

REPORT OF COMMITTEE

The inquiry

Reference of Bill

1.1 The Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000 (the Bill) was introduced into the House of Representatives on 28 June 2000. In its 10th report of 2000, the Senate Selection of Bills Committee recognised that the bill deals with sensitive issues regarding the use of the Australian Defence Force (ADF) in domestic emergency situations and recommended that the provisions of the Bill be referred to the Senate Foreign Affairs, Defence and Trade Legislation Committee.¹ On 28 June 2000, the Senate referred the Bill to this Committee for report by 16 August 2000.

Submissions

1.2 The inquiry was advertised in the *Weekend Australian and Canberra Times* on 1 July and the *Sydney Morning Herald* and the *Age* on 3 July seeking written submissions by 14 July 2000. In addition, the Committee wrote to relevant government Ministers, State Premiers and Territory Chief Ministers, and various organisations and individuals with a known interest in the Defence Force and aid to the civilian authorities drawing attention to the inquiry and inviting submissions on the Bill. In all, the Committee received 16 submissions, which are listed in Appendix 1. All submissions were made public documents.

Hearing and evidence

1.3 The Committee held one public hearing on this inquiry in Canberra on 21 July 2000. Witnesses who appeared before the Committee are listed in Appendix 2.

Acknowledgment

1.4 The Committee is grateful to, and wishes to thank, all individuals and organisations that assisted with its inquiry.

Overview—purpose of the Bill

1.5 Defence Force aid to the civil power is assistance to civil authorities where the ADF personnel may be required to use force in executing their assigned task. In situations where there is no likelihood of Defence Force members resorting to force, the Defence Force may give assistance to the civil community, which involves general assistance in the form of disaster relief, technical assistance to State and Federal agencies and participation in community activities.²

1.6 This Bill deals exclusively with Defence Force aid to the civil power which means that there is the potential for Defence Force members to be called upon to use force. Indeed, this Bill requires that a situation of extreme violence exists or is anticipated before the Defence Force can be authorised to aid the civil power. This legislation, for example, does

1 Selection of Bills Committee, Report No. 10 of 2000, 28 June 2000.

2 National Anti Terrorist Plan, Sixth edition, November 1995, p. 27.

not contemplate the use of the Defence Force in an industrial dispute and can only be invoked when the State or Territory police are unable to cope with the level of violence or the likelihood of such violence. Lieutenant Colonel Michael Kelly told the Committee:

...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.³

1.7 The Bill adds new provisions to the *Defence Act 1903* to enable the use of the Defence Force to assist the civilian authorities to protect Commonwealth interests and States and Territories against domestic violence. It repeals most of section 51 of the *Defence Act 1903*, which will be replaced by a new Part—Part IIIAAA.

1.8 The Australian Constitution contemplates that circumstances may arise in which it is proper to use the Defence Force, as an armed force, to maintain or to restore peace within Australia. Sections 51 and 119 of the Constitution clearly envisage this possibility. Section 51 defines the power of the Commonwealth Parliament and, in part, states:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

...

- (vi) The naval and military defence of the Commonwealth and, of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth.

1.9 Section 119 deals with protecting the States only and reads:

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

1.10 The purpose of this Bill is to amend the Defence Act to provide a legislative framework for the call out of the Defence Force in respect to domestic violence. There is no existing legislative framework that confers specific powers on members of the Defence Force called out in respect to domestic violence, nor is there any provision for the Commonwealth to act on its own initiative to use members of the Defence Force to protect its own interests.

1.11 Section 51 of the Defence Act provides for the call out of troops by the Governor-General upon the application of the Executive Government of a State, declaring that domestic violence exists in that State. As noted above, this section has no provision for the Commonwealth to use members of the Defence Force to protect its own interests and provides no guidance for members of the Defence Force on their role and responsibilities should they be called upon to assist in law enforcement tasks.

1.12 Part V of the Australian Military Regulations 1927—‘Duties in aid of the civil power during domestic violence’—provides greater detail about the role and responsibilities of members of the Defence Force during call out but is written for a bygone era. For example,

3 Lieutenant Colonel Michael Kelly, Department of Defence, *Committee Hansard*, 21 July 2000, p. 44.

regulation 407 states, in part, that it is the duty of the magistrate accompanying the forces engaged in protection against domestic violence, to read, read or repeat, or cause to be read in a loud voice, if circumstances permit, the proclamation authorised by the law in force where the riot occurs. It stipulates:

Before the proclamation is read, the alarm should, if possible, be sounded on a bugle, or some similar action be taken so as to call attention to what is about to be done, and the magistrate shall go amongst the rioters, or as near as he can safely come to them, and command, or cause to be commanded, in a loud voice, that silence be kept while the proclamation is made.⁴

1.13 The Committee agrees that this legislation fulfils the need to bring up to date arrangements for the call out of the Defence Force as a result of domestic violence.

Need for certainty

1.14 For many years, legal experts have been calling for legislation that would clarify the position of members of the Defence Force engaged in law enforcement tasks.⁵ Since Federation, there have been a number of requests by States to the Commonwealth for assistance in dealing with civil disturbances but the call out of the Defence Force has occurred on two occasions only.⁶ These occasions have raised more questions than answers about the call-out procedure.

1.15 After the call out of troops in 1978 following a bomb explosion outside the Sydney Hilton Hotel where visiting heads of Commonwealth were gathering for a meeting, Professor Blackshield argued that if Australian soldiers were ever again to undertake the kind of assignment following this incident, legislation to codify and clarify their position 'is even more sorely required'. For him, regular and orderly processes were 'signally lacking' during this call out. He maintained that 'Indifference to careful legal thinking was manifest throughout the CHOGRM call-out, but nowhere more than in the government's cavalier disregard for the legal position of army personnel'.⁷

1.16 Mr Justice Hope, in his review of protective security in 1979, believed it was important that:

...the Commonwealth government, the Defence Force, and all relevant civil authorities should know where they stand and what they have to do, and what they can do, if the Defence Force is to be used in this special role. It is also important that the general public knows the position. The more important provisions should therefore be contained in a statute, where they are readily accessible.⁸

4 Part V, 407(2), Australian Military Regulations 1927, Statutory Rules 1927 no. 149 as amended (Prepared on 11 May 2000 taking into account amendments up to SR 2000 No. 67.), pp. 38–9.

5 See Brigadier Maurice Ewing, 'Serviceman's dilemma in defence of the civil power', *Pacific Defence Force Journal*, February 1985 and A. R. Blackshield, 'The Siege of Bowral—the Legal Issues', *Pacific Defence Reporter*, March 1978, p. 9.

6 See Appendix 3 for more information.

7 A. R. Blackshield, 'The Siege of Bowral—the Legal Issues', *Pacific Defence Reporter*, March 1978, p. 9.

8 R. M. Hope, *Protective Security Review*, (unclassified version), AGPS, Canberra, 1979, p. 147.

1.17 Almost a decade later, Mr Anthony Bergin made a similar point:

The most striking aspect of the legal setting in which a force would be deployed in Australia is the fact that the Defence Act hardly envisages the possibility of hostilities in Australia and certainly does not look at the possibility of action being fought in the middle of a civilian population. There exists no Commonwealth legislation which would give soldiers performing a defence function authority by way of police powers or power similar to that under state emergency services Act—powers relating to such things as traffic control, arrest, search, civilian evacuation, guarding etc.⁹

1.18 This Bill is a response to the identified need to bring certainty to legislation dealing with Defence Force aid to the civil power. It also fulfils a need to put in place a contemporary legislative framework to give effect to the Commonwealth's constitutional powers, and to set down the duties and responsibilities for the use of members of the Defence Force in assisting civil authorities in law enforcement matters. It specifies the powers conferred on military personnel and minimises legal uncertainty; it provides 'clear and workable procedures for a call-out' and ensures that both the ADF and the public are clear on the duties and responsibilities assumed by the Australian Defence Force when giving aid to the civil power. The Department of Defence submitted:

