

Chapter 2

Provisions of the Bill

Schedule 1—Third Additional Protocol to the Geneva Conventions

2.1 Schedule 1 amends the *Criminal Code Act 1995* and the *Geneva Conventions Act 1957* to implement the Protocol Additional to the Geneva Conventions of 12 August 1949. It establishes a third emblem, 'red crystal', alongside the red cross and red crescent emblems.¹

2.2 The protocol was adopted in December 2005.² Australia signed it on 8 March 2006, with the protocol entering into force on 14 January 2007.³

Background

2.3 The red cross emblem was established in 1864 to identify medical services of armed forces and voluntary relief societies in conflicts. It was believed to 'embody the fundamental requirement of neutrality', and it substituted various flags and distinctive signs used on the battlefields.⁴ Contrary to the intentions, the emblem was perceived by some to have religious, historical and cultural associations, and soon other designs emerged. For example, during its conflict with Russia in 1860s and 1870s, the Ottoman Empire used a red crescent on a white ground to distinguish the medical services of its armed forces.⁵

2.4 In 1949, the First Geneva Convention established the red cross and the red crescent as the official emblems of the International Red Cross/Red Crescent movement. However, some thought the use of the two emblems would hinder the universality of the movement because it excluded states that did not recognise the two

1 ICRC, <http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/emblem?OpenDocument> (accessed 8 December 2008).

2 Australian Red Cross, *Submission 2*, [p. 3].

3 The Hon Joel Fitzgibbon MP, Minister for Defence, Second reading speech, *House Hansard*, 3 December 2008, p. 3.

4 Australian Red Cross, *Submission 2*, [p. 2]; Jean-François Quéguiner, Commentary on the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), *International Review of the Red Cross*, Volume 89, Number 865, March 2007, p. 176.

5 Jean-François Quéguiner, Commentary on the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), *International Review of the Red Cross*, Volume 89, Number 865, March 2007, pp. 176–177. Iran discontinued using the red lion and sun emblem and adopted the red crescent in 1980. ICRC, About the adaptation of the additional emblem: questions and answers, <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/emblem-questions-answers-281005> (accessed 9 December 2008).

emblems—Israel and Palestine Authority.⁶ Eritrea wanted to use both emblems together, which was not possible under the rules.⁷ To overcome these difficulties, a new emblem was required.

New emblem

2.5 The new emblem had to meet certain criteria. It needed to be simple; easily recognisable from a distance; and lack religious, ethnic, or political connotations. The shape of a crystal was chosen as it was seen as 'a sign of purity, frequently associated with water, an essential component of all human life'.⁸

2.6 The name of the emblem also needed to meet certain criteria. In addition to lacking religious or political significance, the name had to be linguistically neutral, easy to pronounce and complement the names of the existing emblems. It also had to be 'short, easy to memorize and convey a dynamic but serious image'. Thus, red crystal.⁹

2.7 The use of the emblems is governed by the 1949 Geneva Conventions and their Additional Protocols.¹⁰ This protocol does not modify the existing conditions governing the use of the emblems. The protocol permits countries and their national societies to continue using their old emblems, adopt the red crystal, or use them in combination.¹¹ For *protective* purposes, the red crystal must be used on its own, only temporarily and for limited purposes.¹² National societies and the International Committee of the Red Cross (ICRC) and the International Federation of the Red Cross

6 Jean-François Quéguiner, Commentary on the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), *International Review of the Red Cross*, Volume 89, Number 865, March 2007, p. 187.

7 Australian Red Cross, *Submission 2*, [p. 3].

8 Jean-François Quéguiner, Commentary on the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), *International Review of the Red Cross*, Volume 89, Number 865, March 2007, p. 187.

9 Jean-François Quéguiner, Commentary on the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), *International Review of the Red Cross*, Volume 89, Number 865, March 2007, p. 187.

10 ICRC, http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/section_ihl_nat_emblem (accessed 8 December 2008).

11 Jean-François Quéguiner, Commentary on the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), *International Review of the Red Cross*, Volume 89, Number 865, March 2007, pp. 190–191. An emblem other than red cross or red crescent can be incorporated on strict conditions. Currently, only the shield of David used by Israel's national society Magen David Adom meets those conditions.

