



12 February 2009

Dr Kathleen Dermody
Committee Secretary
Senate Standing Committee on
Foreign Affairs Defence and Trade
Parliament House
CANBERRA ACT 2600

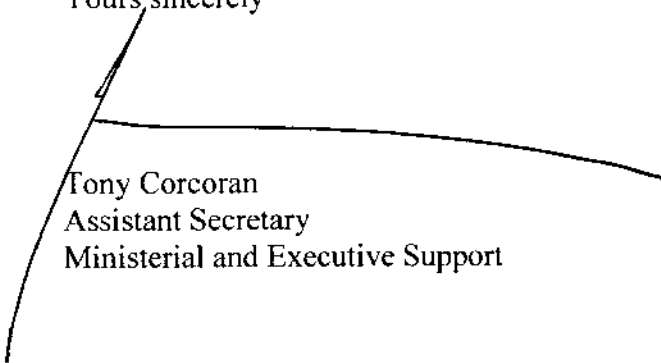
Dear ~~Dr Dermody~~ *Kathleen*

Please find attached responses to the Committee's questions concerning the inquiry into the Defence Legislation (Miscellaneous Amendments) Bill 2008.

The responses have been cleared by the Minister for Defence, the Hon Joel Fitzgibbon MP.

Please do not hesitate to contact me if you would like to discuss further.

Yours sincerely


Tony Corcoran
Assistant Secretary
Ministerial and Executive Support

Inquiry into the Defence Legislation (Miscellaneous Amendments) Bill 2008

Senate Foreign Affairs, Defence and Trade Committee

SCHEDULE 2

1. The Defence Welfare Association raised two concerns in its submission—one was the lack of clarity in some of the terms used when announcing the defence family health and dental care scheme and the other with consultation before making regulations.

- Could you respond to both these concerns as they relate to the legislation?

RESPONSE

The *Defence Legislation (Miscellaneous Amendments) Bill 2009* amends section 124 of the *Defence Act 1903* to explicitly enable the making of regulations to cover the provision of medical and dental treatment including pharmaceuticals to an ADF member or cadet, or a member of the family of an ADF member.

The *Defence Legislation (Miscellaneous Amendments) Bill 2009* is not part of the implementation of the Commonwealth Government election commitment to provide free basic medical and dental care to dependants of ADF members, or its associated arrangements.

The intention of the *Defence Legislation (Miscellaneous Amendments) Bill 2009* is to address concerns that in some jurisdictions, ADF health professionals, APS health professionals and contracted civilian health professionals, who are registered in that State or Territory, may potentially be exposed to liability for breach of professional standards. This may arise through supervising the medical treatment provided by ADF medics as well as the provision of pharmaceuticals to members and their dependants in certain overseas countries where the quality and range of pharmaceuticals may not be to the standard available in Australia.

Given that the purpose of the amendment is to allow regulations which clarify the status of ADF health professionals, APS health professionals and contractors in dealing with such matters as pharmaceuticals in the course of Defence activities, it is not currently the intention to consult with the Defence Force Welfare Association (DFWA).

Having said that, in relation to the concerns raised by DFWA:

- The provision of healthcare to ADF dependants forms a part of the Government's retention and recruitment strategy for Defence.
- A trial to provide free basic healthcare to ADF dependants living in eight regional and remote localities within Australia will commence from May 2009.