The Bill has taken a situation of procedural uncertainty and disregard for the status of ADF members and the information of the community and provided a proper democratic framework of control, accountability, authority and safeguards.¹⁰

1.19 In short:

The 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.¹¹

1.20 Mr Stephen Brown submitted 'In the absence of provisions such as are embodied in this Bill, exercise of those powers and responsibilities in the most likely scenarios will proceed either in the dangerous uncertainty of a legislative vacuum or distorted by the obsolete concepts in existing legislation'.¹²

Consultation with States and Territories

1.21 Questions were raised during the Committee's inquiry about the level of consultation with State and Territory Governments about the Bill. Mr Geoffrey Dabb, Executive Adviser, Attorney-Generals' Department, told the Committee that 'the problems addressed by the bill were discussed, and there were views expressed within SAC-PAV (State and Commonwealth Committee for Cooperation in Protection Against Violence) 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.'¹³

9 Anthony Bergin, 'Legal Complexities in low level threats', *Pacific Defence Reporter*, April 1988, p. 16.

10 Department of Defence, submission no. 6, p. 12.

11 Group Captain Gregory Evans, Department of Defence, *Committee Hansard*, 21 July 2000, p. 26.

12 Stephen Brown, submission no. 8, p. 1.

13 *Committee Hansard*, p. 28.

He emphasised that the Bill itself had not been referred to SAC-PAV or other State or Territory authorities.

1.22 Asked why the Bill had not been referred to the State and Territory Governments for comment, Mr Dabb replied that ‘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.’ He went on to say that ‘This is entirely a Commonwealth piece of legislation’.¹⁴

1.23 Lt Col. Kelly also addressed this issue:

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.¹⁵

1.24 The NSW Government submitted that it was ‘concerned that the Bill may operate to override the National Anti-Terrorist Plan, which [it understood] was intended to operate over the period of the Olympics’. Mr Dabb acknowledged that details of the Plan would need revision in light of the passage of the legislation, although it was not clear whether arrangements for the Olympics would be affected. Such uncertainty on the part of the Olympics host State so close to the event should have been averted through better consultation.

1.25 In a late submission, the Victorian Premier wrote:

A significant reason for the delay is that the Commonwealth has not consulted with Victoria on this Bill, which I find concerning given that the Bill directly affects the States’ roles and responsibilities when responding to terrorist and emergency scenarios. It is disappointing that my Government first became aware of such a critical Bill from a Senate inquiry. Since becoming aware of the Bill, my Department has consulted on this matter with the agencies which have primary responsibility for dealing with incidents of domestic violence in Victoria, the Office of the Emergency Services Commissioner and Victoria Police.

Victoria is not going to be in a position to consider whether to endorse the policy encapsulated in proposed section 51A, until the Commonwealth engages in a dialogue. The Commonwealth must explain why it is necessary to have legislated powers to intervene in State matters without a request for assistance from the State, and why the Defence Force warrants receiving the significant powers provided in the Bill. The Commonwealth also needs to clearly explain why its objective of

14 *Committee Hansard*, p. 28.

15 *Committee Hansard*, p. 28.

streamlining call out procedures cannot be achieved by the Commonwealth amending its own relevant legislation and regulations and/or engaging the States and Territories in a rewrite of the SAC-PAV NATP protocols. None of these issues are dealt with in the Second Reading Speech or the Explanatory memorandum to the Bill.

1.26 Although the Bill is Commonwealth legislation with no requirement for complementary State and Territory legislation, the provisions of the Bill do require considerable cooperation by State or Territory Governments and authorities in their implementation. Even SAC-PAV was not shown a copy of the Bill. In any event, State and Territory members of SAC-PAV may not have been the appropriate State and Territory officers to consider the political and constitutional issues that have been raised in relation to this Bill.

1.27 At the very least as a matter of courtesy, but more importantly from an operational point of view, the Committee believes that the Attorney-General's Department, as co-ordinator for SAC-PAV, should have referred copies of the Bill to the States and Territories for comment prior to the introduction of the Bill in the Parliament. Many of the concerns expressed by State Governments in their submissions to the Committee might have been avoided by prior consultation.

Section 51A—Commonwealth Interests

1.28 Constitutional lawyers agree that the Commonwealth has the authority to use the defence forces to enforce its laws and protect its interests and property. They often quote Sir Victor Windeyer's opinion to establish the validity, on constitutional grounds, of the Commonwealth's right to protect its own interests. He found:

The power of the Commonwealth Government to use the armed Forces at its command to prevent or suppress disorder that might subvert its lawful authority arises fundamentally, I think, because the Constitution created a sovereign body politic with the attributes that are inherent in such a body. The Commonwealth of Australia is not only a federation of States. It is a nation.

...

I do not doubt that the Commonwealth Government can, of 'its own initiative' employ members of its Defence Force 'for the protection of its servants or property or the safeguarding of its interests'.¹⁶

1.29 Mr Justice Hope, after considering evidence presented before his inquiry into protective security in Australia, concluded that the 'various expressions of opinion support the view that the Commonwealth government can use all the force at its disposal, which would include the Defence Force, to protect itself and its interests'.

1.30 Section 119 of the Constitution and section 51 of the Defence Act refer only to call outs initiated by the States of the Commonwealth. The existing legislation falls silent on the procedure for initiating the use of ADF in a law enforcement role where Commonwealth interests are under threat. There are no specific provisions in the Defence Act to regulate the

16 Cited in R. M. Hope, *Protective Security Review*, (unclassified version), AGPS, Canberra, 1979, p.150.

use of the defence force on the initiative of the Commonwealth to protect Commonwealth property or its servants or to safeguard its interests.¹⁷

1.31 This lacuna in the legislation was made apparent after the Hilton Bombing in 1978 when the Commonwealth called out troops to ensure the safety of visiting delegates to a Commonwealth Heads of Government Meeting. Professor Blackshield voiced the concerns of others when he wrote that although not illegal, the call out, ‘was neither protection to the State nor a Commonwealth “external affair”: it was **simply** a flexing of those ‘amorphous “inherent” powers of nationhood, in their most amorphous form’.¹⁸

1.32 Mr Justice Hope found that Section 51 of the Defence Act is only concerned, and the relevant regulations and directions are almost entirely concerned, with protecting the States against domestic violence. He pointed out that the regulations deal with the use of the Defence Force by the Commonwealth for its own purposes inaptly, and as an afterthought. The Defence Instructions are more specifically and practically concerned with the latter use, but in various ways are inconsistent with the regulations.¹⁹

1.33 New section 51A makes up for this omission. It deals exclusively with Commonwealth interests and outlines the process involved in using the Defence Force to protect Commonwealth interests against domestic violence. Firstly, each of the three authorising ministers²⁰ must be satisfied that:

- (a) domestic violence is occurring or is likely to occur in Australia; and
- (b) if such a situation exists in a State or Territory and that State or Territory is not able to protect Commonwealth interests against domestic violence; and
- (c) the Defence Force should be called out and the Chief of the Defence Force should be directed to utilise the Defence Force to protect the Commonwealth interests against domestic violence; and
- (d) either Division 2 (powers to recapture buildings and free hostages etc) or Division 3 (general security area powers), or both, and Division 4 (provisions common to both Divisions 2 and 3) should apply in relation to the order.

1.34 If each Minister is satisfied that such a situation exists, the Governor-General may, by written order, call out the Defence Force to protect the Commonwealth interests against the domestic violence.

17 See Andrew Hiller, *Public Order and the Law*, The Law Book Company Limited, 1983, p. 216.

18 A. R. Blackshield, ‘The Siege of Bowral—the Legal Issues’, *Pacific Defence Reporter*, March 1978, p. 8. See also, Brigadier M. J. Ewing, ‘Military Aid to the Civil Power—The Legal Position,’ Address to the United Service Institution of the Australian Capital Territory, *Defence Force Journal*, no. 57, March/April 1986, p. 24.