12 Jean-François Quéguiner, Commentary on the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), *International Review of the Red Cross*, Volume 89, Number 865, March 2007, p. 192.

and Red Crescent Societies can use the red crystal in exceptional circumstances and to facilitate their work.¹³

Proposed changes to the legislation

2.8 The states parties to the Geneva Conventions are responsible for implementing the legislation in their own countries, and ensuring respect for, and protection of, the emblems.¹⁴

Criminal Code Act 1995

2.9 The amendments to the interpretation section of the *Criminal Code Act 1995* are required to ensure that the new emblem 'is covered by the existing offences relating to the improper use of the emblems of the Geneva Conventions'.¹⁵

Geneva Conventions Act 1957

2.10 The amendments to the *Geneva Conventions Act 1957* incorporate a reference to, and a description of, the new red crystal emblem and the protocol as a schedule in the Act.¹⁶ The amendments also refer to the prior use of a design or wording resembling the new emblem, protecting the 'current holders of trademarked emblems against the operation of the Act that would otherwise be illegal through the operation of the legislation'.¹⁷ The Australian Red Cross noted that it is 'authorised to use the Emblem and the words "Red Cross" by virtue of a Ministerial Authorisation dated 29 January 1981'.¹⁸

Terminology

2.11 The ICRC recommends that references to the emblems be generally in lower case, and initial capitals be used when referring to the institutions.¹⁹ Consequently, the

13 Jean-François Quéguiner, Commentary on the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), *International Review of the Red Cross*, Volume 89, Number 865, March 2007, pp. 188–189; Australian Red Cross, *Submission 2*, [p. 3].

14 ICRC, http://www.icrc.org/Web/eng/siteeng0.nsf/html/section_ihl_emblem?OpenDocument (accessed 8 December 2008).

15 Explanatory Memorandum, p. 2.

16 The Hon Joel Fitzgibbon MP, Minister for Defence, Second reading speech, *House Hansard*, 3 December 2008, p. 3.

17 Explanatory Memorandum, paragraph 16, p. 5.

18 Australian Red Cross, *Submission 2*, [p. 4].

19 ICRC, Model Law on the Emblems: National Legislation on the Use and Protection of the Emblem of the Red Cross, Red Crescent and Red Crystal', Advisory Service on International Humanitarian Law, footnote 10, p. 3.

committee draws this recommendation to the attention of the government for its consideration.

Ministerial authority

2.12 The Minister for Defence, the Hon Joel Fitzgibbon MP, noted that 'As with the other emblems, the new emblem will be used only with the consent of the Minister for Defence'.²⁰

2.13 The committee notes that in times of conflict, civilian medical staff and hospitals or other civilian facilities, most likely under the authority of the Minister for Health, may use and require the protection of the emblems. The ICRC has stated that 'Close cooperation between the ministries directly concerned, generally the Ministries of Defence and Health, would be advisable'.²¹

Use of emblem in Australia

2.14 The Minister for Defence noted that Australia is unlikely to use the new emblem but the Australian Defence Force may use it 'in certain regions overseas'.²²

Committee view

2.15 The committee notes the minister's comments and supports the use of the red crystal by the Australian Defence Force, for example, when it serves under the United Nations (UN) or in joint operations with other countries using a different emblem.²³

20 The Hon Joel Fitzgibbon MP, Minister for Defence, Second reading speech, *House Hansard*, 3 December 2008, p. 3.

21 ICRC, 'Model Law on the Emblems: National Legislation on the Use and Protection of the Emblem of the Red Cross, Red Crescent and Red Crystal', *Advisory Service on International Humanitarian Law*, footnote 34, p. 9.

22 The Hon Joel Fitzgibbon MP, Minister for Defence, Second reading speech, *House Hansard*, 3 December 2008, p. 3.

23 Jean-François Quéguiner, *Commentary on the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III)*, *International Review of the Red Cross*, Volume 89, Number 865, March 2007, p. 195. Formally not party to the Geneva Conventions, the UN is not authorised to use the distinctive emblems of the Red Cross/Red Crescent movement. However, the armed forces of UN member states, serving under the auspices of the organisation, have the right to use the emblems and the obligation to respect them. Countries may also opt to choose a common emblem together with partnering countries.