- The initial Government election commitment to establish 12 Defence Family Clinics was revised in accordance with a new evidence based policy approach to implement new proposals. In undertaking an evidenced based approach the Government and Defence can take a sensible and practical approach to ascertaining the health service needs of Defence dependants prior to the expansion to Defence dependants living in regions outside of the initial trial.
- Joint Health Command (JHC) has, and will continue to consult with a range of stakeholders including the Defence Community Organisation and Defence Families Association in the development of policies associated with the trial to deliver free basic healthcare to ADF dependants.
- The trial model will allow ADF dependants living in the trial regions to choose a participating medical practitioner or access a dental provider from anywhere within Australia.
- Basic medical and dental services, for the purpose of the trial include medical consultations provided in a general practice setting and GST free dental services. Pharmaceuticals are not included in the trial.
- The JHC, in consultation with the Directorate of Service Conditions, determined that the definition of “family”, for the purpose of this trial is in accordance with the Pay and Conditions Manual (PACMAN) definition of a dependant. The manual lists dependants as:
 - ◆ Any of these persons who normally lives with a member is the member's dependant.
 - The member's spouse.
 - The member's interdependent partner, if that relationship is recognised under Defence Instruction (General) Personnel 53-1, Recognition of Interdependent Partnerships.
 - The member's dependant child.
 - A person acting as a guardian or housekeeper, if the member has a dependent child and any of these other conditions is met.
 - The member has no spouse or interdependent partner.
 - The member's spouse or interdependent partner is an invalid or has a disability.
 - The member's spouse or interdependent partner is a member serving at another posting location.
 - A person who has an interdependency relationship with the member that is recognised by the CDF under clause 1.3.79.
- Dependants that are eligible to receive the benefits associated with the trial will register to participate and will be issued with an eligibility card.

SCHEDULE 3

Application of the Defence (Special Undertakings) Act 1952 to Pine Gap

QUESTION

2. Could the department please explain to the committee what prompted the proposed changes to the legislation?

To what extent did the decision by the Northern Territory Criminal Court of Appeal in 2008, acquitting a group of four Christian pacifist protesters arrested at the facility in December 2005, influence the drafting of the legislation?

RESPONSE

The methods used for collecting intelligence at the Joint Defence Facility Pine Gap are sensitive. This factor makes the facility a special defence undertaking which requires special security measures. This factor also means that it is important for the Commonwealth to be able to successfully prosecute the offences created by the *Defence (Special Undertakings) Act 1952*, as applicable to the facility.

The amendments to the *Defence (Special Undertakings) Act 1952* were proposed as part of a broader review conducted in response to the quashing of the convictions of the four protestors who broke into the Joint Defence Facility Pine Gap in December 2005. This trial was the first time there had been a prosecution which tested this legislation.

The convictions were quashed based on errors by the trial judge in relation to interlocutory decisions on discovery and a direction to the jury during the trial. These matters did not go to the validity of the Act. While the underpinnings for the Act were unsuccessfully challenged, the fact that such a challenge was made highlighted the need to strengthen the Commonwealth's ability to successfully prosecute the existing offences under the Act in relation to the Joint Defence Facility Pine Gap, by:

1. establishing the Joint Defence Facility Pine Gap as a special defence undertaking and prohibited area for the purposes of the Act; and
2. inserting a purposive clause in the Act which will make it clear that the Parliament's power to legislate with respect to the defence of the Commonwealth is not the only constitutional basis relied upon for the new provisions.

The measure will ensure that there is a clear and express intent for the provisions of the *Defence (Special Undertakings) Act 1952* to cover a joint work or undertaking between Australia and any friendly nation in a collaborative effort to the maintenance of global peace. This would make it clear that the provisions of the Act are not only covered by Parliament's power to legislate with respect to the defence of the Commonwealth, but may also fall within some other head of power in section 51 of the Australian Constitution, such as the Parliament's power to legislate with respect to external affairs. The measure will therefore reduce the likelihood and legitimacy of any argument about the scope of Parliament's power to legislate with respect to the defence of the Commonwealth, which might be made in a

challenge to the validity of the provisions of the Act by persons accused of the offences under the Act in relation to the facility.

QUESTION

3. A submission to the inquiry raised concerns about the appropriateness of the ongoing application of the *Defence (Special Undertakings) Act 1952* to Pine Gap:

Separate policy concerns might be raised concerning the appropriateness of the ongoing application of the 1952 Act to Pine Gap, when the Act was originally enacted to secure a British atomic weapons test site at the Monte Bello Islands off Western Australia. Draconian penalties flow from a breach of that Act—and which were used by prosecutors against pacifist protesters in the recent Northern Territory case, not against genuine threats to national security—compared with the ordinary penalties applicable for trespass upon other Commonwealth property by demonstrators in a democratic society (Dr Ben Saul, University of Sydney, *Submission 4*, p. 2).