19 R. M. Hope, *Protective Security Review*, (unclassified version), AGPS, Canberra, 1979, before p. 145. See also for example Brigadier M. J. Ewing, ‘Military Aid to the Civil Power—The Legal Position,’ Address to the United Service Institution of the Australian Capital Territory, *Defence Force Journal*, no. 57, March/April 1986, p. 22.

20 ‘Authorising Ministers’ means the Prime Minister, the Minister (for Defence) and the Attorney-General.

1.35 The Bill stipulates the form and content of the order which must:

- (a) state that it is made under this section; and
- (b) specify the State or Territory in which the domestic violence is occurring or likely to occur, the Commonwealth interests and the domestic violence; and
- (c) state that Division 2 (powers to recapture buildings and free hostages etc) or Division 3 (general security area powers), or both, and Division 4 (provisions common to both Divisions 2 and 3) should apply; and
- (d) state that the order comes into force when it is made and that, unless it is revoked earlier, it ceases to be in force after a specified period which must not be more than 20 days.

Further orders may be made in relation to the same matter.

1.36 If the authorising Ministers are no longer satisfied that the conditions for making an order exist, the Governor-General must revoke the order. In making or revoking an order the Governor-General is to act on the advice of the Executive Council unless an authorising Minister is satisfied that, for reasons of urgency, the Governor-General should act on the advice of that Minister.

1.37 A number of submitters and witnesses held strong reservations about this section of the proposed legislation.

Authorising ministers

1.38 Mr John Greenwood pointed out that all action under this proposed legislation springs from the authorising Ministers. He states: ‘if the authorising ministers do not pull the trigger, nothing happens. That is a very serious flaw’. He noted that emergency situations such as a hostage situation occur quite unexpectedly and that flexibility is needed during the stage of the call-out. He posed the problem of the authorising Ministers not being available if a serious situation developed.²¹ The requirement for each of the three authorising Ministers to authorise an order for the call out of the Defence Force could lead to a serious and dangerous delay in an emergency situation.

1.39 Mr Geoffrey Dabb explained to the Committee that this requirement to have the three authorising Ministers satisfied that conditions warrant the call out of the Defence Force is a safeguard against ‘rash and impetuous action’. He maintained that any problems arising from an emergency situation where one or all of the Ministers were suddenly unavailable to authorise a call out could be settled by the machinery of government.²² The Attorney-General’s Department tendered advice to the Committee which makes clear that there are mechanisms in place to ensure that, despite the most extreme circumstances, substitutes would be able to act in the place of the authorising Ministers and for the Governor-General, should one or all of them be unable to perform their duties. (See Appendix 4)

21 John Greenwood, *Committee Hansard*, 21 July 2000, p. 17.

22 Geoffrey Dabb, Attorney-General’s Department, *Committee Hansard*, 21 July 2000, p. 31.

1.40 Based on this evidence, the Committee is satisfied that, even in the most dire circumstances where the Governor-General, the authorising Ministers and the Chief of the Defence Force were all suddenly and unexpectedly unable to perform their duties, procedures are in place that could be followed to enable the Defence Force to be called out in accordance with the requirements set out in the Bill.

Unwarranted interference in State affairs

1.41 The duty of preserving public order in a State rests with the government of the State. It has the responsibility to maintain peace within its boundaries and may, in cases of extreme emergency or serious breaches of its laws, call on all its resources to meet the situation. The specific responsibility for preserving good order rests with the police force.

1.42 It is only in the most exceptional circumstances that the use of the Defence Force as an armed force within Australia would be justified. Since Federation, the various police forces have been the agencies to execute and maintain the laws of the Commonwealth and of the States and Territories within their boundaries. Mr Justice Hope found that ‘they have the competence to fulfil this role, and would be expected to fulfil it’.²³ Writing in 1986, Brigadier Maurice Ewing stated that the fundamental concept in understanding aid to the civil power is that the preservation of law and order within Australia is a police responsibility. He stressed:

The basic rule which is to be remembered is that it is only in a situation where the police are no longer able to cope, that is, to discharge their responsibility effectively, that the law provides for the use of the Defence Force to maintain or restore order.

Where a particular police force is in danger of becoming unable to maintain order especially through lack of numbers rather than lack of firepower or specialist techniques, it may be expected that its first recourse will be to seek support and reinforcement from another police force, if it is available.

...

Remember always, the use of the Defence Force is a last resort, high risk, option.²⁴

1.43 The Bill recognises the obligation and duty of a State to preserve and maintain peace and public order within its boundaries. It also recognises that on occasion, the resources of a State to meet a serious breach of public order may be stretched beyond its capacity to manage a situation of extreme magnitude or they may lack the ‘highly sophisticated hardware’ needed to combat an emergency situation. At such times, the State may request the aid of the Commonwealth to assist in dealing with the situation. The Constitution clearly anticipated such a need. Under this new proposed section 51A of the Defence Act, however, the Commonwealth can act on its own initiative to protect its interests without any request from the State or Territory within which the members of the Defence Force are to be deployed. In other words, the Commonwealth need not wait for a request from a State or Territory when it

23 R. M. Hope, *Protective Security Review*, (unclassified version), AGPS, Canberra, 1979, pp. 152–3.

24 Brigadier M. J. Ewing, ‘Military Aid to the Civil Power—The Legal Position’, Address to the United Service Institution of the Australian Capital Territory, *Defence Force Journal*, no. 57, March/April 1986, p. 22.

intervenes to protect its own interests; not those of a State or Territory. The explanatory memorandum makes this very clear:

Where the domestic violence is occurring in a State or self-governing Territory and they are unlikely to be able to protect Commonwealth interests, the Governor-General may make the order with or without a request from the Government of the State or Territory.²⁵

1.44 For some of the State Governments this was a vexed question. The Victoria Police, the views of which were endorsed forcefully by the Government of Victoria, submitted that legislation should not ‘be enacted which gives the Commonwealth power to intervene in the affairs of the State without the consent of that State. Put bluntly, ‘The proposed automatic power to provide a military intervention where “Commonwealth interests are threatened” represents an unreasonable intrusion on the rights of the States’. This view was strongly supported by the Western Australian Government, which argued that proposed section 51A ‘allows the Commonwealth to unilaterally enter a State and protect undefined ‘Commonwealth interests’. The NSW Government added weight to this concern submitting that the Bill contemplates ‘unilateral Commonwealth action’ without any State consultation or agreement. It suggested that this approach leaves open ‘the possibility of conflict between State police and Commonwealth Defence Forces’.²⁶

1.45 The Committee appreciates the concerns of the States but believes that the Commonwealth has a duty under the Constitution to protect its own interests if the State or Territory, in which the threat to Commonwealth interests is occurring, cannot cope with that threat. Moreover, the Committee believes that there are safeguards in the legislation preventing any unwarranted interference by the Commonwealth in State or Territory affairs.

1.46 Firstly, the Bill states unequivocally that the authorising Ministers are to be satisfied that the State or Territory is not, or is unlikely to be, able to protect Commonwealth interests against domestic violence. Considering the resources available to the States and Territories for law enforcement, this legislation clearly contemplates a very serious breakdown in social order or a threat to Commonwealth interests of a nature and extent beyond the capacity of the State or Territory police force. This proposed new legislation rests on the premise that the Defence Force would be used only as a last resort.

1.47 Secondly, there are limitations placed on the use of the Defence Force in performing law enforcement tasks. The proposed legislation in Section 51D requires the Chief of the Defence Force to utilise the Defence Force ‘in such a manner as is reasonable and necessary, for the purpose of protecting the Commonwealth interests specified in the order’. Moreover, proposed section 51F calls for close cooperation between the State or Territory involved and the Defence Force. It states that:

...the Chief of the Defence Force must, as far as is reasonably practicable, ensure that

25 Explanatory Memorandum, p. 4. See also the opinions of R. M Hope, *Protective Security Review*, (unclassified version), AGPS, Canberra, 1979, p. 4 and H. P. Lee, *Emergency Powers*, the Law Book Company, Limited, 1984, p. 199.