Schedule 2—Regulations: medical and dental treatment

2.16 Section 124 of the *Defence Act 1903* provides for the Governor-General to make regulations covering a wide range of matters including: the enlistment, appointment, promotion, reduction in rank, retirement and discharge of members of the Defence Force, the training of members and conditions of service.

2.17 The Bill inserts paragraph 124(1)(h) into this section to enable the Governor-General to make regulations relating to medical or dental treatment of a member, a member of his or her family, or cadet.

2.18 The legislation also adds subsection 124(1C) to describe the meaning of the term 'medical and dental treatment' used in paragraph 124(1)(h). This subsection states that medical and dental treatment includes the provision of services or goods (including scheduled pharmaceuticals) related to medical and dental treatment for an ADF member or a member of his or her family or cadet.

2.19 The committee received one submission addressing Schedule 2 of the Bill. Although the intention of the legislation is to enable the making of relevant regulations, the Defence Force Welfare Association (DFWA) took the opportunity to seek details on the government's initiative to provide free medical and dental treatment to ADF members and their families. This scheme was announced as part of the government's pre-election commitment. The May 2008 budget statement indicated that the government intended 'to roll out free basic health care trial for Defence Force families'.²⁴

2.20 On 17 October 2008, the Minister for Defence Science and Personnel, the Hon Warren Snowdon MP, announced that the initial phase of the trial was set to commence in early 2009 for 2,700 ADF dependants within the Singleton (NSW), Cairns (QLD), Katherine (NT), East Sale (VIC) and the Karratha/Pilbara (WA) regions. He said further that the trial of free basic health care for ADF dependants would be expanded to include Townsville (QLD), Darwin (NT) and Puckapunyal (VIC) in late 2009. He also provided the following details:

Under the trial, ADF dependants will be able to visit general practitioners at no cost for standard consultations.

ADF dependants will also receive a benefit of \$300 per dependant per annum for basic dental services.

24 During the May 2008 estimates' hearings, the committee sought detail on the entitlements under the scheme. Mr Martin Bowles, Deputy Secretary Defence Support, explained that the scheme covered basic medical services—predominantly GP-type services—and a \$300 per annum issue for dental services. *Committee Hansard*, 22 October 2008, p. 111.

When the trial is expanded in late 2009, it will provide for a total of approximately 16,000 ADF dependants.²⁵

2.21 In its submission, the DFWA sought clarification on the meaning of terms such as 'basic medical and dental care' and 'family'. It also raised concerns about the sheer logistics of providing medical and dental services in some locations. It concluded:

Without details, DFWA is not sure that the scheme being proposed by Defence addresses problems of health services for ADF families in regional and remote areas, which was the original intent.²⁶

2.22 In its response to the concerns raised by DFWA, Defence explained that the Bill was not part of the implementation of the government's election commitment to provide free basic medical and dental care to dependants of ADF members. It stated:

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.²⁷

2.23 Even so, Defence provided the committee with details about the implementation of the government's initiative to provide free medical and dental treatment to ADF members and their families including the definition of 'family' (see Appendix 2).

2.24 The Association also took the opportunity to highlight the importance of consultation with organisations such as the DFWA before making regulations relating to medical and dental treatment. Consultation would allow organisations such as the DFWA to raise concerns, if appropriate, including questions about the exact meaning of terms used in the regulations. The committee agrees that Defence should consult with outside organisations representing the interests of ADF members when considering, and during the implementation of, initiatives relating to the health and welfare of its members and their families.

2.25 In this regard, the committee notes that in Defence's response to DFWA's concerns, Defence indicated that:

25 The Hon Warren Snowdon MP, Minister for Defence Science and Personnel, Media Release, 149/08, 17 October 2008.

26 Defence Force Welfare Association, *Submission 1*, p. 2.

27 Department of Defence, answer to question on notice no. 1, see Appendix 2.

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.²⁸

2.26 The committee encourages Defence to strengthen its commitment to this type of consultation.

28 Department of Defence, answer to written question on notice no. 1, see Appendix 2.

Schedule 3—Joint Defence Facility Pine Gap

Background

2.27 In the Northern Territory Supreme Court in June 2007, four anti-war demonstrators were convicted of the offence of entering a 'prohibited area' under the *Defence (Special Undertakings) Act 1952* (DSU). They were the first people to be prosecuted under the DSU Act and faced a maximum seven-year custodial sentence.²⁹ The four were convicted by a 12 member jury and were also found guilty of trespass and wilful damage to Commonwealth property under the *Crimes Act 1914*. They did not receive custodial sentences but were ordered to pay fines totalling \$3250.

