West Australian blue sky here, Senator, that is why I am excited. If you have not seen, it has been raining.

Senator HOGG—I am from Queensland, and I can tell you what I walked into down here today.

In paragraph 3, you say that ‘by not defining Commonwealth interests, the proposed section 51A may stray beyond the Commonwealth’s constitutional power.’ In what way might it stray beyond the Commonwealth’s constitutional power, is the term ‘Commonwealth interest’ defined in any other Commonwealth legislation that you know of, and would not the Commonwealth say that it would be impossible to define, adequately, ‘Commonwealth interests’?

Dr Thomson—I think the first matter I will deal with is the definition of ‘Commonwealth interests’. Even if you cannot define it exhaustively, it would be useful to have some guidance as to what it might include, at least the core and principal examples.

Senator HOGG—Do you know any case law where there has been an attempt to define ‘Commonwealth interests’?

Dr Thomson—No, I do not, just off the top of my head.

Senator HOGG—I think I have been involved in another committee hearing where that issue has been raised. I think it was back in 1926 that the High Court last attempted to address that issue. I might be wrong in the date, but it is a long while ago and no-one has been game to tackle it since.

Dr Thomson—That might be right. It would be useful even if it was the explanatory memorandum or second reading speech but even more useful in the bill it includes. That really leads to the second point, the constitutional law point. As we indicate in paragraph 3 of the submission, the Commonwealth parliament does have powers. They are the defence power, which is very wide, and the incidental power of 51(xxxix). There is, I think, the external affairs power if there are overseas terrorists. It is frightening for a Western Australian to admit there is an external affairs power that gives the Commonwealth parliament some scope.

Senator HOGG—We are taking all these comments that you make in context.

Dr Thomson—In section 61 of the Constitution there is also an inherent prerogative power which gives a lot of scope. There may be matters which the Commonwealth might claim are Commonwealth interests for outside even those wide powers and in a situation where the Commonwealth said there is likely to be domestic violence. It is not occurring but they think it might happen. They have a building in Perth where there is one Commonwealth officer sitting in a 30-storey building. They say they think there is likely to be domestic violence in that building in three weeks time and they want to shut the building down. I do not know whether the Commonwealth’s powers would stretch that far. I am thinking just off the top of my head. We are bit concerned that it could stray and, certainly if it did stray, someone would bring an action to do it.

Senator HOGG—For what it is worth, I would think that would be an abuse of the powers under this legislation.

Dr Thomson—I might agree with you totally. It is really the third point of the Commonwealth-state relations. We are saying that, if it is constitutional because it is so wide, we ought to have consultation and cooperation even on 51A, because of that possibility that it could stray out, be abused and because it is so wide.

Senator HOGG—What if, because of the volatility of the situation, the consultation were not able to be conducted?

Dr Thomson—If it is a 51A situation—

Senator HOGG—It is.

Dr Thomson—Then it would still be within Commonwealth powers. You could frame the act so that in exceptional circumstances consultation cannot and does not occur but the state will be notified and kept fully informed thereafter. I can appreciate that there will be those circumstances. I can appreciate that on 51A the Commonwealth, if it has constitutional power, will say they do not need to consult and then rely on the federalism Commonwealth-state relations aspect. In 51B on protecting state interests is where 119 rears its head.

Senator HOGG—It may well be in respect of 51A that the intelligence services that are at the disposal of the Commonwealth have information which might not be available to even the best intelligence services in the various state police forces throughout Australia. They may well be acting on information that, firstly, they cannot divulge for very good security reasons but, secondly, because there might not be the time to divulge it that they may need to act upon. What is your view there?

Dr Thomson—On the two situations, on the very important security information that cannot be divulged, I presume the Prime Minister rang the premier on that aspect and said, ‘We are going to act. I cannot tell you the reasons. It is classified national security.’ I presume that would be consultation. The premier would presumably say, ‘I accept that Prime Minister.’ On the second point about there not being enough adequate time to consult, I would suggest that if that occurs—and there will be situations where that will occur—there is consultation and cooperation thereafter. The legislation could be drafted to say in exceptional circumstances and the immediacy of the situation could be such an exceptional circumstance of 51A.

Senator HOGG—Would you like to expand on your comments in paragraph 11(c) in which you suggest that the ‘state criminal laws and associated legislation might be rendered inconsistent with the bill; for example, with the proposed sections 51I and 51R’?

Dr Thomson—We have looked at this only briefly. I can give you an example—and I would welcome officers of the Commonwealth Attorney-General’s Department looking at this aspect. Section 51I(1)(b) authorises members of the Defence Force to do certain things—search premises and seize dangerous things—and (c) says ‘do anything incidental’. Assume—and, again, I am thinking from off the top of my head—a Defence Force member enters my house to search the premises and to seize something and pushes me over, or I stand in the way and he has to get me out of the way and pushes me over, which is something incidental in carrying out his task, and then the Defence Force member is charged with an assault against me under the Western Australian criminal code. Could the Defence Force member plead, as a defence, that he was authorised under a section of Commonwealth legislation and that that section is inconsistent with the criminal code provision in Western Australia and, therefore, the Western Australian criminal code does not operate?

That is the type of situation I am trying to think of where the Defence Force does certain things, or exercises certain powers, and that therefore renders state laws inoperative. I am not saying that is a bad thing, and I am not saying that the Commonwealth might not have the constitutional power to do that. All I am asking is: should we identify whether that occurs and, if so, do we need to deal with it—for example, by a savings provision, by protocols or by something? It may well be that this aspect has been well thought out and catered for, but we would like to know how.

Senator HOGG—My final question goes to an issue that was raised by Mr Greenwood, a QC from Queensland, in his appearance before us this morning. He put the proposition to the committee that there may well be a need for a sunset clause to operate on this particular piece

of legislation, such that the operation of the legislation can be thoroughly reviewed in the light of its operation. The other proposition that I raised was that maybe there not be a sunset clause as such but that maybe there be an undertaking that the committee will review the legislation, say, in three, four or five years time, with a view to looking at the impact of the operation of the various aspects of the legislation and then making any appropriate amendments to the legislation at that time. Do you have a view on that situation in Western Australia—either on a sunset clause and/or whether there be an undertaking of some form of review?

Dr Thomson—I am glad to see that Western Australia and Queensland think along the same lines. I would have favoured, at officer level, a review of the legislation rather than a sunset clause.

Senator HOGG—A review by who?

Dr Thomson—A review by your committee or by the parliament. A provision could say ‘this legislation will be reviewed’ and not ‘the legislation lapses’. We would want a review provision on the condition that Western Australia got some safeguards included in the legislation to the extent that we have been suggesting. If we got those provisions and there was a sunset clause and the legislation lapsed, we might have to go through this whole negotiation again with new Commonwealth and state governments to have put into a new bill what hopefully we might achieve in this bill. As long as Western Australia got some comfort from the provisions of the bill that might emanate as a result of your hearings and various submissions, I think we would prefer a review provision. That may be better in a practical sense because, if the legislation lapses and you then have a situation of domestic violence that would have to be dealt with without legislation, that might not be a good situation. If we did not get what Western Australia wanted and there were no consultation requirements, et cetera—I see my leader, Mrs Petrice Judge, nodding her head—I suspect we would then want a sunset clause so that we would have a chance to have another go at this matter when the legislation lapsed.

Senator HOGG—Dr Thomson, we might not be able to accommodate all your needs.

Dr Thomson—I appreciate that.

Senator HOGG—But, as a Queenslander, I can always say to anyone, ‘Don’t you worry about that; we’ll look after you.’

Dr Thomson—And you always do, Senator.

CHAIR—Western Australian ladies and gentlemen, thank you very much for your submission and also for answering the questions so well.

Proceedings suspended from 12.22 p.m. to 1.25 p.m.

EVANS, Group Captain Gregory John, Director, Joint Operations, Department of Defence

GILMORE, Lieutenant Colonel Peter Warwick, Senior Operations Officer, Department of Defence

KELLY, Lieutenant Colonel Michael Joseph, Director, Military Law Centre, Department of Defence

SIMPSON, Lieutenant Colonel James Douglas, Staff Officer Grade One, Land Operations, Department of Defence

DABB, Mr Geoffrey Preston Morrison, Executive Adviser, Attorney-General's Department

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

CHAIR—I declare the meeting open again, and I welcome officers from the Attorney-General's Department and officers from the Department of Defence. The committee prefers all evidence to be given in public, but should you at any stage wish to give any part of your evidence in private, you may ask to do so and the committee will consider your request. The committee has before it written submissions from both the Attorney-General's Department and the Department of Defence. Are there any alterations or additions you wish to make to the submission at this stage?

Group Capt. Evans—No, Senator.

CHAIR—You will not be required to comment on the reasons for certain policy decisions or the advice which you have tendered in the formulation of policy, or to express a personal opinion on matters of policy. I now invite both the Attorney-General's Department and the Department of Defence to make submissions. Bearing in mind that you were here this morning during the hearings, you may wish to address some of those specific areas. At the completion of your opening statements, I think it may be best if we go through the legislation in seriatim and discuss points as they come up at that stage. I think that will cover all areas of concern.

Group Capt. Evans—I do have a one- or two-minute opening statement, if I could read that. This bill provides, for the first time, a cohesive and relevant basis for call-out of the ADF for assistance to the civil authorities in a security and public safety emergency. Defence strongly advocates the implementation of the bill at the earliest possible moment. It is the result of a lengthy gestation process and, through our close cooperation with the Attorney-General's Department and careful regard to other comments, opinions and overseas experience, we believe we have arrived at the best means of addressing this issue.

As has been pointed out in our submission, the bill deals with the reality of the current Australian security arrangements and antiterrorist plans. In summary, that reality is that there is division of labour between the Australian Defence Force and state and territory authorities. At present, there is no alternative available to the role identified for the ADF in this respect. Given this reality, it is only commonsense that an appropriate legal framework should be in place to provide for it. Any objective analysis of the current legislative provisions, such as there are, will reveal the obvious need for action.

Defence has been motivated by three key principles in our approach to the bill. As an organisation firmly centred on defending, and rooted in the Australian democratic tradition, it was felt essential that the Australian public should know what to expect of the ADF when it is called out to assist the civilian authorities in a security emergency. It was also considered critical that the decision to call out the ADF would be subject to the utmost civilian oversight and control. The final key consideration is that ADF members called on to perform such tasks should have as much certainty as possible as to what is expected of them and be provided with appropriate legal authority and protection.

Defence has been at pains to ensure that the ADF is not considered to be a substitute for the police or to be in a position to supersede police authority. With this in mind, the bill focuses on authorising the ADF to perform a few carefully defined tasks, which are those related to the role identified for the ADF in the national antiterrorist plan, as agreed by all Commonwealth, state and territory law enforcement agencies.

The bill also ensures that the ADF does not act unless requested to do so by the police, except where this is not practical, such as in a geographically isolated location. Further to this, the bill provides key control mechanisms to limit the use of the ADF. The legislation may only be used in situations of domestic violence beyond the capability of the state or territory authorities to deal with effectively. In addition, the authorising ministers have the ability to provide strict geographic parameters to the potential exercise of the authorities given to the ADF by the use of the general security and designated area provisions.

The committee should also note the strong safeguard and accountability measures set out in the bill. It is important to stress that the bill in no way derogates or detracts from any aspect of due process or habeas corpus provisions in any part of the Commonwealth. The jurisdiction of the courts and coroners remains untouched with respect to the scrutiny of ADF members for any unreasonable and unnecessary use of force.

Although the bill is designed to provide for the standing call-out framework, the fast looming Olympic Games has been a key focussing agent in resolving this issue. It will be an important part of our preparedness and deterrence posture. Defence would therefore urge that action on the bill proceed without delay so that the necessary training process for the games can be completed.

CHAIR—Thank you, Group Captain.

Mr Dabb—I could perhaps just make a couple of general points that answer some of the issues that have been raised by way of sketching in background. The thrust of the bill, apart from providing certain procedures for activation of the Defence Force, is to confer certain powers on members of the Defence Force for certain purposes. There is nothing unusual about that.

By way of answering the concern expressed by Dr Thomson from Western Australia about the effect the bill might have on the criminal code in Western Australia or on general criminal law, it is quite clear that the Commonwealth act would authorise action and the use of force and possibly extreme force. It would, to that extent, override the background criminal laws of the state. That is quite a normal kind of approach where Commonwealth legislation confers powers on particular agencies. For example, in relation to the Migration Act and the arrest of unlawful non-citizens; and under the fisheries legislation and the customs legislation, they all have powers which authorise the use of force in particular situations. The powers so given are circumscribed. They only authorise action—and often words are used like ‘necessary’ or ‘rea-

sonably necessary' for certain purposes—within the statutory provision. If the officer operating under the provision steps outside the authorised field of action, they become liable to the background criminal law, which is normally state law. That is quite a normal state of affairs.