26 The Victoria Police, submission no. 4, p. 1; Victorian Government, Department of Premier and Cabinet, submission no. 15, p. 3; The Western Australian Government, submission no. 12, p. 1; and the NSW Government, submission no. 13, p. 1.

- (a) the Defence Force is utilised to assist the State or Territory specified in the order and cooperates with the police force of the State or Territory; and
- (b) 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.

1.48 The Committee acknowledges the concerns of the various States about the Commonwealth's power to act on its own initiative when protecting its interests and their apprehensions about the potential for the Commonwealth to encroach on their rights. Nonetheless, it believes that the proposed legislation has in place safeguards that would prevent such likelihood.

Consultation with the States or Territories

1.49 The Committee listened carefully to the views of the Western Australian Government, which would like the legislation to provide for greater consultation between the States and Territories particularly during the process of call out. Dr James Thomson, Senior Legal Officer, Western Australian Crown Solicitor's Office, told the Committee that in regard to proposed section 51A and the process leading to the order for a call out, it would be 'useful and appropriate and maybe helpful for the Commonwealth if the premier was consulted and at least advised.'²⁷ He accepted that there may be occasions where the order has to be made as a matter of urgency and consultation cannot take place. Nevertheless, he told the Committee:

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.²⁸

He would also like to see the State involved in the revocation of orders under proposed section 51A.

1.50 The Victorian Premier also criticised the Bill for not providing for formal notification to a State or Territory Government prior to a call out of the Defence Force under proposed section 51A. He wrote:

The Bill should express a requirement that a State Government be formally notified by the Commonwealth in the event of a call out of the Defence Force to protect 'Commonwealth interests' in that State. We have seen from the manner in which this Bill has been prepared that we are unable to rely on informal arrangements for critical information to be conveyed to the State.

1.51 The Committee notes that section 51A deals only with the Commonwealth taking action to protect its own interests, which it is duty bound to do. The Committee believes that close cooperation between a State or Territory during the call out of the Defence Force under Section 51A is important. Although it is likely that the Commonwealth would consult and/or advise the State or Territory in which the violence was, or was likely, to occur, the

27 Dr James Thomson, *Committee Hansard*, 21 July 2000, p. 21.

28 Dr James Thomson, *Committee Hansard*, 21 July 2000, p. 23.

Committee believes that it should be a statutory obligation to notify the State or Territory subject to the domestic violence of the call out as soon as the order is made.

Recommendation

The Committee recommends that the Bill be amended such that the Commonwealth notify the State or Territory of the call out of the Defence Force under proposed section 51A as soon as the order is made.

Unclear definition of ‘Commonwealth interests’

1.52 The Western Australian Government quite rightly pointed out that proposed section 51A of the Bill does not define ‘Commonwealth interests’. It maintained that in this context, the Commonwealth Parliament’s power in respect to matters of domestic violence may include sections 51(vi) and 51(xxxix) (and, possibly, section 51(xxix)) and 61 of the Commonwealth Constitution and, perhaps, an inherent prerogative power.²⁹ In summary, the Western Australian Government warned that by not defining ‘Commonwealth interests’ proposed section 51A may stray beyond the Commonwealth’s Constitutional power. Even so, it argued that the concept of ‘Commonwealth interests’ should be defined ‘as this will clarify the situations in which the Defence Force will be called out’. The NSW Government also expressed concern about the uncertainty in the use of the term ‘Commonwealth interests’. It submitted:

Clause 51A is directed at the protection of ‘Commonwealth interests’. However, the scope of the term ‘Commonwealth interests’ is unclear, and the clause could therefore extend beyond constitutional support insofar as it may be used in relation to matters having only a tenuous connection with Federal affairs.³⁰

1.53 The Government of Victoria agreed strongly. It stated: ‘...it is critical that a legislated definition be included in the Bill. The concept of a threat to “Commonwealth interests” is the trigger for the Defence Force to enter a State without a request from that State for assistance.’³¹

1.54 As noted earlier, Constitutional experts agree that the Commonwealth has the right to protect its interests but they also agree that these interests extend over a wide range of matters. The scope of the executive power of the Commonwealth, however, has never been defined. Writing in 1901, Quick and Garran took a broad interpretation of Commonwealth powers. They contended that:

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

29 See Appendix 5 for the relevant sections of the Commonwealth Constitution.

30 Western Australian Government, Ministry of Premier & Cabinet, submission no.12 p. 1 and *Committee Hansard*, 21 July 2000, p. 19; The Government of NSW, Cabinet Office, NSW, submission no. 13, p. 2.

31 The Victorian Government, Department of Premier and Cabinet, submission no. 16, p. 3.

otherwise, the Federal Government would be dependent on the Governments of the States for the effective exercise of its powers.³²

1.55 Mr Justice Hope was of the view that ‘It is clearly within the constitutional power of the Commonwealth under the secondary aspect of s.51(vi.) to use the Defence Force in executing and maintaining laws of the Commonwealth in circumstances involving ‘civilian security’ and it doubtless has the same power in respect of its laws which have nothing to do with ‘civilian security’.’³³

1.56 He went further to state:

Notwithstanding the wide extension of Commonwealth statutory law, all Commonwealth interests are not protected by or under a Commonwealth statute. However, the absence of a relevant statute would not, in my view, preclude the Commonwealth from using all resources available to it, including, when appropriate, the services of members of the Defence Force to protect a valid interest.³⁴

1.57 The Explanatory Memorandum acknowledges that the term ‘Commonwealth interests’ is not defined in the Bill but includes ‘such matters as the enforcement of Commonwealth laws, protection of Commonwealth property or facilities and persons connected with the Commonwealth’.³⁵ Mr Geoffrey Dabb submitted that the decision not to define Commonwealth interests was a drafting matter, and arrived at after a ‘great deal of discussion and consultation’. He told the Committee:

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’.

1.58 He stressed that the definition is constrained by the Constitution and the interest could not be of a remote or tenuous kind.³⁶

1.59 The Committee appreciates the desire of the States to have a clearer definition of ‘Commonwealth interests’. It too would like greater certainty given to the meaning of this phrase. But, as noted by legal experts such as Quick and Garran, the scope of Commonwealth interests is extensive and it would be difficult to include a definitive list of Commonwealth interests. Indeed, the Constitution serves as the best authority in defining areas that come under the umbrella of Commonwealth interests.

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

33 Explanatory Memorandum, p. 4.

34 *ibid.*, p. 152.

35 R. M. Hope, *Protective Security Review*, (unclassified version), AGPS, Canberra, 1979, p. 4.

36 Geoffrey Dabb, Attorney-General’s Department, *Committee Hansard*, 21 July 2000, p. 35.

What is domestic violence?

1.60 The NSW Government and Major General Stretton submitted that the Bill does not give an adequate definition of ‘domestic violence.’ Although the definition offered refers to the term as defined in the Constitution, no such definition is given. General Stretton submitted that the term is ‘unfortunate’ and offers no guidance for the authorising Ministers.³⁷

1.61 The Victorian Government went further to express its concern about the use of broad and general terms in the proposed legislation. It argued:

It is unacceptable that the critical notions of ‘Commonwealth interests’ and ‘domestic violence’ remain so indeterminate. This concern is particularly serious because of the enormous powers given to the Defence Force under the Bill, and their potential impact on State authorities and residents. Confusion and conflict could arise between State agencies and the Defence Force, as the boundaries between the jurisdictional powers of Commonwealth and State lack clarity.³⁸

1.62 Although the Constitution does not define ‘domestic violence’, it does offer some understanding of the term. In their study of the Australian Constitution, Dr Quick and Mr Garran noted that the meaning of words and phrases not specifically defined in the Constitution is left to be construed from their natural meaning and their context.³⁹ In this regard the term ‘domestic’ could be taken to mean ‘of one’s own country; not foreign’ and ‘violence’ to mean conduct or treatment that is marked by ‘great physical force’.⁴⁰

1.63 In interpreting ‘domestic violence’ in light of the natural meaning of the words and their context in this legislation, the definition assumes greater clarity. Moreover, the proposed legislation provides a clearer understanding of the meaning of violence. The Department of Defence submitted: ‘The legislation cannot be employed unless there is a situation of domestic violence which is beyond the capability of the State or Territory to resolve effectively. This means that the ADF cannot be used under this legislation for any situation that does not involve the threat of a high threshold level of violence or sophistication’.⁴¹

1.64 The Committee is satisfied that the use of the term ‘domestic violence’ in this legislation is adequate and appropriate.