2.28 The Commonwealth Department of Public Prosecutions appealed against what it considered the leniency of the sentence. Stating that a fine was inadequate, the Crown Prosecutor argued that this case was exceptional in its nature as it was the first time intruders had reached the technical support area of the Pine Gap facility.³⁰ The defendants also appealed against their convictions. In February 2008, the Northern Territory Criminal Court of Appeal overturned the convictions. Chief Justice Brian Martin determined that the defendants were entitled to challenge, at trial, whether or not the 'prohibited area' was in fact necessary for the purposes of the defence of Australia.³¹

2.29 Defence informed the committee that the amendments to the DSU Act were 'proposed as part of a broader review conducted in response to the quashing of the convictions of the four protesters who broke into the Joint Defence Facility Pine Gap'.³²

Proposed changes to the legislation

2.30 In his second reading speech in December 2008, the Minister for Defence, the Hon Joel Fitzgibbon, stated:

The Joint Defence Facility at Pine Gap makes an important contribution to the security interests of both Australia and the United States of America, through the collection of intelligence by technical means and the provision of ballistic missile early warning information.

29 *Defence (Special Undertakings) Act 1952*, Section 9, Unlawful entry etc.

30 Crown Prosecutor Hilton Dembo, 'Four found guilty over Pine Gap break-in', *Australian*, 14 June 2007.

31 Tara Ravens, 'Pine Gap protesters' convictions quashed', *Sydney Morning Herald*, 22 February 2008. It had been the intention of the four to prove that 'Pine Gap was not being used in the Defence of Australia, but in fact was being used to wage a war of aggression in Iraq', Mr Jim Dowling, *Submission 10*, p. 1.

32 Department of Defence, answer to written question on notice no. 2, see Appendix 2.

The methods used for collecting intelligence at the facility are sensitive and their public exposure could threaten their effectiveness and thereby diminish their contribution to national security. It is therefore important that the Joint Defence Facility Pine Gap is protected with effective legislation to deter unauthorised access to the facility.³³

2.31 Defence also underlined the significance of the facility stating, 'Pine Gap is a core element of Australia's national security' and that it is important that the Commonwealth be able to successfully prosecute the offences created by the Act.³⁴

2.32 **Item 1 of Schedule 3** inserts a new section 2A to make clear the purposes of the Act:

(a) to provide for the protection by the Commonwealth of works and undertakings that are carried out for or in relation to:

(i) the defence of Australia; or

(ii) the defence of Australia and the defence of another country; and

(b) to provide for the protection by the Commonwealth of areas that are reserved for:

(i) the defence of Australia; or

(ii) the defence of Australia and the defence of another country; and

(c) to provide for the protection by the Commonwealth of works, undertakings and areas that require special security measures; and

(d) to provide for the protection by the Commonwealth of works, undertakings and areas in order to enable Australia to fulfil its obligations under treaties, conventions and international agreements relating to defence or security.

2.33 **Items 2–4 of Schedule 3** insert definitions of the terms 'prohibited area', 'restricted area' and 'special defence undertaking' as they apply in section 4 of the Act.

2.34 **Item 8 of Schedule 3** has the effect of making the whole area occupied by the Joint Defence Facility at Pine Gap a prohibited area and provides that any work or undertaking that is carried out at the Joint Defence Facility Pine Gap is a special defence undertaking.

33 *Defence Legislation (Miscellaneous Amendments) Bill 2008*, Second reading speech, *House Hansard*, 3 December 2008, p. 12290. As documented in a report by the Joint Standing Committee on Treaties, four types of signals intelligence are collected at the facility: telemetry signals, which send data from deployed missiles; radar signals associated with anti-ballistic missile shields; satellite communications; and microwave emissions. The latter give the base the capacity to eavesdrop on all domestic and international telephone calls and other telecommunications. Joint Standing Committee on Treaties, *An agreement to extend the period of operation of the Joint Defence Facility at Pine Gap*, Report 26, October 1999, pp. 12–13.