I think that also answers the point raised by Mr Greenwood about the coexistence of state powers to prosecute criminal offences. If a person with powers under Commonwealth law steps outside the power, they are liable to be prosecuted because they remain subject to the general criminal law. That, of course, is a basic part of the approach of the bill that persons acting under it remains subject to the law. There is no question of a suspension of the ordinary law of the land or anything like that. That is not an unusual approach.

I might also mention that in some areas there are already coexisting provisions and powers, both Commonwealth and state. For example, we have an Australian Federal Police force which has power to enforce Commonwealth offences, which are quite extensive. They include persons who damage or destroy Commonwealth property, for example, or who threaten or obstruct a Commonwealth officer performing a function. These are all Commonwealth offences. There are also quite a few Commonwealth offences in the area that we sometimes describe as terrorism in relation to aircraft hijacking and unlawful interference with aircraft. Even hostage situations are covered by offence provisions under Commonwealth law and action can be taken to enforce those provisions, arrest the offender and use all reasonable necessary force to do that. There is nothing unusual about that approach or the approach taken by the bill in that regard.

The second general point concerns existing cooperative arrangements to deal with terrorist situations. The national anti-terrorist plan has been referred to. It provides for cooperation between Commonwealth and state agencies in taking action in terrorist situations. The operation of that plan, which is quite a thick document, is monitored by a body that has been referred to and which is known as SAC-PAV—the State and Commonwealth Committee for Cooperation in Protection Against Violence. That is a specialised body that plans, provides for exercises and equipment in relation to possible acts of major violence in this area. It is entirely a cooperative arrangement. Typically, SAC-PAV, when it meets, has representatives of all jurisdictions, including officials—at perhaps the deputy secretary level or the level immediately below that—from state premiers departments. Very senior police officers are also involved in this. It is that group—which meets, I think, twice a year—that, over the years, has not only developed the plan but has also, through the process of exercising, helped to highlight the deficiencies in the present law that this bill seeks to meet.

Two main deficiencies have been identified. One relates to the call-out procedures. Because of difficulties with the present Defence Act and certain subordinate legislation, it is simply impractical to proceed on the basis of a state initiated call-out—that would be a call-out that you might sheet back to section 119—as the legislation is simply too cumbersome and uncertain. Therefore, in all major recent exercises where the legal procedures have been tested as well as the operational procedures—where people need to sit down and look at a scenario and say, 'What would we do now? What happens next? Can we get in touch with the Governor-General?'—under the plan, because of the difficulties with the state call-out, the course has been followed of what is called a Commonwealth initiated call-out relying not on section 119 of the Constitution and section 51 of the Defence Act but on the power of the Commonwealth to protect its own interests. The great difficulty with this, of course, is that it makes it necessary in all situations to identify something that you could call a Commonwealth interest, and that is a very serious limitation. So that is one difficulty which this bill seeks to address by

providing clear and workable procedures for call-out on the basis of a state request, which would be facilitated under this bill, or possibly in the case of a Commonwealth initiated call-out.

The second weakness that is remedied is the one that has been referred to throughout these proceedings, which is the conferring of powers on members of the Defence Force and which might otherwise be unclear and uncertain particularly in the Australian federation where it could well vary from jurisdiction to jurisdiction. They were the two general comments I wanted to make.

CHAIR—Thank you. Senator Hogg, some guidance from you, please—do you wish to start at the beginning, from division 1?

Senator HOGG—No. I have just a couple of general issues to raise before we get into the actual various divisions. Firstly, there is the issue that was raised with the Western Australians; that is, the degree of consultation. Group Captain Evans described the gestation period of 2½ years. I do not know if ‘gestation’ was a very good word; anyway that is his choice, not mine. I am just wondering if the committee can be advised how much actual consultation took place with state governments, from what Mr—

Mr Dabb—It was from Dr Thomson and the other name was—

Senator HOGG—I think it was Ms Judge who said that there had been no consultation at her level but that there may well have been lower level consultation. They thought that, on a matter as important this, there would at least have been consultation at the Premiers level or just under the Premier’s level. Can you advise the committee on that?

Group Capt. Evans—I am aware that there was certainly consultation through the SAC-PAV process. The Attorney-General’s Department might be aware of more.

Mr Dabb—It is quite true to say that there was not consultation at that particular level. SAC-PAV really is the senior working body into whose province this exercise falls, but—I must not mislead the committee—they were not consulted on the terms of the bill that was developed. The problems addressed by the bill were discussed, and there were views expressed within SAC-PAV about the need for legislation. You will recall that, when it was raised at the last meeting of SAC-PAV, and the possible imminence of the bill was put to the committee, there was general support.

Senator HOGG—When was that?

Mr Dabb—That was just a few weeks ago. I was there with Captain Evans.

Group Capt. Evans—It was in Sydney about three or four weeks ago.

Mr McDougall—It was the Monday, was it not, immediately preceding the introduction—about 26 June?

Senator HOGG—Given that this is something that the various state parliaments see as sensitive—I have not consulted them; I just gleaned that from what was said by Western Australia—why wasn’t a draft version put before the various states for their comment and feedback to overcome any doubts and fears they may well have about the legislation?

Mr Dabb—Sometimes that happens with legislative schemes and sometimes it does not. It normally happens where complementary legislation is required and there might be model legislation being developed that is going to be adopted in other jurisdictions.

Senator HOGG—I accept that.

Mr Dabb—This is entirely a Commonwealth piece of legislation. Yes, it is quite true that that course was not followed in this particular case.

Senator HOGG—It just seems to me that that is a valid concern that was raised.

Lt Col. Kelly—The fact that most of those comments that have come in have not reflected on the issue of the powers aspect reflects that there has been that discussion in SAC-PAV and that the principal issue is the process aspect. All that was done in the framing of the bill was a reflection of the current situation, except with the addition of two more limiting factors on the Commonwealth interest deployment. There is a requirement now for there to be state cooperation and for the ADF not to be employed unless there is a request from the police. So there are, in fact, two further limitations placed on the current situation, and the current situation is well expressed in the national anti-terrorist plan. Having spelled that out, people at certain levels may not have appreciated that as being the current situation, but that is all that has been done in the process of formulating this bill.

Senator HOGG—My question now becomes a comment. It is not going to change the events, but it would seem to me that you could have made the path a little bit easier—not that it is rough and rocky at this stage—by just consulting with the various state premiers and/or whomever they may have wanted consulted. That has now passed us, but I think that may have been a weakness in the process. But that does not necessarily mean that the process has fallen as a result of that.

The second general question that I want to ask is: in a quick thumbnail sketch, can you tell the committee what new powers this piece of legislation will give to the Defence Force? Whilst you and I sit here and read the bill per se and go through it in some detail, the average person out on the street will be absolutely totally unwise about this. Can you give us a commonsense evaluation so that we can then say in lay person's language—in something that is simple—what the real powers of the bill are? Is that possible without butchering the piece of legislation before us?

Mr Dabb—It is a more difficult question than might appear on the face of it because, if we are talking about new powers that do not exist otherwise, the difficulty is that to a large extent members of the Defence Force would have powers when acting in support of the local police force. Just what those powers might be could vary from jurisdiction to jurisdiction. For example, it may be possible in one jurisdiction for a person acting in support of the police in their circumstances to be treated as a member or a special member of the police force or, if not formally in that sense, at least as a person who, while acting in support of a police officer, is clothed with the same degree of authority as the police officer. In other words, if it is a power, for example, like stopping and searching a motor vehicle, and it is a power under the police act for a police officer to require a vehicle to stop—the person commits an offence if they do not stop—the police officer can then require the person to allow the vehicle to be searched. If the person resists, the resistance can be overcome. Reasonable force might be able to be used. The question is to what extent does a member of the Defence Force, standing at the shoulder of that police officer, have powers of a similar extent to assist the police officer. That is the great area of uncertainty, the difficulty of spelling that out, that has led to the need to confer these powers directly on the ADF officer. That is a general comment. Colonel Kelly might be able to go through in more detail the particular powers.

Lt Col. Kelly—If you are after an overview of the approach that has been taken, it is basically drawn straight from SAC-PAV designated roles for the ADF. There is a list in the national antiterrorist plan which talks about recapturing buildings, oil rigs and all those sorts of assets, and rescuing hostages, and then certain subsidiary tasks such as cordon, search, neutralising dangerous things, picketing and guarding. So, taking that agreed concept, we have a counter-terrorist assault element that has been represented by Colonel Gilmore here today which has trained to do certain tasks over a period of time now since it was constituted after the Hilton bombing. This legislative framework is meant to provide lawful authority for what they are already trained as to do. So their tasks are well accepted in terms of what would be required to resolve an assault situation.

Senator HOGG—If I could stop you there, we are actually putting legislation in place to match it to what people are already trained for rather than putting legislation in place which people will have to be trained up to?

Lt Col. Kelly—In respect of counter terrorist assault functions in division 2.

Group Capt. Evans—Training will be required for the division 3 skills.

Senator HOGG—Right.

Lt Col. Kelly—That is the counter assault aspect. As to the other subsidiary aspect that I mentioned about the cordoning, searching, perhaps evacuating, neutralisation of dangerous things, there have been response force elements designated in the ADF to perform those functions as well for a long period of time. However, it has been very unclear what the extent of those tasks would be so we have taken this opportunity to specifically narrow down the extent of those tasks and, in the context of the general security area, you are talking about a couple of general provisions of searching vehicles and searching premises where there is a suspicion of a dangerous thing, so that would enable you to set up vehicle checkpoints and whatever, and, within a designated area, taking it a step further, or you may be in a chemical-biological-radiological scenario that would enable us to evacuate or cordon that area off from entry into it and dispose of vehicles or move vehicles, et cetera, within that area. Those are the really strictly confined situations. You could summarise it is briefly as that.

Mr McDougall—A distinct development with the bill—just to be very clear about it—is that this is the first time that I know of that there is a direct conferral of powers on Defence within Australia as opposed to, as Geoffrey Dabb pointed out, where they may be able to assist state or territory police exercise some of their powers. The point is here it is a direct conferral. Part of the aim is to make it clear—not only state by territory ambiguities but also the uncertainty as to what extent someone can assist a professional police officer carry out their duties. I think if someone was, say, prosecuted for an assault because they were assisting a police officer there would be a degree of latitude nonetheless given. It is preferable that the ADF members are clear, as is the public, as to what potential role the ADF may carry out.

Senator HOGG—I will come to that in due course. What I am trying to get at is a view that can be understood by the average person out there. In my reading of some sections of this act, whilst I understand the intent, I do not know if the average person out there in the street would understand.

Mr McDougall—Another very important point, particularly in relation to one of the more extraordinary powers, the division 3 powers, is that they are only available when the Defence Force is called out and only for the purposes of the call-out. So they are not a standing authority for your ordinary soldier walking down the street to suddenly unilaterally decide to

set up a road block or whatever, unimaginable as that is. The bottom line is that these powers may, perhaps in the next 10 years, never be available for an instant of time to the Defence Force. The whole bill is premised around a series of graduated steps before you get to the point where soldiers out in the field might actually be able to utilise these powers. Even when they do utilise them there is series of measures they have to undertake such as these authorisation documents for, say, searching as well as safeguards in relation to their use. A further point is to emphasise that all of these steps are ultimately justiciable in the sense of if someone's house is searched and they have not followed the appropriate steps then they are potentially personally liable for that transgression.

Senator HOGG—In respect of a public utility like a power station or a dam or a communications centre—anything like that—does this confer any special powers in regard to what they can and cannot do inside those sorts of premises?

Group Capt. Evans—This bill only confers powers once call-out has been effected.

Senator HOGG—But assuming call-out has been given, can they take a decision to physically shut down one part of the grid? I might be going to the extreme but I am trying to search out what the powers are.

Lt Col. Kelly—The specifics of the location are not relevant. It is really whether or not an assault needs to be conducted in relation to that facility or if an area needs to be dealt with in terms of a dangerous item being present. In any other respect, managing state utilities or assets, that is a matter for the state and territory authorities.

Senator HOGG—But it might be a decision that needs to be taken in respect of the assault.

Lt Col. Kelly—If it was in relation to the assault you will note that division 2 has another aspect which refers to doing anything incidental to executing those tasks. So if it were such a crucial element of the success of the assault that the power grid needed to be shut down or whatever, then that would be within the purview of it.

Group Capt. Evans—It is hard to imagine the power being exercised in that situation, though.

Senator HOGG—I do not know. That is why our committee exists.

Mr Dabb—Coming back to the distinction between division 2 and division 3, in answer to your question about the extent to which new powers are being conferred, under division 2, the assault situation, that probably goes only a very short distance, if at all, beyond the existing law. The power they would be exercising would be to protect persons against death or serious injury, which would be a power available under the common law, under the criminal codes, in any event. When you asked the question my mind went to the division 3 powers, which do look a little more novel and perhaps open up different areas. But if you are talking about an assault and just division 2 being applicable, one would imagine in the example you give at the power station that there would be a request for the power supply to be turned off, if indeed it was necessary for an assault in this situation, and that that would happen.