The term ‘likely to occur’ constitutional or unconstitutional.

1.65 Section 51 of the Defence Act as it now stands refers to the existence of domestic violence in a State. It makes no reference to the gravity or extent of violence to warrant a call

37 The NSW Government, Cabinet Office NSW, submission no. 12, p. 2; Major-General Alan Stretton, submission no. 1, p. 1.

38 Victorian Government, Department of Premier and Cabinet, submission no. 15, p. 3.

39 J. Quick and R. Garran, *The Annotated Constitution of the Australian Commonwealth*, Angus & Robertson, Sydney, 1901, p. 964. See for example, H. P. Lee, *Emergency Powers*, the Law Book Company, Limited, 1984, p. 364.

40 Definitions taken from *The Concise Oxford Dictionary*.

41 Department of Defence, submission no. 6, pp. 1, 10.

out. Moreover, it makes no reference to the possibility of violence. The proposed legislation gives a broader interpretation of the term ‘protect against domestic violence’.

1.66 The NSW Government expressed concern about the term ‘likely to occur’ used in the Bill. For example in proposed section 51A, the authorising Ministers are to be satisfied that domestic violence is occurring or is likely to occur in Australia before they can make an order for the call out of the Defence Force. The NSW Attorney-General suggested that this term ‘broadens the scope of the Commonwealth’s power in a manner which gives rise to doubts about its constitutional basis’.⁴²

1.67 Mr Justice Hope, however, maintained that ‘To protect itself and its interests, the Commonwealth would be entitled not only to ward off an actual attack upon them, but also to ensure that an attack would not take place or would be discouraged, and to take all necessary preliminary steps for these purposes...’⁴³ Professor Blackshield noted that the key word is ‘protect’ and argued ‘obviously one can protect against threatened, as well as actual, aggressions’.⁴⁴ Mr John Greenwood, QC, also suggested that in considering this matter of the ‘likelihood of domestic violence’, the phrase ‘protect against’ has a concept of futurity in it. He maintained that once consideration is given to this concept, it is very persuasively arguable that the likelihood of domestic violence ‘comes within the constitutional authority given to the Commonwealth to protect a state against domestic violence’.⁴⁵

1.68 The Committee believes that the use of the term ‘likely to occur’ in this Bill is appropriate.

Sections 51B and 51C—protect State or Territory against domestic violence

1.69 The Commonwealth Constitution provides in section 119 that the Commonwealth ‘shall protect every State against invasion and, on the application of the Executive Government of a State, against domestic violence’.

1.70 According to Quick and Garran ‘...even if the State is unable to cope with domestic violence, the Federal Government has no right to intervene, for the protection of the State or its citizens, unless called upon by the State Executive’.⁴⁶

1.71 The legal requirements for aid by the Commonwealth to a State against domestic violence are currently set out in the *Defence Act 1903*. Section 51, which covers the protection of States from domestic violence, states:

Where the Governor of a State has proclaimed that domestic violence exists therein, the Governor-General, upon the application of the Executive Government of the State, may, by proclamation, declare that domestic violence exists in that State, and may call out the Permanent Forces and in the event of their numbers

42 NSW Government, Cabinet Office, NSW, submission no. 13, p. 2.

43 R. M. Hope, *Protective Security Review*, (unclassified version), AGPS, Canberra, 1979, p. 152.

44 A. R. Blackshield, ‘The Siege of Bowral—the Legal Issues’, *Pacific Defence Reporter*, March 1978, p. 6.

45 John Greenwood, *Committee Hansard*, 21 July 2000, p. 16.

46 J. Quick and R. Garran, *The Annotated Constitution of the Australian Commonwealth*, Angus & Robertson, Sydney, 1901, p. 964. See for example, H. P. Lee, *Emergency Powers*, the Law Book Company, Limited, 1984, p. 199.

being insufficient may also call out such of the Emergency Forces and the Reserve Forces as may be necessary for the protection of that State, and the services of the Forces so called out may be utilized accordingly for the protection of that State against domestic violence: Provided always that the Emergency Forces or the Reserves Forces shall not be called out or utilized in connexion with an industrial dispute.

1.72 Proposed sections 51B and 51C deal with using the Defence Force to protect a State or self-governing Territory against domestic violence. It requires a State or Territory Government to apply to the Commonwealth Government to protect it against domestic violence that is occurring or likely to occur within its borders and for the authorising Ministers to be satisfied that:

- (a) the State or Territory is not, or is unlikely to be, able to protect itself against the domestic violence; and
- (b) the Defence Force should be called out and the Chief of the Defence Force should be directed to protect the State or Territory against domestic violence; and
- (c) either Division 2 or Division 3, or both, and Division 4 should apply in relation to the order.

The conditions for making an order are similar to those required to protect Commonwealth interests outlined in proposed section 51A and the order must satisfy the same criteria as that for protecting Commonwealth interests covered in proposed section 51A.

1.73 The order may be revoked if the State or Territory Government withdraws its application to the Commonwealth Government or the authorising Ministers are satisfied that the circumstances no longer warrant the order to continue in force. In revoking an order the Governor-General is to act on the advice of the Executive Council unless an authorising Minister is satisfied that, for reasons of urgency, the Governor-General should act on the advice of that Minister.

1.74 It should be noted that proposed section 51B, which is concerned with protecting a State against domestic violence, also stipulates that 'Emergency Forces or the Reserve Forces shall not be called out or utilized in connexion with an industrial dispute'. This provision forms part of section 51 of the current Defence Act, which, as noted earlier, deals only with protecting the States from domestic violence. The Bill repeals most of section 51 except for this proviso.

1.75 Mr Dabb explained that this stipulation has been retained in section 51B 'to preserve the status quo under which the proviso only applies to a state initiated call-out'. He noted further:

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 preservation 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.⁴⁷

47 Geoffrey Dabb, Attorney-General's Department, *Committee Hansard*, 21 July 2000, p. 44.

1.76 Considering that the Bill significantly broadens the current legislation covering call-out, the Committee found the argument unconvincing. The Committee believes that omitting this provision from proposed sections 51A, which deals with Commonwealth interests, and 51C, which deals with protecting a Territory against domestic violence', creates an anomaly.

Recommendation

The Committee recommends the Bill be amended by inserting the words 'Provided always that the Emergency Forces or the Reserves Forces shall not be called out or utilized in connexion with an industrial dispute' to form a proviso to proposed subsections 51A(2) and 51C(2).

State Government or the Executive Government of the State

1.77 Section 119 of the Constitution clearly stipulates that the Commonwealth shall protect the State, on the application of the Executive Government of that State, against domestic violence. The Bill refers to the 'State Government' and not the 'Executive Government of the State' as required under the Constitution. Mr John Greenwood submitted that 'State Government' does not mean executive government of the state.⁴⁸ The Office of Parliamentary Counsel, however, have informed the Committee, through the Attorney-General's Department, that the expression 'State Government' was chosen because it is consistent with contemporary usage and with the usual practice of the Office for Parliamentary Counsel in drafting legislation referring to the executive of a State or self-governing Territory.⁴⁹

1.78 The Committee is persuaded by the explanation given by the Office of Parliamentary Counsel that the term 'State Government' has the same meaning in this Bill as 'Executive Government of the State' given in the Constitution.