34 Department of Defence, answer to written question on notice no. 3 and no. 2, see Appendix 2.

Submissions

2.35 The committee notes that some submitters expressed concerns which did not relate specifically to the proposed amendments. These ranged from questions about the transparency, openness and accountability of the facility; whether the facility adequately contributes to the defence of Australia; the access rights of Australian parliamentarians; and the location of the facility on the traditional lands of the Arrernte people. Other concerns related to the legislation included:

- the constitutional validity of the Act;
- the applicability of the Act to the Joint Defence Facility Pine Gap;
- the rights of protestors to demonstrate at the facility; and
- the matter of disproportionate punishment.

Constitutional validity

2.36 According to Dr Ben Saul, Sydney Centre for International Law, the Bill inserts a purposive clause to clarify that there are a range of constitutional powers that support the Act, including the defence power and the external affairs power. Citing a precedent from 1996, Dr Saul expressed concern that:

...the declaration is not sufficient by itself to affect the operation and effect of the Act. The Parliament cannot legislate a measure into power merely by declaring its measure to be enacted for a valid object.³⁵

2.37 Nevertheless, he thought it 'doubtful that the High Court would take a narrow view of the defence power', particularly in an area related to matters of national security.³⁶ Dr Saul further notes that the proposed amendments contained in paragraph 1(d), outlined above, would see the external affairs power (such as bilateral treaty arrangements with the United States, or the ANZUS alliance itself) support the activities at Pine Gap.³⁷

2.38 Defence informed the committee that the proposed amendments:

...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...³⁸

35 Dr Ben Saul, University of Sydney, *Submission 3*, p. 2.

36 Dr Ben Saul, University of Sydney, *Submission 3*, p. 2.

37 Dr Ben Saul, University of Sydney, *Submission 3*, p. 2.

38 Department of Defence, answer to written question on notice no. 2, see Appendix 2.

Application to the Joint Defence Facility Pine Gap

2.39 Several submissions to the inquiry raised concerns about the appropriateness of the ongoing application of the DSU Act to Pine Gap.³⁹

2.40 Mr Jim Dowling (one of the four charged under the DSU Act) submitted that the Act was only ever intended to be used in instances necessary for the defence of Australia and not, as he implies, as a means for prosecuting non-violent protestors or anti-war demonstrators:

Not only did the Defence Special Undertakings Act require that it be proven that Pine Gap was necessary for the defence of Australia, for the Act to be used, **but that this was the intention of the legislators at the time.**⁴⁰

2.41 The Act was drawn up in 1952, well before the facility at Pine Gap existed, for the purpose of securing the British atomic weapons test site at the Monte Bello Islands off the northwest coast of Western Australia. In his second reading speech, on 4 June 1952, the Minister for Defence, Sir Philip McBride, said:

The first purpose of this bill is to make provision for the protection of the atomic weapon test that is to be carried out at the Monte Bello Islands off the north-coast of Australia. The fact that preparations for this test are already being made gives the measure an urgent character...

The reason for prohibiting this area is, of course, to protect from observation by any unauthorized person, whether he be on land, on sea or in the air, the activities being conducted in relation to the atomic weapon test. Incidentally, the prohibition will serve the purpose of closing the area to persons who otherwise might stray into it and suffer physical harm as a result of the experiment...

The penalties provided for offences are severe. I make no apology for that; but I invite the attention of the House to the provision which requires the consent of the Attorney-General to the institution of any prosecution. This, I suggest, will afford a safeguard against the measure being applied without due consideration. The Government has thought it wise in preparing the

39 Dr Ben Saul, University of Sydney, *Submission 3*, p. 2; Rev. Simon Moyle, *Submission 4*, p. 2.

40 Mr Jim Dowling, *Submission 10*, p. 2. This view was also supported by Dr Ben Saul, University of Sydney, *Submission 4*, p. 2.

measure to make provision for any similar undertaking that may require to be carried out.⁴¹