Group Capt. Evans—The question is: would we unilaterally go doing that? Could I stress the very close command and control arrangements that are put in place for the exercise of division 2 powers. The Chief of the Defence Force effectively exercises direct control through the commander of the force involved and liaises very closely with the minister, and the minister has veto. We have here a very short, very direct command and control line straight to the

Chief of the Defence Force and back to the minister. So there are protections against a local commander just taking these powers on himself and making unilateral decisions of that type.

Lt Col. Kelly—I might point out that, in the actual administrative arrangements for these assaults, the process that we go through is that the police commander will be taken through the deliberate assault plans and the emergency action plan and will normally be required to sign every page of that plan so he understands exactly what would be happening if he were to make the request for the team to go in.

Senator HOGG—Thank you. You described the national anti-terrorist plan as being a thick document.

Lt Col. Kelly—It is not too thick but it is thick enough.

Senator HOGG—Is it a public document?

Mr Dabb—No, it is not.

Lt Col. Kelly—It is SAC-PAV restricted.

Senator HOGG—I was wanting to know if it had been made available to the committee on a restricted basis. I understand that is the case.

Lt Col. Kelly—Yes. There are a couple of pages there that are of particular note: pages 94 through to about 100 covers a lot of those issues and issues that have been raised in the Victorian—

Senator HOGG—94 through to 100?

Lt Col. Kelly—Yes.

Mr Dabb—The plan is due for revision in certain respects, anyway, and should this legislation be passed it would certainly need to be revised in light of that—not its basic thrust, but in the details of the plan.

Senator HOGG—So are you saying that the provisions in this bill are more onerous than those that are in the antiterrorist plan?

Mr Dabb—No. The main respects in which changes will be necessary would be procedural ones to make it absolutely clear that all jurisdictions understand the procedure. A very important thing there would be to stress the possibility of state initiated call-out rather than, as the plan now suggests, that you have to find some basis for a Commonwealth initiated call-out. That is a very important point. The plan also contains cautions about the difficulty of finding appropriate powers for the non-assault situations, for the cordoning and so on. Of course, the new provisions here, if enacted, would need to be referred to there.

Lt Col. Kelly—There is one of the NATP that is certainly not classified, so I could read that. It is the 'Retention of military command', which says, 'Defence force members at all times when operating in aid of a civil power remained under military command and are accountable as such.' So that is already clearly spelt out and has been for the last 20 years.

Senator HOGG—Is the NATP subject to the scrutiny of any of the committees of this parliament and has it been the subject of scrutiny of this parliament? It is not a trick question.

Mr McDougall—No, they are not.

Senator HOGG—Is there a real benefit in the members of this committee apprising themselves of that NATP document?

Lt Col. Kelly—I think those pages I referred to will just give you an indication of the way the bill has been drafted to reflect the agreed understandings amongst all the Commonwealth and state law enforcement agencies.

Senator HOGG—You mentioned pages 94 to 100. How many pages are in it altogether, so I get some idea roughly?

Lt Col. Kelly—There are a number of annexes. It is about 114.

Senator HOGG—Without getting into necessarily contentious areas, why have you overlooked the first 93 pages?

Mr Dabb—The plan is a kind of global plan that contains agreed and recommended courses of action for avoiding terrorist assaults and the consequences of them. The call-out of the Defence Force is only a very small part. While a lengthy annex is devoted to that, much of the earlier part talks about intelligence exchange, exchange of information and that kind of thing.

Senator HOGG—That is fine, I want to get that on the record so that people who read *Hansard* at some stage say, ‘Why didn’t you do the other 93 pages?’

Mr McDougall—Another point has come up in connection with this question but also in other comments made by other witnesses. That is that, from the Commonwealth’s perspective, there is a view that if one state is having difficulties handling an incident, the call-out of the Defence Force is not to be seen as the one and only course available to a state. Part of the plan is that states will potentially make resources available to other states. Indeed, even though it was not directly relevant to the NATP, such as in the Port Arthur incident in Tasmania, there were Victorian police providing some assistance.

Whilst it is outside of the NATP, there is the network that has been established through SAC-PAV, where you have police over 20 years getting to know their colleagues in other states. Many of those people who were junior at the time are now very senior. You have a flowthrough effect. There are quite good cross state connections that, ironically in a sense, Commonwealth processes have facilitated. That is just part of the emphasis of the whole bill. This is not intended to be the one and only shot of the Commonwealth, or of a single state, in responding to a terrorist incident or some other kind of domestic violence that might be encountered in a state.

Senator HOGG—There is the NATP document. I am also led to believe that there is a defence instructions general. Is that correct?

Mr McDougall—Correct, Senator.

Senator HOGG—And that is known as the Defence Force aid to civil power?

Lt Col. Kelly—Senator, there are really two.

Senator HOGG—There are two, but that is the one that really—

Lt Col. Kelly—That is the most relevant to this 011.

Senator HOGG—I have not seen that document. Is that a classified or restricted document?

Group Capt. Evans—It is not of high classification.

Senator HOGG—No, it is a restricted document?

Group Capt. Evans—Yes.

Senator HOGG—That is fine. What will be the impact on the defence instructions general as a result of this?

Lt Col. Kelly—It will have to be revised. It currently just reiterates those tasks that are spelt out in the national anti-terrorist plan, so those aspects will remain, but it will be revised in relation to these process aspects and with direct references to the legislation that has changed. It is not a lengthy document.

Senator HOGG—Could I basically characterise it as being pages 94 to 100?

Lt Col. Kelly—It is less than that.

Senator HOGG—No, but in that sense. It reflects pages 94 to 100.

Group Capt. Evans—Exactly.

Mr Dabb—There is one thing I could make clear. The Attorney-General's Department, apart from being interested in the legal policy aspects of this legislation and the constitutional aspects and so on, does have a small operational role in this. There is an arm of the Attorney-General's Department known as the PSCC. It is the protective security coordinating centre. One of its functions is anti-terrorist coordination. That body acts both as the coordinating body in the event of a terrorist incident, as between various Commonwealth and state agencies, and also convenes and services the SAC-PAV meetings, which review the NATP. I thought I had better make it clear that the department has that role also.

Senator HOGG—Just let me get that clear in my mind. The coordination role on the anti-terrorist side is done by Attorney-General's, rather than Defence or someone else?

Mr Dabb—That is correct. All agencies have a role. Part of the purpose of the NATP is to sketch out what that role is and what kind of support and assistance can be expected. But it is quite likely there might be a terrorist incident which does not involve call-out or use of the Defence Force at all.

Group Capt. Evans—Or possibly use of the Defence Force in an uncontroversial way which does not involve the use of force.

Mr Dabb—Exactly.

Group Capt. Evans—Such as C130 transport of extra police officers. It is quite simply done through the defence aid to the civil community measures and does not involve the use of force.

Lt Col. Kelly—That is that other defence instruction which deals with technical assistance, including technical assistance to law enforcement, but the dividing line being that no force is in force.

Mr Dabb—Senator, I know time is short, but to the extent that the committee is interested in background information or briefings or anything like that, we would be quite happy to attend to that informally. I do not want the committee to think it has to drag information out of us across the table if it wants to be informed about these things.

Senator HOGG—I can tell you precisely what I am about to try to do: to get an explanation from you of what is in the legislation. The shadow minister has already placed on record that the opposition are in support of the bill, so it is not our endeavour to try to dismantle the bill or in any way change the thrust of the bill. There are a couple of concerns that the shadow

minister has flagged privately—and publicly—on this issue that we want to clarify, But because it is a groundbreaking piece of legislation in this area, we want to be sure that there is a reasonable understanding through a hearing such as this. It has given the likes of Major General Stretton and others the opportunity to put their views, and we are starting from the basis where people have some idea as to the intent and the purpose of this legislation. The other question that I want to raise in the broad sense is: does this legislation cover the use of foreign forces—for example, specialist forces from another power—in a situation where there might be domestic violence?

Mr Dabb—No. Neither the national antiterrorist plan nor this legislation envisages that happening.

Senator HOGG—Even if it involved biological or chemical weapons—and I am not asking you to breach security here—where there might be a deficiency in the knowledge or in the expertise that we have and we may need to call on an expert from outside?

Mr Dabb—That could happen, but it would simply be outside the legislation.

Lt Col. Kelly—It would be in the realm of technical assistance. Any aspect of the use of force would have to remain reserved to Australian law enforcement agencies and the ADF.

Senator HOGG—I indicated to Lieutenant Colonel Kelly earlier that I had an email yesterday from one of my constituents. I will read it to you and then I will ask for your comment, because I think it is important to get it on the record. It states:

I implore you to raise this matter in the Senate and do all you can to prevent foreign countries from bringing their own armed security forces into Australia for the Olympics. Today's morning news on Channel 9 mentioned 12 countries. Those named were Israel, USA and Communist China. If law-abiding Australians can't have military fire arms for the security of their families then why should foreigners be permitted to enter our sovereign nation with such weapons? They will use the best automatic military weapons with silencers, no doubt, which are illegal in Australia. Any thought that single-shot 22s would be carried is a nonsense. If the foreigners are permitted their own armed security forces then, once again, Australian politicians have proven themselves gutless bloody puppets, traitors in fact.

I read that to you not lightly, because the view is out there in the community that this may well be the intent of this legislation: that it is going to secretly and covertly work with other powers and that there is really a hidden agenda to this legislation. I cannot tell you what I do with most emails like that that I receive. but I would welcome your comments.

Mr Dabb—That possibility has nothing to do with the legislation that is now before the committee. It is difficult to see how this legislation could bear on that situation at all. The item referred to, which received some recent publicity, relates to the possible carriage of firearms by security personnel in Australia for the Olympic Games, not specifically or mainly or probably, even, military personnel, just security guards, bodyguards and the like. That matter was the subject of a very comprehensive statement by the Attorney-General yesterday, or the day before yesterday, which clearly stated the position on that of the Australian government.

Senator HOGG—That is fine. I just want to distance this bill and anything that operates in conjunction with this bill from those types of statements.

Group Capt. Evans—This bill applies to the Australian Defence Force and only the Australian Defence Force. Foreign forces would not be using these provisions. I wonder if I could just address one issue which Major General Stretton raised, and that is the issue. under these arrangements, of the minister meddling in tactics and becoming involved directly in the military action which may be necessary in, for example, a division 2 case of an assault on a ter-

rorist stronghold. That is a classic example. The way things are arranged is that the minister will have power of veto over any military action taken virtually up to the point at which it is taken, and then it is the responsibility of the Chief of the Defence Force and the commander on the spot as to how it is carried out. The minister and the state police force involved, however, will be comprehensively and very carefully briefed on what is about to take place, or what is proposed, and will have a veto.

Senator HOGG—I will stop you there. You say that the minister has the power of veto right up to the moment that the military action takes place. I am not trying to be smart here because I can see what might happen. The operation then might proceed and it might go horribly wrong, and then there will be questions as to where the blame lies. Is there some defining moment which says that the minister's responsibility has cut out and the commander of the operation's responsibility has cut in, thereby there being no blurred interface between the two?

Lt Col. Kelly—It is in the division 2 counter terrorist assault aspect. The final mechanism is under section 51I(2), which requires the minister to give the final approval for the assault to take place, except in the situation of a sudden and extraordinary emergency. So the cut-off point will be where the police request has been made and it is then put to the minister, 'Do you concur with the action taking place?'

Mr Dabb—We are talking about two somewhat different things here. One is the relationship between the Minister for Defence, specifically, and the Chief of the Defence Force, and there is a specific provision in 51E about directions by the Minister for Defence as to the way in which the Defence Force is to be utilised. To me, that goes to questions of methodology and so on. There may be other matters concerning the relationship between the minister and the Chief of the Defence Force that I know nothing about and which is for the Defence Force to speak about, but I just want to draw attention to that specific provision for directions.

There is a quite separate matter of ministerial authorisation for recapture action, the assault action to recapture buildings and to free hostages under division 2, which is provided for in 51I(2). That does not refer, specifically, to the Minister for Defence. It is a reference to the authorising ministers—in effect, the key ministers who will be taking important decisions in an emergency situation.

It might be under that provision that they would authorise a particular minister—it could be the Prime Minister or the Attorney-General or the Minister for Defence—to give the authorisation. But the purpose of that provision is to repeat and reinforce the existing provisions and guidelines under the national anti terrorist plan where Commonwealth ministers keep responsibility for this final and very important decision on a lethal assault in that specific situation by the Defence Force. In theory, the authorisation could be given very early on in the process; but, in fact, I think the policy and practice will be that ministers will want to retain control right down to this very last moment that we have been speaking about.

Group Capt. Evans—And they certainly can, if they wish to.

Lt. Col. Kelly—That provision goes to your question about what is the final cut off point in terms of the responsibility of the actual conduct of the assault. That is what 51I(2) addresses and 51E really just reflects the general position in relation to the Defence Act anyway, which is that the minister has the control of the Defence Force.

Senator HOGG—This will not see, then, the minister meddling in the tactics that are to be adopted in the actual assault. Is that the way to interpret it?