Duty or discretion to protect against domestic violence

1.79 The Government of NSW suggested that there is a possible inconsistency between the proposed section 51B of the Bill and section 119 of the Commonwealth Constitution. It pointed out that the Constitution provides that the Commonwealth shall protect every State against domestic violence on the application of the Executive Government of the State. It submitted that proposed section 51B qualifies this obligation by requiring the authorising Ministers to be satisfied that certain conditions exist before exercising a discretion to protect the State by calling out the Defence Force. The Western Australia Government raised the same constitutional issue. It also interpreted section 119 as carrying an obligation on the Commonwealth to respond to a State request and that, indeed, the Constitution does not allow the Commonwealth a choice on this matter.⁵⁰

1.80 This standpoint by the Governments of NSW and Western Australia is inconsistent with the views of many legal opinions. Although the use of the term 'shall' appears to place a duty on the Commonwealth, section 119 of the Constitution does not stipulate the nature of

48 John Greenwood, *Committee Hansard*, 21 July 2000, p. 16.

49 Additional information supplied to the Committee by the Attorney-General's Department, 26 July 2000.

50 Government of NSW, Cabinet office, submission no. 13, p. 2; Western Australian Government, *Committee Hansard*, 21 July 2000, p. 22 and submission no. 12, p. 2.

the protection and certainly makes no mention of military forces.⁵¹ A common view accepts that the Commonwealth has an obligation to protect a State against domestic violence but holds that the Commonwealth has the discretion to decide how it will meet a request. It can be argued that its response to a request by a State must also lie within its discretion.⁵²

1.81 Professor Blackshield has pointed out that section 119 makes no attempt to dictate to the States what constitutional processes they should follow in making the application. It must be made by ‘the Executive Government of the State’, but there is no other guidance. As well as a due application for protection, the fact or threat of domestic violence against which the State seeks protection must exist. But if these conditions are satisfied, the Commonwealth is bound to respond to the request.⁵³

1.82 In other words, while the Constitution imposes on the Commonwealth a duty, it leaves open the question as to how the Commonwealth should fulfil that duty—whether by the Defence Force or by other means. It might use other means as, for example, the Commonwealth Police. But if the Commonwealth were unable to protect a State against domestic violence without using the Defence Force, it would be duty bound to use the Defence Force, provided that the State had duly sought protection.

1.83 Clearly under this provision, the Commonwealth is obligated to protect a State from ‘domestic violence’ should the Executive Government of that State apply for such assistance.⁵⁴ It is clear, however, that the Commonwealth has the discretion to determine whether the State requires this support and the level and type of assistance required.⁵⁵ Professor Blackshield argued that ‘the important point is that ‘domestic violence’ is a matter for executive judgment; and the executive decision must be legally conclusive once it is made.’⁵⁶

1.84 Mr Dabb agreed that where a need to protect a State against domestic violence has arisen, and its Executive Government has made application for assistance, the Commonwealth is bound to respond to the request. He argued, however, that it is not bound to use the Defence Force for this purpose, and may, for example, use Commonwealth police.⁵⁷ Mr Dabb submitted ‘So it is quite natural that there should be a discretion as to whether the Defence Force is used’.⁵⁸

1.85 The Committee accepts the weight of opinion that the Commonwealth has an obligation to protect the States from domestic violence as clearly provided for in the

51 For example see, H. P. Lee, *Emergency Powers*, the Law Book Company, Limited, 1984, p. 205.

52 See for example B. D. Beddie and S. Moss, *Some Aspects of Aid to the Civil Power in Australia*, Occasional Monograph, Department of Government, Faculty of Military Studies, UNSW, Canberra, 1982, p. 15.

53 A. R. Blackshield, ‘The Siege of Bowral—the Legal Issues’, *Pacific Defence Reporter*, March 1978, p. 7; R. M. Hope, *Protective Security Review*, (unclassified version), AGPS, Canberra, 1979, pp. 148–9.

54 See for example Department of Defence, submission no. 6, p. 1.

55 *ibid.*

56 A. R. Blackshield, ‘The Siege of Bowral—the Legal Issues’, *Pacific Defence Reporter*, March 1978, p. 6.

57 Geoffrey Dabb, Attorney-General’s Department, *Committee Hansard*, 21 July 2000, p. 37.

58 Geoffrey Dabb, Attorney-General’s Department, *Committee Hansard*, 21 July 2000, p. 37.

Constitution. It also accepts, in light of the lack of detail in the Constitution, the view that although obliged to protect a State, the Commonwealth has the discretion to decide how it will use its resources to honour that obligation. As noted by witnesses this may entail a range of options including calling on the Federal Police to assist the State or Territory, calling out the Defence Force or, deciding that the level of threat does not warrant Commonwealth Government intervention. Since Federation the Commonwealth has, indeed, declined the request of a number of States to assist them in dealing with the threat of civil disturbances.

1.86 A precedent was set in 1912 when the Government of Queensland, fearing widespread violence arising from a general strike, sought the assistance of the Defence Force. While acknowledging its obligation to protect a state against domestic violence, the Commonwealth declined the request on the grounds that conditions did not warranted a call out. See Appendix 3 for a more comprehensive list of requests made by the states to the Commonwealth for use of Defence Force against domestic violence.

1.87 Quite clearly, the Committee is of the opinion that the Commonwealth must act on the request of a State or Territory to protect that State or Territory from domestic violence within its boundaries, provided that the commonwealth is satisfied that the nature and extent of the domestic violence warrants Commonwealth involvement. It also believes that a State or Territory in requesting the assistance of the Commonwealth in law enforcement tasks cannot dictate to the Commonwealth how the Commonwealth should use its resources in meeting its obligation to protect the State.

Revocation of an order under 51B and 51C

1.88 Having found that the Commonwealth does have an obligation to protect a State or Territory against domestic violence as well as the discretion to decide how to deal with such a situation, the Committee considered related concerns of the Western Australian Government about undue interference in the affairs of a State.

1.89 In revoking a call out order requested by a State, the Western Australian Government would like to see the State have the right to have ‘the Commonwealth leave and the order revoked when it asked’.⁵⁹ At first reading, this suggestion would seem to be consistent with the first part of section 51B which requires the Executive Government of the State to request assistance before the authorising ministers act in ordering a call out of the Defence Force. In brief, Dr Thomson told the Committee

...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.⁶⁰

1.90 This matter of revocation of the order again touches on the issue of the discretion of the Commonwealth to decide how it will deal with the situation. As noted earlier, the Commonwealth has the discretion to decide whether or not to use Defence Force personnel in responding to a State’s request for assistance. It would be inappropriate for a State to have the power to compel the Commonwealth to continue to use the Defence Force to protect that State against domestic violence were the Commonwealth to believe that such measures were no longer necessary.

59 Dr James Thomson, *Committee Hansard*, 21 July 2000, p. 21.

60 Dr James Thomson, *Committee Hansard*, 21 July 2000, p. 22.

1.91 The situation of where a State or Territory no longer believes the participation of the Defence Force is necessary is a slightly different matter. Under proposed sections 51B and 51C, the Commonwealth authorises a call out of the Defence Force on the explicit request of the Executive Government of the State or Territory. The question arises then whether the Commonwealth must revoke the order should that State or Territory no longer want the Commonwealth involved. Proposed Subsections 51B(5) and 51C(5), however, make clear that if a State or Territory Government withdraws its application to the Commonwealth Government the Governor-General must revoke the order.

