

The Senate

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Standing Committee on  
Foreign Affairs, Defence and Trade

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Defence Legislation (Miscellaneous  
Amendments) Bill 2008 [Provisions]

February 2009

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# Chapter 1

## Introduction

### Background

1.1 The Hon Joel Fitzgibbon MP, Minister for Defence, introduced the *Defence Legislation (Miscellaneous Amendments) Bill 2008* (the Bill) in the House of Representatives on 3 December 2008. On the following day, the Senate referred the provisions of the Bill to the Standing Committee on Foreign Affairs, Defence and Trade for inquiry and report by 20 February 2009.

### Purpose of the Bill

1.2 The Bill has three schedules. The purpose of the Bill is:

- To amend the *Geneva Conventions Act 1957* to incorporate the Third Additional Protocol to the Geneva Conventions. This protocol establishes a third universal and distinctive emblem called a 'red crystal' for the Red Cross/Red Crescent Movement. The Bill also amends the *Criminal Code Act 1995* to ensure that this new emblem is covered by existing offences relating to the improper use of emblems of the Geneva Conventions.
- To amend the *Defence Act 1903* to enable the making of regulations to cover the provision of medical and dental treatment to an Australian Defence Force (ADF) member or cadet, or a member of the family of an ADF member.
- To amend the *Defence (Special Undertakings) Act 1952* to provide that the Joint Defence Facility Pine Gap is a special Defence undertaking and a prohibited area.

### Submissions

1.3 The committee advertised the inquiry on its website and in *The Australian* on 17 December 2008 and 28 January 2009. The committee wrote to the Minister for Foreign Affairs, the Attorney-General, and the Minister for Defence, inviting them or their departments or related agencies to make a submission. A number of other organisations, commentators, academics and stakeholders were also contacted and invited to make submissions to the inquiry.

1.4 The committee received 11 submissions, which are listed in Appendix 1. The committee agreed that, based on the submissions, a public hearing was not required but wrote to the Department of Defence seeking advice on, or clarification of, a number of matters raised in the submissions. The responses to these written questions on notice are included at Appendix 2.

## **Scrutiny of Bills Committee**

1.5 The Senate Standing Committee for the Scrutiny of Bills considered the Bill but had no comments to make.<sup>1</sup>

## **Acknowledgement**

1.6 The committee thanks those who assisted with the inquiry, especially the Department of Defence (Defence) for its promptness in responding to the committee's written questions.

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1 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest*, no.1 of 2009, 4 February 2009, p. 17.



# 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.<sup>1</sup>

2.2 The protocol was adopted in December 2005.<sup>2</sup> Australia signed it on 8 March 2006, with the protocol entering into force on 14 January 2007.<sup>3</sup>

### 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.<sup>4</sup> 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.<sup>5</sup>

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

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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.<sup>6</sup> Eritrea wanted to use both emblems together, which was not possible under the rules.<sup>7</sup> 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'.<sup>8</sup>

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.<sup>9</sup>

2.7 The use of the emblems is governed by the 1949 Geneva Conventions and their Additional Protocols.<sup>10</sup> 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.<sup>11</sup> For *protective* purposes, the red crystal must be used on its own, only temporarily and for limited purposes.<sup>12</sup> National societies and the International Committee of the Red Cross (ICRC) and the International Federation of the Red Cross

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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](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.<sup>13</sup>

### **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.<sup>14</sup>

#### ***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'.<sup>15</sup>

#### ***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.<sup>16</sup> 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'.<sup>17</sup> 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'.<sup>18</sup>

#### ***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.<sup>19</sup> Consequently, the

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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](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'.<sup>20</sup>

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'.<sup>21</sup>

### *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'.<sup>22</sup>

### *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.<sup>23</sup>

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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'.<sup>24</sup>

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.

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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.<sup>25</sup>

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.<sup>26</sup>

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.<sup>27</sup>

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:

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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.<sup>28</sup>

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

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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.<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup>

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'.<sup>32</sup>

### 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.

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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.<sup>33</sup>

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.<sup>34</sup>

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.

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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.<sup>35</sup>

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.<sup>36</sup> 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.<sup>37</sup>

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...<sup>38</sup>

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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.<sup>39</sup>

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.**<sup>40</sup>

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

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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.<sup>41</sup>

### ***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'.<sup>42</sup>

### ***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.<sup>43</sup>

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.<sup>44</sup>

### ***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

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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.<sup>45</sup>

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.<sup>46</sup>

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.<sup>47</sup>

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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'.<sup>48</sup>

***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

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

# Dissenting Report

## Australian Greens

The Australian Greens do not support the recommendation made in this report to pass the Defence Legislation (Miscellaneous Amendments) Bill 2008 without amendment.