Group Capt. Evans—In the sense that the minister will not be—

Senator HOGG—He will not be saying, ‘Climb that trestle there and drop someone from a helicopter over there’?

Group Capt. Evans—No. The proposed course of action will be carefully explained to the minister. The minister will have the power to say that it is not to go ahead, but the minister will not be involved in the action as it happens, that is, in having to make split-second tactical decisions.

Senator HOGG—Once the decision is made that the assault is on—

Group Capt. Evans—The commander runs it.

Senator HOGG—then the commander runs it lock, stock and barrel. The commander has the complete authority and, one would assume in that sort of environment, would see it through to its logical conclusion.

Group Capt. Evans—At which point it is handed back to the police.

Senator HOGG—Yes. And once it is handed back to the police, there is the option then to revoke the order?

Lt. Col. Kelly—I think the reality of the situation is that this is not our normal operational focus in terms of our normal armed conflict or offshore deployment situation. This is the higher end of the sensitivity scale.

Group Capt. Evans—This is a very special case.

Lt. Col. Kelly—So the ministerial direction will follow us down to a closer proximity of the action in this context.

Mr McDougall—I would just like to make a further qualifying point. You directed your question some time ago about the issue of concern about minister versus local commander, their responsibilities, and the possibility of things going horribly wrong and the blame. A further point that is relevant to that point is, for example, section 51T. This is use of reasonable and necessary force. Even if ministers are convinced that an assault is necessary and so on, the individuals on the ground still have to direct their use of force to what is reasonable and necessary in the instance in which they find themselves. So, for example, if the hostage takers at the first sign of an assault surrendered and made it very clear that they were surrendering, the Australian Defence Force cannot just unilaterally take them out the back and shoot them and then say that was a reasonable use of—

Senator HOGG—I am glad to hear that.

Mr McDougall—But the point I am trying to make is that there are degrees of responsibility here that are often what you might call concurrent responsibilities. They are not a dividing line in that sense. Individuals, be they a junior officer, an ordinary soldier or whatever, all have a degree of individual responsibility.

Senator HOGG—And I assume that an individual degree of responsibility would be reinforced through the training process.

Group Capt. Evans—Exactly. One of the vital training issues for the use of division 3 powers—the cordon, search and stopping traffic type powers—is to point out to all of our people that, unless you are called out and unless you have been tasked with this after call out, you may not cordon, stop traffic and search and so forth. So, in other words, it works in two

directions, if you like. They may not assume those powers until call out, whereas under the present legislative arrangements the troops are aware that they may be required to do these things because everyone has seen foreign troops doing them in trouble spots. But to us there does not seem to be a sound legislative basis for authorising them. The new legislation, from our perspective, gives very firm guidance on who can authorise those powers; when they are authorised—and that is after call out; and what those powers are.

Mr Dabb—We are talking on the one hand about procedures and getting the procedures right but Mr McDougall's point is that, apart from all that, merely because the procedures are complied with and the approvals are given does not, of itself, allow the action to go ahead. The responsibility under 51T for the individual to be satisfied that the force is reasonable and necessary still remains.

Senator HOGG—We had better proceed to some of my more specific questions now. Thank you very much for the cooperation there to date. Undoubtedly we will traverse some of the other issues that I want to traverse as we go through.

The first issue that comes up as I go through the bill is the heading on page 3, part IIIAAA, 'Utilisation of the Defence Force to protect Commonwealth interests'. It raises the issue that has already been raised today. There is no definition of the words 'Commonwealth interests'. Interestingly, when one looks at the 51A heading, it refers to Commonwealth interests. Part 51B does not specifically refer to Commonwealth interests but would there be Commonwealth interests to protect in the state or are there state discerned interests? The same applies to the heading for 51C.

Mr Dabb—Those three provisions, although they read much the same, are intended to represent three distinct streams—three ways in which you get to call-out. Part 51B does not require Commonwealth interests to be present although they might be; they could conceivably be but it is not essential that they be present.

Senator HOGG—But that is my point. It could well be a state interest rather than a Commonwealth interest that is affected.

Mr Dabb—There might be no Commonwealth interest at all.

Senator HOGG—In 51B?

Mr Dabb—That is right.

Senator HOGG—Or a territory interest—

Mr McDougall—I will give you a concrete illustration where there could be a 51B situation where it would be hard to discern a Commonwealth interest. Say, in suburban Sydney, nowhere near any Commonwealth buildings, facilities or whatever; there was one of these marital dispute kind of situations that was at the high end, where there was a kind of building which the state police did not have the capability to get into; the incident had been going on for a week, blah, blah, blah. The state might—probably not, but it might—seek Commonwealth assistance and this might be the appropriate response for the Commonwealth to use the Defence Force for resolving the incident. That is a pure state thing; no Commonwealth interest.

Senator HOGG—All right. That was the point I wanted in my mind. There is not necessarily a Commonwealth interest in 51B or 51C; 51A is directly a Commonwealth interest.

There is no definition of 'Commonwealth interest'. Why? That is the question that is being asked.

Mr Dabb—This is a drafting matter—whether the bill would be better and better give effect to its purpose if an attempt was made to spell out various interests. A decision was taken that the broad expression 'Commonwealth interests' was appropriate in the context of the bill. It would cover things like protecting Commonwealth property, possibly buildings, protecting against violence that would prevent the performance of Commonwealth functions of one kind or another. Giving effect to a treaty obligation or an obligation to international law could possibly be quite important. You finish up with a very long list and, in the end, the decision was taken to use the broad expression 'Commonwealth interests.' It does need, of course, to be constitutionally constrained. It could not be an interest of such a remote or tenuous kind. I think Dr Thomson from Western Australia referred to one Commonwealth employee in a building and action being taken well before domestic violence was likely on that basis. Well, as in the need for Commonwealth legislative provisions to be sufficiently connected to Commonwealth heads of power, there would necessarily be limits to the kinds of Commonwealth interests that would be within that phrase there.

Senator HOGG—Are there any precedents?

Lt Col. Kelly—There is one that the shadow minister referred to in fact in the debate in the House, which is the case of Sharkey that occurred in the High Court in 1949. It considered the issue of Commonwealth interests. There is a famous passage from that which I could refer to. It is in the Commonwealth Law Reports of 1949. The passage also reflected the deliberations over this in the US. It said that it is within the necessary power of the federal government to protect its own existence and the unhindered play of its legitimate activities. To this end it may provide for the punishment of treason and suppression of insurrection or rebellion or for the putting down of all individual or concerted attempts to obstruct or interfere with the discharge of the proper business of government. It went on to talk about the need to protect citizens' rights, the electoral processes or other central features of federal government.

Senator HOGG—Say there is a group who are protesting around the time of the Olympic Games and they become quite violent for one reason or another. Is that covered under the definition of being in the Commonwealth interests for those people not to be seen protesting and therefore for there to be a call-out and for these people to be somehow removed, given that they may well be potentially threatening violence if they are disruptive?

Mr Dabb—It would need to be domestic violence initially.

Senator HOGG—We do not have domestic violence defined either. That is why I am asking.

Mr Dabb—It would be a matter for a decision to be made. Taking that as a legal question, which I take it is how it has been put, it would be better for a decision to be made in all the circumstances as to whether there was a sufficient Commonwealth interest at the time to be within the expression in the act. It may depend on whether there were foreign heads of government or heads of state who were apprehensive as to their safety, for example.

Lt Col. Kelly—Perhaps two historical examples might help there. In 1926 the Victorian government requested a call-out of Australian troops to assist it during the police strike. The Commonwealth refused the request but deployed Australian troops to picket and guard specific Commonwealth assets so as to protect them. So it did not call them out in the sense of the process but that was in fact a call-out under the Commonwealth's powers under section 61

of the Constitution, the prerogative. The Commonwealth deployed those personnel to picket and guard specific Commonwealth assets but it considered that the state authorities were sufficient to deal with the general request that the Victorian authorities had made.

The second example is the Bowral call-out itself, in that the Premier of New South Wales, Neville Wran, consulted with the Prime Minister at the time, Malcolm Fraser, and said, 'How do you want to go about this? If you like, we will request the call-out.' The Prime Minister replied, 'No, because it is involving a CHOGRM meeting with foreign dignitaries, we have specific Commonwealth legislation dealing with this and we're going to treat it as a Commonwealth interest issue and call out on that basis,' and the New South Wales Premier was happy with that. So it was a question at that time of working through that issue. In that instance, because it involved visiting foreign dignitaries, specific international responsibilities and protection of VIPs and diplomats, it was considered to be a Commonwealth interest issue.

Senator HOGG—The secretary of the committee has just reminded me that the legislation we are looking at was to do with broadcasting out of Australia, and we were concerned there with national interest. Is national interest different from Commonwealth interest? I ask that quite sensibly, because it may well be that the actions that are taking place on Australian soil. There might be a domestic violence situation there which might not necessarily have a Commonwealth interest but which might have a national interest in that a government from another country might be embarrassed by the incident that is taking place here or something like that.

Lt Col. Kelly—You are highlighting how difficult it is to provide a statutory definition of the circumstances. It will be decided in discussion with the ministers and the state governments, depending on the specific circumstances.

Senator HOGG—Are you saying to me that outside of the operation of this legislation you see the state ministers and the federal government coming to some sort of understanding as to what the Commonwealth interests are? If you are, then I think that is dangerous. I would rather see that decided as part of the legislation. If the definition of 'national interest' and 'Commonwealth interests' is so hard to settle but needs to be deliberately broad for interpretation by the High Court, then I might be able to cop that. But I could not cop someone, for whatever reasons, determining the 'Commonwealth interest' and 'domestic violence' outside of the province of parliament.

Mr Dabb—I appreciate that. Both expressions were deliberately chosen by the drafter after a great deal of discussion and consultation, so it is not an oversight that these provisions have not been more precisely defined.

Senator HOGG—No, I am not suggesting it is.

Mr Dabb—As a matter of record, an extremely valuable and important book for background to all these matters is the report by Mr Justice Hope after the protective security review, as it was called, in 1979. There was quite a bit of discussion there about the constitutional basis for Commonwealth action in this area. In particular, pages 148 to 152 contain a discussion of the extent. They say that certainly if it is something within Commonwealth legislative power it could be a valid Commonwealth interest for this purpose. But Justice Hope goes on to say, on the top of page 152, that there may be other Commonwealth interests that are not those predicted by statute, and he explains how it is. It is difficult to define.

In practice the government is going to have legal advice available to it during any of the kinds of situations we are talking about here. If there were doubt or difficulty, if we were at

the margins of what might be a Commonwealth interest, I would imagine that the state would be invited to make a request. In other words, if there was not a clear Commonwealth interest, as a precaution, in order to ensure the action was covered, that possibility would then be explored.

Senator HOGG—What about the other part of the definition, the ‘domestic violence’?

Mr Dabb—‘Domestic violence’ is used because it is the expression in the constitution in section 119. We need that because section 51B is intended to be one of the vehicles for giving effect to section 119. It is not exhaustive. It does not attempt to cover the whole of the field covered by 119. Maybe it goes a little broader in some respects.

Senator HOGG—What about the inconsistency that Dr Thomson described between 51B and 119?

Mr Dabb—He said, as I understand him, that the requirement in 119 is mandatory—‘the Commonwealth shall protect’. Then he went on to point out how in various respects the making of an order under 51B was discretionary. As to that, we certainly would not agree that it is mandatory for the Commonwealth to take action on a state request. It would need to be considered, in any event, whether there was domestic violence, whether the use of the Defence Force was an appropriate course. So it is appropriate to have a discretion built into the statutory power in the act. Apart from that, I think a complete answer to Dr Thomson is that section 119 does not require the Commonwealth to call out or use the Defence Force. That might be one way in which the state could be protected. There might be other ways—use of the Australian Federal Police, for example. So it is quite natural that there should be a discretion as to whether the Defence Force is used.

Lt Col. Kelly—There is one good illustration of that. It was a request specifically made under 119 in 1912 by the Queensland government for dealing with a situation during a general strike and violence. The reply of the federal government was illustrative of the sort of reasoning that has gone behind the bill. They said that, whilst the Commonwealth government was quite prepared to fulfil its obligations to the states, if ever the occasion should arise, they did not admit the right of any state to call for their assistance under circumstances which are proper to be dealt with by the police forces of the states. They said that the condition of affairs existing in Queensland did not, in the opinion of the ministers, warrant the request of the executive governor of Queensland contained in His Excellency’s message being complied with.

Senator HOGG—How many instances have there been of recourse to section 119 and/or the like?

Mr Dabb—Interestingly, the Hope report purported to give an exhaustive account of what had happened and came to the conclusion there had not actually been a formal invocation of section 119. I am indebted to Colonel Kelly, who has found this instance that he has just referred to. It was missed by the Hope inquiry. So the answer to the question will be only one.

Lt Col. Kelly—There were altogether, in the first 28 years of the Federation, six requests for assistance from the Commonwealth in the form of troops. There was only one case in which section 119 was specifically mentioned. In all six of those requests the request was not complied with.

Senator HOGG—In the last 10 years?