1.92 The Western Australian Government was concerned that section 51B(6) could override the right of a State or Territory to have an order under 51B revoked. This provision states that in making or revoking the order, the Governor-General is to act on the advice of the Executive Council or in an emergency on the advice of an authorising minister. According to Mr Dabb, the tendering of advice to the Governor-General is simply a conduit—‘it is simply a matter of having a conduit to satisfy the constitutional requirement that the Governor-General always acts on advice’. This advice has to be grounded on certain conditions, in this case either the State or Territory has withdrawn its request for assistance or the authorising Ministers are no longer satisfied that circumstances warrant Commonwealth involvement.⁶¹

1.93 The Committee is satisfied that once a State or Territory has withdrawn its application for assistance to protect it against domestic violence under proposed sections 51B and 51C, the Commonwealth must revoke the order.

Section 51D—‘reasonable and necessary’

1.94 Proposed section 51D directs the Chief of the Defence Force to utilise the Defence Force during call out in a manner that is ‘reasonable and necessary’ for protecting Commonwealth interests or for protecting a State or Territory against domestic violence. Mr Warwick Johnson submitted that the word necessary is the only word required.⁶² He explained:

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.⁶³

1.95 Group Captain Evans told the Committee that the Defence Force uses both the words ‘in virtually everything we do that involves graduated use of force’. He stated, “‘Reasonableness’ is a word we are very comfortable with, and it is frequently used when describing a soldier’s obligations and responsibilities”.⁶⁴ He noted that a person may believe something to be absolutely necessary, but ‘the belief is not reasonable’. Mr Dabb, in supporting the use of the word reasonable in the proposed Bill, pointed out that ‘reasonable

61 Geoffrey Dabb, Attorney-General’s Department, *Committee Hansard*, 21 July 2000, pp. 40—41.

62 Warwick S. Johnson, submission no. 9, p. 3.

63 Warwick S. Johnson, *Committee Hansard*, 21 July 2000, p. 2.

64 Group Captain Gregory Evans, *Committee Hansard*, 21 July 2000, p. 51.

and necessary' is an expression used in Commonwealth legislation. In his opinion, the word implied reasonableness, meaning that the judgment as to necessity needed to be reasonable.

1.96 The Committee accepts the advice from the officers from the Department of Defence and Attorney-General's Department that the expression 'reasonable and necessary' is the appropriate term to be used in this proposed legislation.

Section 51I—ministerial authorisation

1.97 The Committee sought clarification on the reason for extending the authority to authorise the recapture of a premise and other tasks covered under 51I(1) to a Minister not one of the three authorising Ministers.⁶⁵ Mr Dabb told the Committee that this provision allowed for greater flexibility. He explained further that this proposed administrative arrangement provided for a duty Minister to be on call, 'in circumstances where it might be inconvenient for one of the three named Ministers to perform that role'.

1.98 Mr Dabb submitted that Ministers often act for one another, and cited Sections 18C or 19A of the Acts Interpretation Act (AIA) as the authority allowing an authorising minister to authorise another Minister to act on his or her behalf. Section 18C of AIA reads:

A Minister (the **authorising Minister**) who administers (whether alone or jointly with one or more other Ministers) an Act or a provision of an Act may authorise:

- (a) a Minister who does not administer the Act or provision; or
- (b) a member of the Executive Council who is not a Minister;

to act on behalf of the authorising Minister in the performance of functions, or the exercise of powers, that the authorising Minister may perform or exercise under the Act or provision.

1.99 Mr Dabb advised the Committee that the situation in proposed section 51I of the Bill is rather different because:

...only one of the three named 'authorising Ministers' is the Minister administering the Defence Act. However, another provision of AIA Act (s19) would enable a Minister other than, say, the Attorney-General, to be appointed to act for and on behalf of the Attorney-General for the purpose of Part 111AAA.⁶⁶

1.100 He raised this point to emphasise that the flexibility provided in this proposed section of the Bill 'as it stands is not offensive to any principle'. He stated further:

Proposed section 51I envisages that the three Ministers would decide that Minister X would perform the function as Minister X, rather than that the Prime Minister would decide that Minister X would act 'for and on behalf of (say) the Attorney-General.

1.101 Even though the Acts Interpretation Act gives the Government the authority to delegate an authorising Minister's responsibilities to another Minister, the Committee

⁶⁵ See *Committee Hansard*, 21 July 2000, p. 46.

⁶⁶ Additional information supplied to the Committee by Mr Geoffrey Dabb, 2 August 2000.

believes that in the extreme circumstances surrounding the call out of the ADF in response to domestic violence, it would not be appropriate to delegate such responsibilities to another Minister. At least one of the three authorising Ministers should be available to make decisions required of them under the legislation. The inclusion of a provision to delegate authorising Minister responsibilities to another Minister would give the wrong impression that such delegation was sanctioned as a matter of course. If absolutely necessary, the Government has recourse to the Acts Interpretation Act.

Recommendation

The Committee recommends that, in proposed sub-section 51I (2), the words ‘or an authorising Minister’ be substituted for the words ‘or a Minister (whether or not one of the authorising Ministers)’.

Uniforms and identification

1.102 Major-General Alan Stretton (retired) questioned whether it was necessary keeping most of the provisions of Division 3. He conceded during the hearings that the declaration of a general security area and a designated area were worthwhile provisions. He remained, however, unconvinced about other provisions within that division, especially the requirement for ADF members to wear uniforms and identification while exercising powers under Divisions 3 and 4. Although not clear in the Bill itself, paragraph 28 of the Explanatory Memorandum states:

However, it is the intention of the Bill that the powers under Division 2 prevail where both Division 2 and 3 apply. 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.

1.103 During the hearings, Lt Col. Kelly further clarified the matter when he said that the wearing of uniforms and identification ‘does operate within the designated area as well [the general security area] but it does not operate in relation to the exercise of division 2 powers’. Lt Col. Kelly also said:

So you may not even have a general security or a designated area declared. It may not be necessary in the situation. You may need the division 2 powers so there would be no areas declared contained enough to permit just the assault to take place.⁶⁷

1.104 As a result of the explanations contained in the Explanatory Memorandum and provided by officers during the hearings, the Committee is satisfied that the provisions of Division 3 would not impede members of the Defence Force called out as a result of domestic violence.

General security area

1.105 The Committee questioned officers about arrangements for the establishment of a general security area under proposed section 51K. With regard to the timing of the declaration of a general security area, Mr Dabb said that it could take place at any time during

67 Lt. Col Michael Kelly, *Committee Hansard*, 21 July 2000, p. 50.

a period of domestic violence but ‘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’.⁶⁸

1.106 When questioned about the publication of the declaration of the general security area by a television or radio station under subsection 51K (2), Mr Dabb responded that ‘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.’⁶⁹ As to the frequency of the broadcasts of the declaration, Mr Dabb said, ‘there is nothing as to frequency [in the Bill], 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.’⁷⁰

1.107 The Committee questioned the officers whether authorisation of the broadcast of the declared general security area should be included in the broadcast, as it is in political broadcasts. Mr Dabb said it would be sensible to include authorisation from one of the authorising Ministers to emphasise the seriousness of the matter but queried whether such authorisation should be a statutory requirement.⁷¹

1.108 Questioned by the Committee as to why the designated area should be publicised in a different way to the general security area, Lt Col. Kelly replied:

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.⁷²

1.109 Lt Col. Kelly went on to say:

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.⁷³

1.110 On the basis of the answers supplied by officers, the Committee was satisfied with arrangements for publication of the declaration of the general security area and the designated area.

⁶⁸ *Committee Hansard*, p. 47.

⁶⁹ *Committee Hansard*, p. 47.

⁷⁰ *Committee Hansard*, p. 47.

⁷¹ *Committee Hansard*, p. 48.

⁷² *Committee Hansard*, p. 49.

⁷³ *Committee Hansard*, p. 49.

Publication of order and report

1.111 Proposed subsection 51X (3) provides that a copy of the order(s) and report of the call out, within seven days of the order or the last of the orders ceases to be in force, are to be:

tabled in the Parliament; or

published on the Department's web site; or

otherwise publicly released.