Committee view

2.42 While the committee notes that the Act was written so that it could be applied to other, or similar, defence undertakings, it also notes that when the Bill was originally passed unopposed in 1952, it was deemed to contain some 'drastic provisions' and that they were only justified in 'serious cases'.⁴²

Right to demonstrate

2.43 Various submitters expressed concern that the proposed changes to the Act infringe upon the rights of citizens exercising their democratic right to protest. The Australian Anti-Bases Campaign Coalition, for example, suggested the proposed legislation denies the democratic rights of Australian citizens.⁴³

2.44 It was also suggested that by making it easier to prosecute those entering the prohibited area at Pine Gap, the legislation will deter and intimidate those who may otherwise be exercising their democratic right to engage in non-violent protest.⁴⁴

Committee view

2.45 It is the committee's view that the proposed changes to the legislation do not diminish the capacity of citizens to protest; rather the proposed changes attempt to protect the Joint Defence Facility Pine Gap against trespass and enhance the ability of the government to prosecute offenders who enter a prohibited area.

Disproportionate punishment

2.46 Under Section 9 of the DSU Act—

(1) A person is guilty of an offence if:

(a) the person is in, enters or flies over an area; and

41 Mr McBride, 'Defence (Special Undertakings) Bill 1952', Second reading speech, *House Hansard*, 4 June 1952, pp. 1374–1375. The Opposition supported the Bill. Leader of the Opposition, Dr Evatt, explained his party's position in the following way: '...the Opposition believes that the bill should be passed and that there should be no opposition to it. In the light of precautions that are to be taken in connection with the atomic tests, the Opposition asks the Minister to consider the application of the bill to other defence projects. As the Minister has stated previously, the bill contains some drastic provisions. They are justified in serious cases, and the Attorney-General must approve of prosecutions that are laid under it.' Dr Evatt, 'Defence (Special Undertakings) Bill 1952', Second reading speech, *House Hansard*, 5&6 June 1952, p. 1619.

42 As appears in footnote 41.

43 Anti-Bases Campaign Coalition, *Submission 6*, p. 2.

44 See Mr Benjo Keane, *Submission 9*, p. 5; Mr Jim Dowling, *Submission 10*, p. 2.

(b) the area is a prohibited area.

2.47 The maximum penalty for this offence is imprisonment for seven years.

2.48 Subsection 9(2) of the Act states:

A person is guilty of an offence if

(a) the person:

(i) makes a photograph, sketch, plan, model, article, note or other document of, or relating to, an area or anything in an area; or

(ii) obtains, collects, records, uses, has in his or her possession, publishes or communicates to some other person a photograph, sketch, plan, model, article, note or other document or information relating to, or used in, an area, or relating to anything in an area; and

(b) the area is a prohibited area.

2.49 Again, the maximum penalty for this offence is imprisonment for seven years.⁴⁵

2.50 A number of submitters to the inquiry suggested that such a punishment is disproportionate for acts of non-violent civil disobedience. The Australian Anti-Bases Campaign Coalition claimed:

This is a grossly disproportionate sanction for acts of non-violent civil disobedience by citizens opposed to the presence and functions of the Pine Gap military facility, especially given that the majority of the Australian community are opposed to the majority of the functions carried out at and/or through Pine Gap.⁴⁶

2.51 When Defence was asked whether the penalties under the proposed Act 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, it explained:

All decisions in relation to the application of penalties under the Defence (Special Undertakings) Act 1952 would be made by the court...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.⁴⁷

45 *Defence (Special Undertakings) Act 1952*, Section 9, Unlawful entry etc.

46 Anti-Bases Campaign Coalition, *Submission 6*, p. 1.

47 Department of Defence, answer to written question on notice no. 3, see Appendix 2.

2.52 With respect to the question of discretion in sentencing, Defence reassured the committee that, 'The maximum penalty could be imposed in only the most serious case'.⁴⁸

Committee view

2.53 The committee notes that a seven-year term is a maximum penalty and that sentencing will ultimately be determined by a court in accordance with general sentencing principles in the *Crimes Act 1914*.

Recommendation

The committee recommends that the Bill be passed without amendment.

SENATOR MARK BISHOP
CHAIR

48 Department of Defence, answer to written question on notice no. 3, see Appendix 2.