Lt Col. Kelly—There have not been any. There has been all the normal DAP assistance rendered. There have been countless examples of that.

Senator HOGG—Yes, I understand that.

Lt Col. Kelly—There have only been two call-out situations in the history of Federation. One was in relation to disturbances on the Gazelle Peninsula in Papua New Guinea in 1971 and the other was the Bowral call-out in 1978. Both were Commonwealth initiated.

Mr McDougall—Just on 119, 119 causes us some difficulty. I do not know if you are familiar with this but one of the foundation textbooks that we still use to this day from 1900 is Quick and Garran. I have forgotten how many pages it is but it is about 500 or 600 pages. It has a great detail on things like section 92 of the Constitution but about one paragraph about section 119. There has been no judicial determination by, say, the High Court of the provisions, so we are lacking one of the usual sources of guidance that you might have available for other provisions as to what the courts might find a provision means.

Lt Col. Kelly—I just make two points on that. One is that the historical background to that is that we have basically stolen that provision from the American constitution. Domestic violence was the phrase used in the American constitution. But I think the key to focus on in relation to this bill is the fact that the expression of domestic violence is tied to the other phrase that it has to be beyond the capability of the state or territory police to deal with. That actually gives you the definition of domestic violence. It is a level of violence that is beyond the capabilities of the state or territory police to handle.

Senator HOGG—And that also has to be linked in with NATP where there is a degree of supplementation across state boundaries from one police force to another?

Mr Dabb—That is correct.

Senator HOGG—So really you are looking at a fairly extraordinary set of situations.

Lt Col. Kelly—Absolutely; a worse-case scenario.

Mr Dabb—A matter of absolute last resort. I mention one other point about domestic violence. It may have been General Stretton who gave an example of a situation where a foreign aircraft with possibly foreign terrorists was within Australia. We would have no doubt that, if such an incident were to occur within Australia, it would be within the definition of domestic violence, notwithstanding that foreign persons were involved.

Senator HOGG—What would happen if, for some reason, the foreign nation from where the aircraft came wanted their special forces involved?

Mr Dabb—That is an interesting situation because aircraft, rather like ships, are subject to a degree to the jurisdiction of the flag state or the state of registration. It is very clearly understood that territorial jurisdiction prevails over flag state jurisdiction. So, while the country of nationality might have an interest, there would be no question that there would be any involvement of armed personnel from the flag state without the consent of Australia and, under Australian policy, it simply would not be given.

Senator HOGG—None of the provisions of this bill apply to any of the embassies or high commissions?

Mr Dabb—It is something of a misapprehension that foreign embassies are in fact little pieces of foreign territory put down in the host state. In fact, Australian laws do apply to conduct in foreign embassies. Under international law and in particular under the Vienna Convention on Diplomatic Relations, jurisdiction is not exercised without the consent of the sending state.

Senator HOGG—So this could have extension into foreign embassies?

Mr Dabb—It could. The key question would probably be whether the sending state, the state of nationality of the foreign mission, consented and agreed to the action on its premises. I think the expression is ‘inviolable’, which means that force is not to be exercised by the agencies of the receiving state. It would be possible if it appeared that the sending state had completely lost control of the situation, the ambassador himself had perhaps been taken captive or something like that. In some situations, force might be exercised summarily, but in every case there would be consultation with the sending state about what should happen.

CHAIR—You said that if there were terrorist action against a foreign flag carrier when they were in Australian territory it would not be policy to allow for that foreign flag carrier’s antiterrorist personnel to operate in Australia. What you mean by ‘not policy’?

Mr Dabb—That would be for two reasons. One reason would be that all such action would be subject to Australian law and in particular the criminal laws of the Australian jurisdiction where the aircraft is. It would be first a matter for their police to take the action—it is one of the basic principles of the national antiterrorist plan that the local police take action—and then as a last resort they might need to call in the resources of the Defence Force. Foreign armed personnel would have no status in Australia and no statutory authorisation to exercise force. Indeed, I would think most governments would see it as a derogation of Australian sovereignty to allow armed action by foreign personnel within Australia. The fact that it was a foreign aircraft probably would not make any difference.

CHAIR—If there were an action taken against a United States facility or aircraft in this country, there would be enormous pressure on the Australian government to permit the Americans to do what they liked.

Mr Dabb—That is conceivable, but it would be a matter for the Australian government of the day to consider.

CHAIR—It is against existing policy in a generic sense.

Mr Dabb—I would expect it to be against the policy of any national government.

CHAIR—That just prompted my memory. I read some time ago—and I may be quite wrong—that the United States is going to have some sort of battle group or facility off Sydney during the Olympic Games. Your response, I suspect, is that they will be there for technical assistance or some sort of backup. What are they there for, though?

Mr Dabb—On something like that, it would be a matter for the Attorney-General as the government spokesperson on security matters to say anything that the government might want to say, but as far as I know there is no such arrangement.

Senator HOGG—Could I turn now to the actual process of making the orders or the conditions for making orders. Firstly, the question was raised this morning: what happens if the authorising ministers happen to be the subject of the event? That does not seem to be catered for. I know some people would say, ‘Throw the key away,’ and that could be on both sides of politics, regardless of who is in power.

Mr Dabb—The short answer is that an acting minister would act in the event of the incapacity or inability of a minister to act, whether by reason of absence from Australia or serious illness.

Senator HOGG—I am not talking about people who are on leave. In those cases it is clearly defined. I am talking about where the authorising ministers, who are the Prime Minister, the Attorney-General and the Minister for Defence, are the ones who are subject to an act of violence—and remember this act of domestic violence will take place suddenly and there is not an opportunity to appoint acting people in their places. Who then become the authorising ministers? It seems to me that is a shortcoming in the legislation.

Mr Dabb—In such a situation I would expect the Governor-General, in consultation with the available ministers of the government, and with their advice, to appoint another minister to act.

Senator HOGG—That is too wide.

CHAIR—Let us take the example of a terrorist group that simultaneously take over—

Senator HOGG—70 Phillip Street.

CHAIR—No, the parliament at question time—

Senator HOGG—They were desperate.

CHAIR—both the Senate and the House of Representatives, and Yarralumla.

Mr Dabb—This is a question that does go to the machinery of government. We are getting into an area of responsibility of the Department of the Prime Minister and Cabinet. I would think if the committee is concerned about this, the best thing would be for us to undertake to consult the department and give you an answer to that question.

Senator HOGG—I would like a clear line of authority. If the authorising ministers are somehow indisposed, and I am not talking about health now; I am talking about something like this. Then there must be some legitimate way by which the appropriate triggers can be moved. It may well be that in that extraordinary circumstance—and I am just speaking completely off the top of my head—it is the Governor-General acting alone. If the Governor-General also happened to be part of it, because we he was meeting with those three ministers, let us say, and they were all part of the event, it would then, to my mind, rest with the Chief Justice. I don't know if I am correct.

CHAIR—It is the order of precedence isn't it?

Senator HOGG—It seems to me that it is important that that scenario be addressed.

CHAIR—Avoid the historic precedent where General Haig, I think, said after the attempt on Reagan's life, 'I am in charge here,' which worried a lot of people.

Senator HOGG—I understand what you are getting at, and I am not knocking it, I just think that that contingency needs to be covered. The other thing that was raised this morning, which I now raise, is: do the authorising ministers have to be in agreement?

Mr Dabb—Yes, each of the authorising ministers needs to be satisfied—

Senator HOGG—So it is a three-nil vote?

Mr McDougall—That is correct. It is not a 2-1 or a 1-2.

Group Capt. Evans—Or a seniority issue.

Senator HOGG—Or a seniority issue. Right.

Mr Dabb—That is one of the safeguards against rash and impetuous action, or an irrational Prime Minister, as suggested in one of the submissions.

Senator HOGG—Down the track that could be quite likely.

Mr Dabb—Coming back to the earlier question, our understanding is that you would always have a Governor-General, by the processes of succession, and the Governor-General would be able to constitute a person, a minister, as the minister to act for one of the named ministers. I appreciate that does not satisfy you, and we will come back to the committee on that.

Senator HOGG—Given that these are going to be violent circumstances and that people are going to have to act quickly, you are not going to have the time to call together those who are not part of the situation. It seems to me that there needs to be, I think the term used this morning was ‘flexibility’. I would not like to see it become a single person’s decision. But, given the extreme circumstances, one may well need to consider that option.

CHAIR—Does the Constitution refer to the situation where the Governor-General finds it impossible to act? In other words, when the Governor-General is absent from the country the senior state government is his deputy. Is that enshrined in the Constitution? If he were incapacitated and unable to act, the senior state government automatically becomes—

Mr Dabb—Not in the Constitution, so far as I know.

Lt Col. Kelly—They are probably succession issues and part of the ‘unwritten constitution’ that we have inherited from Great Britain. What happens is that one of the state governments becomes the administrator performing all the functions of the Governor-General.

CHAIR—Who appoints him or her?

Lt Col. Kelly—It is that succession principle that applies that you mentioned.

Senator HOGG—Can I take you over to page 6, subclause (6):

If the authorising Ministers cease to be satisfied as mentioned in subsection (1), the Governor-General must revoke the order.

If they are in agreement there is no question, but if there is a split decision—2-1 or 1-2—then what happens?

Mr Dabb—If each of them does not continue to be satisfied, then that is the occasion for revocation.

Senator HOGG—So it has got to be all three, again?

Mr Dabb—Yes. I think that follows from the way it is drafted. Initially, the authorising ministers must be satisfied. ‘The authorising ministers’ means each of the three of them. Then if those authorising ministers, meaning each of the three of them, cease to be satisfied—and that could be one minister ceasing to be satisfied—then that would be the occasion for revocation.

Senator HOGG—All right. We then go on to subsection (7):

In making or revoking the order, the Governor-General is to act with the advice of

- (a) except where paragraph (b) applies—the Executive Council; or
- (b) if an authorising Minister is satisfied that, for reasons of urgency, the Governor-General should, for the purposes of this subsection, act with the advice of the authorising Minister—the authorising Minister.

So (6) says that the three must be in agreement and then (7) says that you can have the situation where, with one authorising minister, either an order can be made or an order can be revoked.

Mr Dabb—That is correct. But in each case the advice has to be grounded on the condition that the three ministers be satisfied. So one minister who was of a different view—

Senator HOGG—Where does it say that though?

Mr Dabb—That would be a matter for agreement between ministers as to which one should tender the advice. Already under the convention that the Governor-General acts in accordance with ministerial advice, any minister may tender advice to the Governor-General. We already have that situation, and people do not say, ‘Ah, but a minister who disagrees with the policy might give difference advice to the Governor-General’.

Senator HOGG—We are looking at something here, though, that is a lot more contentious.

Mr McDougall—This is really just a provision aimed at making the actual process of giving the advice potentially a little bit quicker. Instead of a formal meeting of Executive Council having to be held, if it is a matter of urgency, a single minister—albeit an authorising minister—after consultation with the other two authorising ministers and ensuring that they are satisfied can tender that advice to the Governor-General. It is basically to assist in cases of urgency—so that the call-out can be done as quickly as humanly possible.

Senator HOGG—I accept that, but that is not it what it says, in my view, and that is not the way I read it. I know what your intention is.

Mr McDougall—In other words, you would take a drafting point that we perhaps have not fulfilled what our stated policy is.

Senator HOGG—The other thing I cannot understand is why the Executive Council is there. It would seem to me that in most of these circumstances it will be the authorising ministers dealing with the Governor-General. Let me assure you that if you want to find out information about the Executive Council it is difficult to find out. After two days of squirreling around we were asking: what is a quorum for the Executive Council? Who is on the Executive Council? You can ask many a wise head even around this place and you will get a number of versions as to who is on the Executive Council and what constitutes a quorum.

Mr Dabb—Before I address that, can I just go back to the scheme of the provisions, which is that if certain conditions are satisfied—that is, if the three ministers are of a certain view—then the Governor-General takes certain action. The advising of the Governor-General is simply a conduit. It is not as if one minister who is of a particular view expresses that personal view of his to the Governor-General. It is not a personal thing; it is simply a matter of having a conduit to satisfy the constitutional requirement that the Governor-General always acts on advice. The advising is to take certain action and does not represent the view of the person doing the advising; it is just a conduit.

Senator HOGG—How is the Governor-General assured that the three ministers are in concert?

Mr Dabb—This needs to happen all the time. Frequently there will be a provision in a statute that if a minister is satisfied of certain things the Governor-General will do something. The Executive Council that advises him might consist of quite separate ministers who have no involvement in the subject matter at all but simply meet the requirement for advice to the

Governor-General. That is not an unusual situation. As to the reason why there is a reference to the Executive Council, throughout Commonwealth legislation there are references to the Governor-General exercising certain powers. There is a provision in the Acts Interpretation Act that says that means the Governor-General acting with the advice of the Executive Council, even though it just says 'Governor-General'. So, if we said nothing at all about this, what would happen would be that the three ministers would form their view and there would be a decision that in some way would be notified to an Executive Council meeting. Two possibly quite unrelated ministers together with the Governor-General would constitute the Executive Council and would sign the minute paper and give the advice. But, to provide a more expeditious procedure in the event of an emergency, we have preserved the reference to the Executive Council, this being the convention, but have also provided this additional emergency method by which the Governor-General might be advised.