1.112 The proposed subsection goes on to read:

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 the 7 days mentioned in that subsection.

1.113 The Committee questioned the departmental witnesses as to why tabling in the Parliament should be delayed to 'within three sitting days' of the seven days from the cessation of the order(s), given that the Parliament might not sit for two months from that time and that there are provisions for the tabling of documents out of sittings.

1.114 Mr Geoffrey McDougall told the Committee that the 'three sitting days' was 'an arbitrary number, but we were trying to come up with reasonably quick reporting to parliament'.⁷⁴ He also pointed out that parliamentarians would be able to access the documents from their publication elsewhere as provided for in the Bill.

1.115 The fact that a parliamentarian may be aware of the publication of the order(s) and report and may be able to access these documents misses the point that the Government is accountable to the Parliament for its actions and through the Parliament to the people of Australia. As the Parliament has in place arrangements for tabling documents out of sittings, there is no reason for the order(s) and report not to be presented to the Parliament within the seven-day period.

1.116 Moreover, according to the Committee's reading of this proposed section, the Minister is not obliged to table the documents in the Parliament, even if it were sitting, within the seven-day period. The proposed subsection provides that, within the seven-day period, the documents may be tabled in the Parliament or published on the Department's web site or otherwise publicly released. The Minister is only obliged to table the documents in the Parliament within three sitting days after the seven-day period. If a parliamentary sitting period ended two sitting days after the end of the seven-day period, and the documents were otherwise released within the seven-day period, conceivably, tabling could be delayed until the next sitting period, which could be as long as two months hence.

1.117 The Committee believes that the order(s) and the report referred to in proposed section 51X should be tabled in the Parliament or presented out of sittings within the seven-

74 *Committee Hansard*, p. 50.

day period provided for in that section. In addition, the Minister should also place the documents on the Department's web site or make them publicly available in other ways.

Recommendation

The Committee recommends that proposed sub-sections 51X (3) and (4) be amended to provide for the report to be tabled in both Houses of the Parliament within seven days of the cessation of the call out. The Committee also recommends that, if a House is not sitting at the time the report is ready for publication, the documents be presented to the Presiding Officer of that House for circulation to members of that House. The suggested wording of an amendment to the Bill to cover these two recommendations is set out in Appendix 6.

Sunset clause or review of the legislation

1.118 Mr John Greenwood put to the Committee that:

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 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.⁷⁵

1.119 The Australian Council for Civil Liberties contended strongly that:

‘the almost breakneck speed at which this legislation has been introduced and is proposed to be passed of itself justifies the imposition of a sunset clause’.

Nowhere in the Explanatory memoranda or in the Parliamentary speeches is there any serious discussion of reviews of the use of the Defence Forces in aid of ordinary Police Services in Canada, the US or the UK.

Any Bill which proposes to statutorily enshrine powers to be given to the Defence Forces to exercise police powers ought to proceed only after an analysis of comparative legislation and accountability procedures in similar democracies such as the UK, Canada and the USA.

It is contended, therefore, that there is a very strong rationale for a sunset clause. A sunset clause will force the review of the Bill's provisions by your Committee but in circumstances where the impossibly short time frame for consultation in respect of this Bill can be extended in respect of the review of the sunset clause.

75 *Committee Hansard*, p. 14.

Sunset clauses typically are inserted in respect of legislation dealing with police powers where it is felt that fine tuning of the legislation can be achieved once the police powers have been put into effect and used in particular operational circumstances.

On this basis, therefore, not only would a sunset clause be uncontroversial, it would be positively useful to enable a sober and considered review of the legislation, particularly for the purpose of examining overseas accountability measures, something which is not possible in the subject review because of the impossibly tight time frame.⁷⁶

1.120 The proposition of a sunset clause or review of the legislation was put to departmental officers at the hearing. Group Captain Evans responded:

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.⁷⁷

1.121 The Committee appreciates the sentiments expressed by Mr Greenwood and the Australian Civil Liberties Council in support of their recommendations for a sunset clause to be added to the legislation, particularly to ensure a review of it is undertaken once there is either operational experience or training exercises that test the provisions of the legislation. However, while the Committee supports a review of the legislation, either following a call out of the Defence Force under this legislation or otherwise within three years of its enactment, the Committee does not believe a sunset clause is the ideal method for achieving that purpose. The legislation at least provides a framework for any call out of the Defence Force as a result of domestic violence, which is preferable to the existing provisions in the Defence Act.

Recommendation

The Committee therefore recommends that the Government give a commitment to a review of the legislation by a parliamentary committee within six months of any call out of the Defence Force or, if there is no call out, within three years of enactment of the legislation.

Miscellaneous

Governor-General as Commander-in-Chief

1.122 A number of submitters raised the issue of the role of the Governor-General. Mr Trevor Barker was concerned that the Bill overlooked the role of the Governor-General as

76 Australian Council for Civil Liberties, submission, pp. 3-4.

77 *Committee Hansard*, p. 51.

Commander in Chief of the Defence Force. Mr S. T. Cumming drew attention to s. 68 of the Constitution which states that ‘The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen’s representative’. He was concerned that the proposed new legislation might ignore the powers of the Governor-General.⁷⁸ Mr John Greenwood also looked at section 68 of the Constitution. He submitted:

The proposed legislation purports to fetter the power of call out (which the Constitution confers on the Governor-General as Commander-in-Chief) by making call out conditional on the unanimous advice of the three named Ministers.

1.123 He quoted the opinion of Sir Victor Windeyer:

It follows that orders by the Governor-General to the Defence Force, including calling it out, are given by virtue of the authority of command in chief. That does not mean that His Excellency may act without ministerial advice. He must act on the advice of a responsible Minister; but not necessarily by an Order-in-Council after a meeting of the Executive Council.⁷⁹

1.124 Sir Ninian Stephen also cited Sir Windeyer’s opinion in examining the role of the Governor-General as Commander-in-Chief of the Australian Defence Forces and acknowledged that there are misconceptions about section 68.⁸⁰ He agreed with the view that ‘the command in chief thus vested in the Governor-General is not required to be exercised with the advice of the Executive Council...but like all other prerogatives is exercisable under the advice of a responsible minister’.⁸¹

1.125 The issue of whether it is unconstitutional for the Parliament to regulate the power of the Governor-General goes to the heart of this matter. Mr Henry Burmester, Chief General Counsel for the Australian Government Solicitor, made the point that the title of commander-in-chief is titular only. He went on to explain:

There is an issue whether s. 68 confers any substantive powers. The disposition of the armed forces involves an exercise of what were traditionally prerogative powers that now come within executive power under s. 61 of the Constitution. These powers are subject to regulation by Parliament, as has occurred in the Defence Act.

...

The requirement that three ministers be ‘satisfied’ and that formal advice can be tendered through Executive Council or an authorised minister is no more than a legislatively imposed restriction on the exercise of the executive power in relation to the disposition of the defence force for the particular purposes dealt with in the Bill.

78 Trevor Barker, submission no. 2, p. 2; T. S. Cumming, submission no. 7, p. 1.

79 John Greenwood and N. J. C. Greenwood, supplementary submission 11A, p. 2.

80 Ninian Stephen, ‘The Role of the Governor-General as Commander-in-Chief of the Australian Defence Forces’, *Defence Force Journal*, no. 43, Nov/Dec 1983, p. 8.

81 Ninian Stephen, ‘The Role of the Governor-General as Commander-in-Chief of the Australian Defence Forces’, *Defence Force Journal*, no. 43, Nov/Dec 1983, p. 8.

1.126 In his opinion the provisions in the Bill should be regarded as ‘a regulation and not a taking away of the relevant executive power’ and hence constitutional.⁸²

1.127 The Committee notes the advice of the Chief General Counsel of the Australian Solicitor General’s Office.

Sandy Macdonald
Chair

82 Additional information provided by the Australian Government Solicitor through the Attorney-General’s Department, 7 August 2000.