- a) Could the department please respond to the suggestion that the legislation may not be appropriate for the protection of works, undertakings and areas of the Joint Defence Facility Pine Gap?
- b) Could the department please advise whether penalties under the legislation differentiate persons who may represent a genuine and serious threat to national security from demonstrators or 'mischief makers' opposed to the presence and operation of the facility:
 - are the penalties for each type of potential offender—those who represent a genuine threat to national security and demonstrators or mischief makers—appropriate; and
 - would it be more appropriate for demonstrators or mischief makers to be charged with unauthorised access to a Commonwealth facility under another Commonwealth law?

RESPONSE

- a) Pine Gap is a core element of Australia's national security and carries out a number of activities related to the defence of Australia and the US. The facility is responsible for the collection of intelligence by technical means and the provision of ballistic missile early warning information. The information collected provides priority requirements of the Australian and US Governments for intelligence on terrorism, the proliferation of weapons of mass destruction and military weapons development.

The facility also assists with the monitoring of compliance with arms control and disarmament agreements. Pine Gap supports the US ballistic missile early warning program, contributing significantly to global security. This program gives reassurance against the possibility of accidental or surprise ballistic missile attack and early warnings about shorter ranged tactical missiles. This capability also provides information regarding nuclear explosions. The facility plays a critical role in the defence of Australia against those countries aggressively pursuing ballistic missile programs and weapons of mass destruction. Pine Gap can therefore be considered a special defence undertaking as it is conducting work for or in relation to the defence

of Australia, as well as in part for the defence of Australia and in part for the defence of the US, which is associated with Australia resisting or preparing to resist international aggression.

- b) All decisions in relation to the application of penalties under the *Defence (Special Undertakings) Act 1952* would be made by the court. Defence has no role to play in deciding the penalty for any action which contravenes the *Defence (Special Undertakings) Act 1952*. The penalties for an offence against federal legislation are decided upon by the court in accordance with general sentencing principles in the *Crimes Act 1914*. Under these principles the court is required to consider the nature and circumstances of the offence in determining the appropriate sentence.

In addition, the penalties stipulated in the *Defence (Special Undertakings) Act 1952* are maximum penalties. The maximum penalty could be imposed in only the most serious case. Prior to being quashed, the perpetrators were found guilty of offences against the *Defence (Special Undertakings) Act 1952* but no sentences of imprisonment were imposed. Instead, the court imposed individual fines and made reparation orders for the damage they caused to the facility. Defence considers that the penalties in the *Defence (Special Undertakings) Act 1952* are appropriate, particularly in view of the court's discretion in relation to sentencing.

- Defence considers that any incursion into Pine Gap could represent a serious threat to national security. The physical security surrounding Pine Gap includes a series of barriers to prevent unauthorised access to classified material and other official resources and assets. Entering such a prohibited area would be a signal of intent to do damage to, or disable, Pine Gap's infrastructure. In the view of Defence it is appropriate for a significant penalty to be applied to any activity which threatens the security of Pine Gap to punish and to deter these kinds of activities.
- The offences in the *Defence (Special Undertakings) Act 1952* apply to persons generally. If a person intentionally and knowingly commits an offence against the *Defence (Special Undertakings) Act 1952*, it is appropriate for that person to be charged accordingly. One safeguard against the misuse of the penalties in the *Defence (Special Undertakings) Act 1952* is that the Attorney-General's consent is required in order to institute a prosecution under the *Defence (Special Undertakings) Act 1952*. The protestors in 2005 were also charged with separate offences against the *Crimes Act 1914* (damage to Commonwealth property) and the guilty findings and penalties under that Act still stand.