Senator HOGG—The reality is that it is not an additional emergency factor; it really is the most likely path that they would go down in an operational sense?

Mr Dabb—Yes, provided in each case the authorising minister giving the advice is satisfied that for reasons of urgency he should act on the advice of one minister. That condition does need to be satisfied. It could not be ignored.

Senator HOGG—So it is only one of the three ministers who has to decide that it is a matter of urgency?

Mr Dabb—Yes, that is correct.

Senator HOGG—So it would have a two-one vote.

Mr Dabb—What would happen in practice is that the event would happen which causes the giving of the advice and that would either be the three individual ministers each being of the opinion as required or, in the event of revocation, one of those ministers ceasing to be satisfied as required. That would be the trigger condition, if I might put it like that. Then someone needs to give advice to the Governor-General; the Governor-General must act on advice. By virtue of this provision, that could either be advice by the Executive Council or one of the ministers, not necessarily the minister whose change of mind has precipitated the action; it could be one of the other ministers. It simply needs to be one of the authorising ministers. But, if you are to go under B and do it like that, he would have to say to the Governor-General in his advice, 'I am satisfied that, for reasons of urgency, you should act on my advice rather than waiting for the advice of the Executive Council.'

Senator HOGG—All right. Is that advice oral or written advice?

Mr Dabb—It could in an extreme emergency be oral, although it should be then recorded very soon after, but in fact I would expect it would always be written—perhaps a fax or some other form of communication.

Senator HOGG—Or an email or some other form of communication?

Mr Dabb—Yes.

Mr McDougall—This bill we have premised on, wherever possible but not necessarily statutorially, having a paper trail.

Senator HOGG—Yes. I was going to say that transparency is one of the things that is absolutely necessary with this and that being able to be accountable for the actions is equally as important.

Mr Dabb—Could I just mention that this is not entirely academic. What actually happens with a major exercise is that we do go through this procedure, prepare faxes and send them. These kinds of procedures are not under this particular bill because it is not in force, but the process of advising is exercised along with other operational action.

Group Capt. Evans—Even the handover from the police forward commander to the ADF commander is done on paper.

Senator HOGG—Yes, there is an authorisation process.

Group Capt. Evans—And then it is handed back on paper with signatures.

Senator HOGG—So, if there is a conflict between the ministers as to whether we should or should not seek an order then because there is no agreement there they do not proceed to the Governor-General?

Mr Dabb—That is correct.

Senator HOGG—And it is only those three ministers?

Mr Dabb—Correct.

Senator HOGG—And you will take away with you the case where those three ministers are the subject of the event themselves.

Mr Dabb—Or one of them.

Senator HOGG—Yes, it could be one, two or three. You will come back with some sort of suggestion as to how that could be reasonably handled, in a transparent way.

Mr Dabb—Yes, Senator.

Senator HOGG—Part 51B refers to the state government:

if a State government applies to the Commonwealth Government to protect the State ...

What is meant by the state government? Is that the premier of the state? Is it the governor of that state? What do you mean by 'the State government'?

Mr Dabb—In the context, the governor—again, acting on advice by virtue of convention—would suffice. It could also be the premier or possibly another responsible minister. But the important thing is that the application would need to be expressed to be on behalf of the government of a state.

Mr McDougall—There would clearly be a limit to that. If it was the 'junior packer down the bottom of the state parliament house'—

Senator HOGG—That is the one I worry about.

Mr McDougall—I do not think the Commonwealth government, without further correspondence, would act upon it. Clearly, practicalities rule here in terms of appropriate visibility—that the Commonwealth government can be reasonably satisfied that in fact it is truly a request of the state rather than some unauthorised individual.

Senator HOGG—Or some mad action on behalf of some premier. It really does not spell it out there. It says the 'state government'. It really does not spell out who you would expect to be initiating the request as such.

Lt Col. Kelly—There was a bit of a difficulty with this. In the original section 51—which has been adverted to in previous testimony—there was an issue as to whether in fact that pro-

vision was constitutional, in that it varied from the formula that exists in section 119 of the Constitution. Section 119 talks about the application of the executive government of the state. So, with this bill, we have really just reflected what is in section 119 and got rid of that potential dilemma of section 51 in some way limiting section 119.

Mr McDougall—In terms of your point about a mad premier, ultimately a mad premier could advise a state governor and, as a matter of constitutional principle, except where a governor might exercise reserve powers the governor must act on the advice. If, for example, we put in there, ‘on application of the governor of the state’, I do not think that, by and of itself, would particularly assist us.

Senator HOGG—No; but in the previous one you require three ministers to be in agreement for the Commonwealth to intervene for Commonwealth interests. Here you are reliant upon a broad term, ‘State government’.

Mr Dabb—We still require the three Commonwealth ministers to be in this—

Senator HOGG—I accept that. But it is now getting to the genuineness of the request from the state government.

Lt Col. Kelly—Their process for coming to that decision is a matter under the state constitution and state processes for them to formulate and the Commonwealth has not got power, constitutionally, to dictate that and therefore it reserves its right to evaluate that request in all the potential vagaries of the circumstances you might be thinking of. But as far as the constitutional provision goes we can only be guided by section 119. Anything that went beyond that or purported to go beyond that would be unconstitutional.

Mr Dabb—In practice, after a formal communication there is absolutely no reason why the Commonwealth ministers could not test it and have a conversation or discussion backwards and forwards in the course of deciding whether or not they were satisfied as required.

Group Capt. Evans—In practice, there would be continuous conversations going on.

Senator HOGG—As has been pointed out to me by the secretary, section 119 says:

The Commonwealth shall protect every State against Invasion and on the application of the Executive Government of the State ...

Why did you not use those words ‘the Executive Government of the State’ as opposed to the state government? Is there a difference between the ‘Executive Government of the State’ and the state government. I understand what you are getting at, The state government seems to me to be a looser term than the ‘Executive Government of the State’.

Lt Col. Kelly—It is the drafter’s opinion but this expression is their attempt to make the language as plain as possible. That expression encompasses what is intended in section 119

Mr McDougall—Just in terms of the drafting, our job was to give the draft to the policy—

Senator HOGG—I accept that.

Mr McDougall—And the drafters are quite sensitive about being dictated to by policy people as to how they draft.

Senator HOGG—Sensitive, new age person, SNAP.

Mr McDougall—Yes, that is it.

Lt Col. Kelly—It was his advice that that reflects section 119 and the analysis.

Senator HOGG—Could you take that concern back to the drafter and get back to the committee? I then take you to the note midway down page 7. It might seem as if we are going slowly, but we are actually covering a lot of ground, at least in these few areas. I have one other question. When the state government make an application, who do they actually make the application to?

Mr Dabb—This is a matter for procedures. I would imagine that, after this becomes enacted, there would be procedural explanations of the steps that should be followed.

Senator HOGG—Do they make the application to one of the authorising ministers?

Mr Dabb—Yes.

Senator HOGG—That does not say that.

Mr Dabb—It does not matter. Explanatory material will be distributed to the states that will say to whom the application should be made. That will say to one of the authorising ministers—meaning to the office of one of the authorising ministers. In other words, there is not going to be a formal requirement that this be pressed into the hand of a particular named individual. Provided it is addressed to the Commonwealth and finds its way into the hands of one of the authorising ministers that would be sufficient to cause the process to roll on.

Senator HOGG—The process will be important though because it may well be that there will be criticisms of delays that might be brought about as a result of people not knowing to whom the state application should be directed.

Group Capt. Evans—There are already well-established and well-exercised secure communications links running on defence bearers. They are practised four times a year?

Lt Col. Gilmore—Up to four times a year.

Group Capt. Evans—The state authorities, the police services and the protective services coordination centre and all the government agencies are well used to using them. The actual practice of making that communication—

Senator HOGG—Can you put that into plain English for me? Does that mean that they are getting through to the authorised ministers?

Group Capt. Evans—Yes, they can email them.

Lt Col. Kelly—You need the flexibility in the legislation to adapt to changes in technology and processes.

Senator HOGG—The states said that.

Group Capt. Evans—The state government has secure email to contact the federal.

Senator HOGG—So long as there is no criticism if this bill is invoked upon the request of the state government that there is no knowledge as to whom the contact should be made and, in the absence of that particular designated authority or authorities, who the contact should be made with so as to trigger it. Otherwise that will lead to something being dragged on. Then people will ultimately criticise what goes on.

I want to go to the note in small print halfway down page 7. I made reference to this this morning, as did someone else. Section 51B retains the proviso that states:

Provided always that Emergency Forces or the Reserve Forces shall not be called out or utilized in connexion with an industrial dispute.

It is not applicable to 51A, which deals with the Commonwealth interest; or to 51C, which deals with the territories. Is there any reason why?

Mr Dabb—That is deliberate. The intention was to retain the proviso in relation to a state request as it exists in relation to the present section 51, which deals with state requests.

Senator HOGG—Am I to interpret then that 51A and 51C enable a call-out for industrial dispute purposes?

Mr Dabb—It is not a call-out; it is the calling out and the utilisation of emergency forces—whatever they may be—or the reserve forces. It is limited to those.

Lt Col. Kelly—This legislation cannot be used in connection with an industrial dispute in any event.

Senator HOGG—Yes, but there are some minds that would read that and say that in 51B you have the proviso, and in 51A and 51C you do not have the proviso.

Mr Dabb—The explanation of that is that it is intended to preserve the status quo under which the proviso only applies to a state initiated call-out.

Senator HOGG—Why doesn't it apply to 51A and 51C if the intention of the legislation is for it not to apply to industrial dispute situations?

Mr Dabb—No, it is not the intention for that the proviso to have that broad application. The intention is for the proviso to have a narrow application and be limited to state initiated call-out. The reason, of course, so far as the presentation of the legislation is concerned, is to make it clear that we are not changing the effect of that proviso, whatever it might be. It is neither broader nor narrower than it is at present.

Senator HOGG—Where do I find the insurance that none of this act will be used in an industrial dispute?

Mr Dabb—That comes from the point made by Lieutenant Colonel Kelly and Group Captain Evans that, given the nature of the powers and the kind of situation being addressed, it does not encompass an industrial dispute.

Lt Col. Kelly—It is specific in that case; it is not just a matter of interpretation. This legislation can be used only in a state of domestic violence beyond the capabilities of the state or territory police to deal with.

Senator HOGG—It cannot be invoked for any form of industrial dispute, no matter how bad or otherwise it might become?

Lt Col. Kelly—None whatsoever, unless it was a situation of incredibly extensive violence, total anarchy or whatever. Even in that sense, the Defence Force could not be used in connection with resolving a dispute or as substitute labour under this legislation. It would be in the situation of only dealing with violence. It would have to be something incredibly extensive to be beyond the capabilities of the state or territory police to deal with. In all circumstances in which that has been requested so far, that request has always been rejected.

Senator HOGG—So there is no undertaking in the legislation, other than what appears in the second reader and what appears on the *Hansard* record now, that that is the intent of the legislation?

Lt Col. Kelly—That is the effect of using those qualifiers of domestic violence beyond the capability of the states and territories to deal with. There is no way that the bill could be interpreted to apply to any other situation.

Senator HOGG—All right. If I can now move to page 11, 51E, at line 11, states:

... comply with any direction that the Minister gives from time to time ...

I assume that is the Minister for Defence?

Mr Dabb—Yes, by virtue of the act's interpretation.

Senator HOGG—As to way in which the Defence Force is to be utilised, we had some discussion about 'utilised' this morning. Do you have any comments?

Group Capt. Evans—We would interpret that as providing the minister with the opportunity to choose whether the Defence Force is employed in a proposed method. The CDF would have to propose how the Defence Force would be utilised and then the minister would have the opportunity to veto or choose that.

Lt Col. Kelly—It reflects the situation under the Defence Act anyway, that the minister has the authority to direct the CDF. In this situation it is just there for emphasis, in particular that once a call-out has been effected, the minister will continue to provide direction to the CDF, because this is the most sensitive dimension of the operational spectrum.

Senator HOGG—So the CDF must comply with the directions of the minister?

Group Capt. Evans—Yes.

Mr Dabb—Directions of the minister as to the way in which the Defence Force is utilised.

Senator HOGG—So that way excludes direct tactics?

Lt Col. Kelly—The trickle down, if you are looking at the semantics of it, is ways, means and ends. The force commander will determine the means and ends by which he achieves the mission objective and the minister will set the ways.

Senator HOGG—I will move on to 51F. At line 21(b) it states:

... the Defence Force is not utilised for any particular task...

What is a 'task'? Is it defined?

Mr Dabb—No. It could not be defined either broadly or narrowly; I think it is a flexible expression. In a search situation, for example, it could involve the search of a particular house, the search of a street full of houses or the search of all the houses in a particular area.