The Greens do support two thirds of this Bill. There are good reasons for, and international consensus on, the establishment of the 'Red Crystal' as an alternative symbol to the Red Cross and Red Crescent because it does not have religious, cultural or political connotations. The Greens also support dental care being provided to ADF members and their families. However, amendments to the Defence (Special Undertakings) Act 1952 making Pine Gap a 'special Defence undertaking' and a 'prohibited area' are excessive, corrosive of democratic principles and should not be supported.

Neither the government nor the Committee make an adequate case as to why an enhanced ability to prosecute offenders is required. Adequate legislation already exists to protect Pine Gap from trespass or acts of aggression, in particular, the Crimes Act of 1914.

As noted in the Committee's report, the amendments related to Pine Gap were drafted in direct response to the failed attempt by the Howard government to use the Defence (Special Undertakings) Act for the first time against four Christian pacifists, who entered Pine Gap after informing the Defence Minister and the media of their intention to conduct a peaceful and nonviolent "citizens inspection" of the facility. Given this forewarning, it would appear that what this "core element of Australia's national security" lacks is not legislative protection, but perimeter patrols. If it is indeed such a sophisticated intelligence gathering facility, the capacity to gather intelligence about its immediate environment needs to be enhanced.

Despite engaging an army of QCs, at taxpayer's expense, to inflict the maximum punishment and to place maximum limitation on the court hearing the defence's justification and legal argument, the Northern Territory Court of Criminal Appeal quashed the convictions of the Christian pacifists. The court found that citizens had the right to challenge whether the 'prohibited area' was necessary for the purpose of the defence of Australia. While the Committee's report dismisses concerns made in submissions as unrelated to the amendments, the Australian Greens find that questions about whether the facility contributes to the defence of Australia as highly relevant, as did the Northern Territory Court of Criminal Appeal.

Given this series of events, the amendments proposed in this legislation can be accurately described as "retrospective revenge" that would "punish and frighten

those thinking about engaging in non-violent resistance against Pine Gap's role in war making," as several submissions stated. The amendments would inhibit citizens from ever challenging whether Pine Gap is necessary for Australia's defence in future, which is an erosion of the democratic rights of which Australians are proud.

It is ironic that the democratically elected members of the Australian Parliament are being asked to enact legislation on a facility about which Australian parliamentarians know so very little. In 1999 the government refused to provide information about Pine Gap to the Joint Standing Committee on Treaties – information that is made freely available to members of the US Congress. Nothing has changed since then. Although US Congress officials have visited Pine Gap and received classified briefings about its functions, elected representatives and Senators are "entrusted with less information than can be found in a public library".

The history of disinformation and misinformation about Pine Gap is long. In 1966, Australians were told the facility was to be a weather station. Later the official cover was a "Space Research Centre". Australians have the right to know what is happening on Australian soil at one of largest and most sophisticated satellite ground stations in the world. Information is still not forthcoming about who is being spied upon, and who is being targeted through this facility? Was it used to coordinate air strikes against Iraqi citizens in a war accurately described by the UN Secretary General and other leaders as an illegal war? How is it used to support US nuclear war fighting capabilities, and how is that consistent with our government's efforts towards nuclear disarmament?

If Pine Gap is indeed a 'core element' of Australia's national security, Australians have a right to know how and why. Rather than making the case for the proposed amendments, the government has described citizens exercising their democratic right to protest as "mischief makers" and have furnished the Committee with statements such as, "Pine Gap makes an important contribution to the security interests of both Australia and the United States of America...The methods used for collecting intelligence at the facility are sensitive..." which are not convincing or compelling, and neither are the arguments made in the Committee's report.

Rather than being convinced that Pine Gap does protect Australians, the Senate is being asked to enact legislation that would further shield Pine Gap *from* Australians. Such efforts to erode democratic rights are unsupportable and run directly counter to the kind of "security" we need.

SENATOR SCOTT LUDLAM



# Appendix 1

## Public submissions

- 1 Defence Force Welfare Association
- 2 Australian Red Cross
- 3 Dr Ben Saul, University of Sydney
- 4 Rev. Simon Moyle
- 5 Mr Justin Tutty
- 6 Dr Hannah Middleton, Australian Anti-Bases Campaign Coalition
- 7 Karen Buczynski-Lee
- 8 Dale Hess
- 9 Benjo Keaney
- 10 Jim Dowling
- 11 Bryan Law



## **Appendix 2**

### **Department of Defence—answers to written questions**



# **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



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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.