Lt Col. Kelly—It is a term that is well understood within the ADF as well. It gels nicely with it.

Senator HOGG—How is it understood within the ADF?

Group Capt. Evans—The term 'task' is used as a discrete body of work that is quite narrow. We use it writing our orders—'Your task is ...'

Mr McDougall—I would make the point that any of the envisaged operations under this bill are indeed specific tasks, be they releasing hostages or so on. The general management of the incident remains with the state or Territory law enforcement body. What the Defence Force is doing is some subset of the total management of the task—

Group Capt. Evans—at police request.

Mr McDougall—Yes, and it may be a large or small portion of the total management of the law enforcement emergency.

Senator HOGG—I will read on:

... the Defence Force is not utilised for any particular task unless a member of the police force of the State or the Territory specified in the order requests, in writing, that the Defence Force be so utilised.

That is in writing to whom?

Group Capt. Evans—To the force commander.

Senator HOGG—The force commander or CDF?

Group Capt. Evans—The force commander.

Lt Col. Kelly—The CDF may not be at their location.

Senator HOGG—I understand that and that is why I am asking the question. It says ‘in writing’, but it does not say in writing to whom.

Lt Col. Kelly—The obligation is on the CDF to ensure that happens, but the actual request will go to the force commander on the ground and he will communicate to the CDF that that has happened.

Senator HOGG—Is there any need to be more specific there? That is all I am asking.

Mr Dabb—In my view, notwithstanding the answer by my Defence colleagues on the operational requirements, I think it is left very broadly here and that that provision could be satisfied by a requirement that the Chief of the Defence Force—going back to the chapeau under (1) there—must, as far as practical, ensure that what is stated in (b) happens. I think it is sufficiently broad for it to be either to the Chief of the Defence Force or to the force commander or to someone at a lower level perhaps in an operational situation—in a search situation.

Lt Col. Kelly—It reflects the fact that the CDF will be in the loop on what is going on, basically.

Group Capt. Evans—And he is responsible to ensure that it is done.

Senator HOGG—I accept that, and that is what I was trying to clarify: who it was in writing to, whether there was anyone specific in mind. Was it just the CDF or were there other persons who could be so designated? Where it says ‘a member of the police force’, what level of person are you looking at?

Mr Dabb—There is no requirement for any particular level.

Senator HOGG—So it could be a humble constable who makes the written request.

Mr Dabb—Yes, and it would be a matter for the administration of the police force whether someone who should not have been doing it did it inappropriately. That would be under fraud if it were on the police side.

Group Capt. Evans—There is a wide variety of tasks there. It could be as simple as a stop and search station or it could be a direct assault in a counter-terrorist action.

Senator HOGG—Section 51G, on page 11 of the bill, raises the issue that I raised earlier today. It says:

In utilising the Defence Force in accordance with section 51D, the Chief of the Defence Force must not:

- (a) stop or restrict any lawful protest or dissent ...

Lt Col. Kelly—It is quite correct to point out that—

Senator HOGG—What about unlawful? How do they know what is lawful and what is unlawful?

Mr Dabb—Law enforcement agencies have to make that determination every minute of the day, practically.

Lt Col. Kelly—Basically, unlawful is anything that is against the law.

Senator HOGG—Yes; I understand that. But you have got in here that they are not to stop or restrict any lawful protest or dissent, which I am fully in agreement with. But how are you to know? Someone is proceeding with a lawful protest or dissent and because someone else, who might be a complete rank amateur, decides that this is unlawful, you find yourselves entangled in—

Mr McDougall—But they are subject to the law, then. If they did something that was illegal in terms of, say, preventing such a protest in a way that was unlawful, they would be subject to the courts.

Lt Col. Kelly—It would have to be something extremely significant. Once again, emphasising that ‘beyond the capability of the state or territory authorities to deal with’, this is one of those provisions that reflects the democratic aspirations as well as having a legal effect. It is quite rightly pointed out that the constraints of this legislation not operating—unless it is domestic violence—beyond the capabilities of the authorities would probably preclude that happening anyway. But this is for more abundant caution than to reflect the philosophy behind it as well.

Senator HOGG—In 51G(b) it says:

utilise the Emergency Forces or the Reserve Forces unless the Minister ...

In what sort of instance are the emergency forces or the reserve forces used?

Lt Col. Kelly—Lieutenant Colonel Simpson can explain the emergency aspect.

Senator HOGG—What are the emergency forces?

Lt Col. Simpson—The emergency forces there, I think, refers to an element or a component of the army reserve. It is simply one of the components. We have got the active reserve, the inactive reserve and the emergency reserve. It is simply one of those components.

Senator HOGG—Thank you. Moving on to page 13 where it talks about ministerial authorisation, subclause 51I(2) says:

... unless the authorising Ministers, or a Minister (whether or not one of authorising Ministers) authorised in writing by them, has in writing authorised the recapture.

Why go outside the authorising ministers?

Mr Dabb—The reason for that is largely historical. It is a reiteration of an existing administrative guideline, which does envisage in some situations that another minister might be used. In fact, the existing administrative rule is not so specific as to refer to those three particular ministers.

Senator HOGG—We have now been specific.

Mr Dabb—Yes, we have.

Senator HOGG—It would seem to me that, if I am looking for a fundamental flaw, that is one of the fundamental flaws that I would see. If we have gone to the trouble in other sections to have the authorising ministers and/or the subsets of those authorising ministers being one of the authorising ministers and we have accepted that, it would seem that in this instance we should be doing exactly the same—again, bearing in mind the contingency that you might have all three wrapped up in the one bundle and the one place at the one time. Putting that to one side it seems to me that that does not sit in with the rest of it. It might have been something that sat previously all right.

Mr Dabb—The purpose of the present administrative arrangement is simply to have additional flexibility.

Senator HOGG—I just think that, if you have got three authorising ministers who are across the issue—and I am comfortable with that concept—and they put someone who might be the minister for tiddlywinks on such a major issue just because they have now been authorised by the authorising ministers, it becomes clumsy and messy. You have got to follow the paper trail to pick up the authorisation. I suggest that we drop that—unless you can give me a really good reason. If you want to take that on notice, you can get back to me.

Mr Dabb—We shall think about it further. The only answer I can give at the moment is the obvious one, which is that it gives more flexibility.

Mr McDougall—I have a point there, even though reasonable people can differ on this. For example, there might be an incident at Sydney airport that goes on for weeks and weeks. We were just trying to build in a degree of flexibility for dealing with ministers wanting to get away from the instant situation where it was well after call-out—it might have been going on for, perhaps, a couple of weeks—and where there was always tension.

Senator HOGG—If that were the case, I would expect the minister to remain involved and wear the tension. That is what I reasonably think they are paid for. Can I take you to subsection (3), which says:

Subsection (2) does not apply if the member believes on reasonable grounds that there is insufficient time to obtain the authorisation because a sudden and extraordinary emergency exists

I presume that is a life or death situation.

Group Capt. Evans—Yes, if the action is necessary.

Senator HOGG—This is not something to encourage the rambos out there or that character in *Police Academy* who decided he had to get the cat out of the tree so he pulled the gun out and shot the cat. That is not the sort of situation we are looking at.

Mr Dabb—For the purpose of it—and this is reflected under the existing arrangements—in return for having this tight control by ministers right down to the very end before a deliberate result takes place, you do need something to relax that rule in case you need to save lives by taking action suddenly. That is the purpose of it.

Lt Col. Kelly—That wording reflects the current situation in criminal law and common law for sudden and extraordinary emergency action.

Senator HOGG—Thank you. Now I will move on to division 3 on the declaration of a general security area. Is there any appointed time at which the general security area has to be declared? Does it have to be declared up-front in the situation or can it be declared at any stage throughout, and what is the process for that declaration?

Mr Dabb—It can be declared at any stage after the order is made.

Senator HOGG—Does that mean seeking a variation to the order?

Mr Dabb—No, it need not be part of the order itself. It would not normally be part of the order itself. But, if ministers are satisfied that division 3 powers need to apply, you would need a declaration of a general security area for that to operate. You would normally expect consideration to be given to the declaration of a general security area up-front—at the same time as, or soon after, the order was made.

Lt Col. Kelly—That would also be informed by the military appreciation process in terms of what was required to do the task and would be fed through to the CDF to consult with them.

Senator HOGG—It seemed to me that that was something that would naturally take place up-front. Is that a reasonable interpretation?

Lt Col. Kelly—That is right, Senator.

Senator HOGG—When you go to the next page, line 6 on page 14 under (d) says that the general security area is to be ‘broadcast by a television or radio station so as to be capable of being received within the general security area’. There are some issues that come to mind there. When does it have to be announced? Is there a frequency of the announcement? Because this is something that is being given out to the public, does it have to carry an authorisation? If it does have to carry an authorisation, authorisation by whom? The other issue then is: is there a requirement to do that in more than one language, given that it could be in a non-English speaking background area? None of that is clear. If there has been a declaration of a general security area and people are not aware of the regime that is in place, these are the areas where people will be criticised. It certainly would help us to know.

Mr Dabb—As to time, I think it is clearly implied that this is for the information of people who are going to be affected by action under the order. So it would need to be done as soon as possible and, in any event, before that action is taken, if possible.

Senator HOGG—Frequency?

Mr Dabb—That is the timing. As to the other points, no, there is nothing as to frequency, but it would need to be more than just a token. It would need to be done in a way that is calculated to widely inform people within the area who are going to be affected by the order. That may involve doing it more than once, but there is no requirement that it be done more than once.

Senator HOGG—Does it have to carry an authorisation?

Mr Dabb—No.

Senator HOGG—Even political advertising has to carry an authorisation. This is an event of great moment that is happening out there. It would seem to me that it should be authorised by group captain so and so, if that is the person directly involved. It seems to me a reasonable step. As I say, these are the areas where criticisms will come if things go wrong.

Mr Dabb—The statement has to be arranged for by the authorising minister. So, ultimately, it comes back to ministerial authority, unless it is a complete fake and someone is perpetrating a false alarm or something—in which case they can say it is made by anyone.

Senator HOGG—What I am trying to flesh out is that—

Mr Dabb—It must be effective.

Senator HOGG—It must be effective. It is a grave consideration. The reason my attention was drawn to that is that, under subdivision (c) under ‘Declaration to be published’, all they must take are reasonable steps, whereas they are quite definite under subdivision (b) in respect of the statement to be published.

Mr Dabb—I think that what lies behind the drafting on this—you can discuss what might be needed or what is desirable—is that this is one of those pieces of legislation which is a balancing of convenience, effectiveness and what is possible against loading up additional requirements that are going to be needed. Given that this is an extreme emergency situation—we are here, right down to the very fine, sharp pointy end of one of the most serious life threatening emergencies that you could imagine in the community—the question is to what extent you put in things that might be desirable as statutory requirements, like ascertaining the languages spoken in a particular area and ensuring that—

Senator HOGG—I accept that but, nonetheless, there needs to be some guidance as to the sorts of issues that need to be taken into consideration when the matter is being publicised.

Lt Col. Kelly—There are a lot of administrative steps that are spelt out now—for example, in the national antiterrorist plan—that you would not consider putting in legislation. To reflect on what Geoffrey said about the extreme emergency nature of this, there would need to be some flexibility to the administrative aspects that are utilised. I think that these finer detail issues could be left to the administrative instructions that are associated with implementing the bill.

Senator HOGG—Yes, I accept that. But we do not get to see the administrative instructions—that is the problem. I am not doubting your good intention or your goodwill. All that has to happen is for one of these events to occur and for something to go wrong, and then they will start looking for scapegoats and will trawl over anything and everything to find out who did not do what and when. ‘Why didn’t you do it?’ and ‘That was a question asked then.’ They are invariably merciless; they look for whoever they can pillory in those sorts of events.

Lt Col. Kelly—We would certainly take this legislation and interpret that provision to mean that the information had to be broadcast so that it was capable of being received, as it says there, within the general security area, meaning that the population would need to be able to have access to it and would need to understand it reasonably. Those considerations would—

Senator HOGG—And carry an authorisation?

Lt Col. Kelly—It would have to be obviously indicative of the authority that came with it and so that, to me, is the interpretation that I would place on it if I was acting on that provision.

Mr Dabb—Senator, of all the points you have made, I do not quite see the force of the one relating to the authorisation.

Senator HOGG—Who has authorised it?

Mr Dabb—It is authorised by three ministers.

Senator HOGG—When it is going over the airwaves: ‘Authorised by the Minister for Defence’, or ‘Authorised by the Minister for Defence, the Attorney-General and the Prime Minister.’

Mr Dabb—That would be sensible in order for people to understand the seriousness of it and what is going on.

Senator HOGG—That is correct, that is what I am asking.

Mr Dabb—But I just wonder if that is an appropriate thing to put in a statute as a requirement.

Lt Col. Kelly—That would be how I would interpret that anyway, Senator.

Senator HOGG—If we are getting that undertaking, then that is fine. We are not necessarily trying to get everything written into the piece of legislation.

Mr Dabb—Whereas the requirement for an authorisation under the Electoral Act is for different reasons.

Senator HOGG—I think there would be a good reason to have an authorisation here as well.

Group Capt. Evans—This broadcast, of course, serves an operational purpose; that is, to make the populace aware of restrictions on their movement, for example. It would be in our interest to make sure that that is effective and clear.

Senator HOGG—Is it also in your interest not to broadcast on some occasions? That is why I raise the issue of when the broadcast should be made. It may well be that you will upset an operational issue by broadcasting some form of detail over the airwaves.

Lt Col. Kelly—Not in connection with the general security area.

Senator HOGG—That is all right then.

Lt Col. Kelly—The effectiveness there is in relation to how we relate to the population and its movement and management.

Group Capt. Evans—It would be unlikely, I think, that we would have deception activities going on around that event.

Senator HOGG—Then in relation to the declaration of the designated area, the bottom of page 17 said that reasonable steps be taken:

to make the public aware of the declaration of the designated area and of its boundaries.

Do we know why it is just a different form of words to that which seems to be far more specific to that with which we have just dealt?

Lt Col. Kelly—We are talking about an area within the general security area.

Senator HOGG—That is correct.

Lt Col. Kelly—The requirement there is of a very serious emergency where you are having to evacuate or prevent the entry into a dangerous area. The priority there will be to make the public actually aware of the declaration, by whatever means we can do that in the emergency of the situation. The key there is there is a requirement to make the public aware.

Senator HOGG—All right. So what will be the simple test that the public will be able to take out of the messages that have been sent out so that they know the difference between the designated area and the general security area?

Lt Col. Kelly—It will be principally in relation to the boundaries of that designated area.

Senator HOGG—So it will be a physical boundary situation.

Lt Col. Kelly—There will be steps taken to facilitate the demarcation of that so that people are aware of it. Obviously, in making them aware, there will be issues that might be associated with designating it, such as the areas bound by Castlereagh Street and William Street or whatever, to provide the specific information they would need to know where the area was. The requirement there is in fact stricter in that it is making the public aware of the direct declaration rather than just broadcasting so that it is capable of being received.

Senator HOGG—How likely is it that the general security area and the designated area will be one and the same?

Lt Col. Kelly—That is sort of, as we would say, situating it. It is hard to say.

Group Capt. Evans—In general, it is unlikely, I would think.

Senator HOGG—I am just trying to get some feel for that. I have a more general question that goes to detention. If a person is detained by an ADF person in either the designated or the general security area, how long can they be held by the defence forces before they are passed on to the civil authorities?

Lt Col. Kelly—The process is that, as soon as possible, they have to be handed over to the nearest civilian authority.

Senator HOGG—I just take you to 51S. This is for members to wear uniforms and identification when exercising powers. That clearly operates in the general security area. It does not operate within the designated areas. Is that correct?

Lt Col. Kelly—No, it does operate within the designated area as well but it does not operate in relation to the exercise of division 2 powers.

Senator HOGG—That is the difference. That is the provision that covers the SAS—

Lt Col. Kelly—Exactly.

Senator HOGG—when they are operating within the designated area, and or the general security area?

Lt Col. Kelly—That is right—to do those assault tasks.

Senator HOGG—They would have to operate through the general security area before they got into the designated area, and they may well have part of their operation situated in the general security area, so they are exempt from that provision.

Lt Col. Kelly—So you may not even have a general security or a designated area declared. It may not be necessary in the situation. You may only need the division 2 powers so there would be no areas declared contained enough to permit just the assault to take place.

Just on that operational security aspect, one of the issues we were concerned about here was not adverting to the fact that the SAS may be involved. We have opted for the Governor-General's order rather than a proclamation because, in specifying whether division 2 or division 3 powers are authorised, that does not have to be publicised. Someone reading the order would say, 'Division 2; they are obviously calling in the SAS'. In that sense, we can preserve that operational security.

Senator HOGG—But that will come out in a subsequent report to parliament.

Lt Col. Kelly—Yes.

Senator HOGG—On the wearing of the uniforms and the identification, I presume the name is embedded in the uniform. Is the number equally embedded in the uniform or is that something that is a moveable feast?

Group Capt. Evans—The number is not generally embedded in normal items of uniform. Special arrangements would have to be made to make certain that names and numbers are displayed.

Senator HOGG—I suppose people could swap jackets as well. How do you ensure that numbers are not swapped and that a person gets a unique number to them?

Group Capt. Evans—The unique number is going to be their service number which is unique to each service person. In terms of swapping jackets, names and numbers, it is just a matter of discipline and military oversight.

Senator HOGG—Page 24 of the bill looks at the tabling of a report. It says:

... the copy and report are:

- (a) tabled in the Parliament; or
- (b) published on the Department's web site; or
- (c) otherwise publicly released.

It goes on:

If publication of the copy and report takes place in accordance with subsection (3) other than by tabling them in the Parliament, the Minister must arrange for them to be tabled in the Parliament within 3 sitting days of the Parliament after the end of 7 days mentioned in that subsection.

Why is it three sitting days?

Mr McDougall—Ultimately, it was an arbitrary number, but we were trying to come up with reasonably quick reporting to parliament.

Senator HOGG—That could be a lifetime.

Mr McDougall—It could, but the point was that there is the seven calendar day requirement. It is reported to the public which, presumably, also includes members of parliament in the sense that it is available to them. But to make sure that parliament ultimately becomes aware within the three sitting days, regardless of whether they have been overseas or otherwise, it is made available to them.

Senator HOGG—Can't it be tabled out of session? What is wrong with that? There are lots of reports that are tabled out of session. If it can go on the web site or otherwise be publicly released, parliament is the supreme authority there. It would seem to me that the proper thing to happen is for the report to be tabled in parliament. The mirror committee of this that I am on tabled a report today out of session and that will be received by the Deputy President this afternoon and will become public as of today. It seems to me that is the smart way to go.

Mr Dabb—That is really an argument for the abandonment of the sitting days concept altogether.

Senator HOGG—Yes, just get rid of the sitting days and have it. My concern is that you could have the report on the web site before it is officially tabled in parliament.

Mr McDougall—The intention was that it be publicly known if parliament was not sitting at the relevant time. We can look at that.

Senator HOGG—It is just that parliament is the appropriate authority. In the general security area, as opposed to the designated area, the issue was raised about armed versus unarmed. Is it necessary for all of the defence people to be armed when they are being deployed in a general security area? It can be a fairly gung-ho thing to see a lot of people running around with weaponry but it might not be necessary in controlling motor vehicles.

Lt Col. Kelly—We have a process that we go through in relation to every type of operation, which is a rules of engagement process for off-shore deployments, or in this case it would be more akin to guidelines whereby we would go through an analysis of what the threat was within that domestic environment. For members to be authorised to deploy with weapons, there would have to be an assessment made that they were confronting a potentially lethal threat; in other words they would be equipped to face a lethal threat with lethal means if necessary. If there were an assessment made that there was no lethal threat, then the instructions would be, generally speaking, that they were not to go armed, although there may be some emergency measure taken in terms of a fall-back position if necessary. But for most of these tasks—for vehicle searching and for searching in general for establishing the cordon in terms of general conduct with the public—there would not be a need for them to be armed.

Senator HOGG—Thank you. The other issue that was raised today was the issue of a sunset clause, or a review by the committee or by the parliament of the operation of this legislation. May we have your comments on that, please.

Group Capt. Evans—From the Defence perspective, I think a sunset clause would be something of a concern. We will undertake significant training to make our people familiar with this legislation and its law and order consequences for them. To have this situation default back to where we are now would, for us, be fairly difficult. It would require a fair bit of training again, and it would be awkward to explain to our people why we are going from a body of legislation which clearly enunciates their obligations, responsibilities and authorisations back to a situation where those are not clearly enunciated. It would be a little awkward for us, but a review would seem very sensible. The operational consequences of this legislation will be quite extensively exercised a number of times a year, and a review could be quite informative.

Senator HOGG—A review in what period of time? We are looking for your guidance. It is not mandatory.

Group Capt. Evans—I think Defence would have meaningful input to such a review within, say, two or three years, easily.

Senator HOGG—It may well be that that acts as a safety valve for some of the broader community concerns with the operation of this type of legislation. If there is an undertaking by the minister that there will be a review of the legislation, and obviously it is up to the government of the day to determine who will conduct that review—one would hope, though, that it would be a parliamentary committee review—that may help to allay some of the fears that some people have out there as to the actual operation.

Lt Col. Kelly—Hopefully it will be more frequent than the 100 years that we have waited to do it so far.

Senator HOGG—You won't have me around here then, I can promise you that. I might have retired. I do not know about Senator Macdonald; he is a lot more youthful than I am.

Group Capt. Evans—And hopefully our discussions will still be theoretical.

Senator HOGG—The only other point was that raised by Mr Johnson in respect of division 2, where he suggested that, where it talks about recapturing property, we insert ‘defend or recapture property’ Have you a view to express on that, or is that implicit in what is there?

Group Capt. Evans—I think the point is better made in terms of general military operations rather than in this specific counter-terrorist, if you like, operation. Actions taken to defend against attacks of this type will not tend to be military occupations of a site; they will tend to be much more subtle than that and probably information operations. I would not see it as that important a change, personally. There was also the point of deleting the word ‘reasonable’.

Senator HOGG—Yes, ‘reasonable and necessary’.

Group Capt. Evans—We are very used to both of those words being used in virtually everything we do that involves graduated use of force. ‘Reasonable’ is a word we are very comfortable with, and it is frequently used when describing a soldier’s obligations and responsibilities.

Senator HOGG—Do you have a specific context within which that word is used, a specific meaning?

Group Capt. Evans—We speak about the use of force in terms of the reasonable use of force, the reasonable and necessary use of force.

Senator HOGG—But how would I interpret that? You obviously have an understanding of what ‘reasonable’ is in your terms. You live there; I do not. I live outside your environment.

Group Capt. Evans—Like most of what we do, it is just done in commonsense terms. If an ordinary group of peers would look at the situation and deem it to be reasonable then it is reasonable.

Lt Col. Kelly—That reflects the careful supporters for the open-fire scenario based training that we put the soldiers through. We give them a mental template for their decisions to use force in all circumstances. The context in which we use the word ‘reasonable’ in there: their honest and reasonable belief that that force is necessary to be used to resolve that situation.

Mr Dabb—Can I say two things. One is that ‘reasonable and necessary’ is an expression used in Commonwealth legislation. The second thing is that I thought that it implied reasonableness, meaning that the judgment as to necessity needed to be reasonable. I think that is the conclusion a court would probably come to. If you look at section 51T, subsection (1) talks about using such force as is ‘reasonable and necessary’. We have it there, but then in subsection (2) it is taken apart a little and the expression is that the person is to believe ‘on reasonable grounds’ that doing that thing is necessary. That also occurs in subsection (3). That is how I would understand ‘reasonable and necessary’. Of course, that test, as set out in subsections (2) and (3), really is a translation of the general criminal law on the matter for when the use of lethal force or force likely to cause grievous bodily harm is justified, when that would be a defence. It does need to be perceived by the person reasonably to be necessary.

Group Capt. Evans—A person may believe something to be absolutely necessary, but that belief is not reasonable.

Senator HOGG—Yes, that is quite correct.

Group Capt. Evans—Adolf Hitler believed a lot of things to be absolutely necessary, but none of his beliefs were reasonable.

Senator HOGG—I will not dispute that.

Mr Dabb—That is straying into the policy area.

Senator HOGG—We have now been going for nearly 2½ hours. I do not know if I have covered everything that I need to cover, but I think you have cast a fair bit of light on a number of issues for us. I have put a number of propositions to you that I ask you to take away and reconsider. If there are any further questions that arise out of the proceedings today then I will direct those through the secretariat to you. I thank you for your assistance today in the consideration of the bill.

Mr Dabb—Thank you. It will be in our interest to respond as expeditiously as we possibly can, because there is a heavy time element in all this and we are anxious—

Senator HOGG—That is why this hearing is on today. When the legislation actually came before the Senate for inquiry, Senator Macdonald was away. It was in the middle of the night, and with presence of mind we convened a meeting of the committee to put this hearing on so that we could allay the fears that any people might have in respect of this legislation and so that if we had any misgivings about the legislation, we could get them over and done with and out of the way very quickly. I thank you all.

CHAIR—Thank you for mentioning that, by the way. It was probably in the middle of the night where I was too being brutalised by Zimbabwean police upholding law and order in that country. You mentioned that we had provided you with a number of propositions and we would value your response. I think we have some questions on notice, but only one or two. A couple of questions were specifically asked.

Senator HOGG—Yes, you have taken a couple on notice. When we sit down in the light of day and look at the *Hansard* we may want to come back to you. We have trawled fairly well over the whole document today.

Mr Dabb—Yes. We will study the transcript and see if there is anything that we have not made as clear as we think we ought to have.

CHAIR—Thank you for that. I thank both the ADF and Attorney-General's for their time and for the answers that have been provided. It has been very informative.

Committee adjourned at 4.01 p.m.