

Chapter 3

Consensual and non-consensual security functions

3.1 The bill establishes a statutory regime of search and seizure powers to reduce the risk of unauthorised persons or items entering defence facilities and restricting items including weapons and classified information being improperly removed. In this chapter, the committee considers the consensual and non-consensual security functions conferred on defence security officials including search and seizure powers and the safeguards in the exercise of such powers. Trespass offences and the associated arrest power are also considered.

Statutory regime of search and seizure powers

3.2 Defence argued that the bill seeks to overcome the security risks imposed by the current absence of explicit search powers by introducing a statutory regime of search, seizure and related powers to be exercised by Defence security officials on Defence premises.¹ In relation to the proposed security functions, the bill contains two levels of power that can be exercised—consensual and non-consensual. Consensual security functions are detailed in division 3 of the bill whereas non-consensual security functions are outlined in division 4.

Consensual security functions

3.3 Division 3 of the bill confers a range of powers on defence security officials at defence access control points and on defence premises. Such officials have the power to:

- request a person about to pass a defence access control point or on defence premises, to provide evidence of identity and the authority to pass the control point or to be on defence premises respectively;²
- request a limited search of a person, vehicle, vessel, or aircraft about to pass a defence access control point;³
- refuse, (in defined circumstances), to allow a person, vehicle, vessel or aircraft to pass a defence access control point if:
 - the person refuses to provide identification or permit such a search; or
 - as a result of the person complying with the request, the defence security official 'reasonably believes' that the person, vehicle, vessel or aircraft,

1 Department of Defence, *Submission 8*, p. 6.

2 Defence Legislation Amendment (Security of Defence Premises) Bill 2010, ss. 71H(1) and 71K(2).

3 Defence Legislation Amendment (Security of Defence Premises) Bill 2010, ss. 71H(2) and 71J(1).

or thing in it is not authorised to pass, constitutes a threat to the safety of a person on defence premises, or relates to a criminal offence committed or may be committed on or in relation to the defence premises;⁴ and

- if on defence premises, restrain or detain a person or any person in a vehicle, vessel or aircraft if that person:
 - has refused a request for identity or search; or
 - as a result of complying with such a request, the defence security official reasonably believes that the person, vehicle, vessel or aircraft (or thing in it) is not authorised to pass the defence access control point, constitutes a threat to the safety of persons on site; and
 - in the case of a person, has committed, or may commit, a criminal offence on, or in relation to, the defence premises; or
 - in the case of a vehicle, vessel or aircraft relates to a criminal offence that has or may be committed on the defence premises.⁵

Provisions for declared explosive ordnance depots

3.4 The same limited search, restrain and detain powers are conferred on a contracted defence security guard on a declared explosive ordnance depot.⁶ In relation to land, buildings or structures declared explosive ordnance depots, a contracted defence security guard may under section 71M:

- request a person on site to undergo a limited search;
- restrain and detain a person who refuses a request or is believed not to be authorised to be on a declared explosive ordnance depot, constitutes a threat to the safety of persons on the depot, or has committed or may commit a criminal offence in relation to the depot.

3.5 According to the Explanatory Memorandum, the concept of a limited search has been introduced in the bill 'to allow both the search of things in a person's possession and a 'pat down' of the person over their outer garments'.⁷ A 'limited search' is defined as a search of things in the possession of a person and may include requesting that the person remove an overcoat, coat or jacket, gloves, shoes and hat; and examination of such items that the individual consents to remove. A limited search also means:

4 Defence Legislation Amendment (Security of Defence Premises) Bill 2010, ss. 71H(3) and 71J(2).

5 Defence Legislation Amendment (Security of Defence Premises) Bill 2010, ss. 71H(4), 71J(3) and 71K(3).

6 Subdivision B.

7 *Explanatory Memorandum*, Defence Legislation Amendment (Security of Defence Premises) Bill 2010, p. 6.

A search of a person conducted by quickly running the hands over the person's outer garments and an examination of anything worn or carried by the person that is conveniently and voluntarily removed by the person;

But does not include requesting the person to remove all of his or her garments.⁸

3.6 The powers to restrain and detain a person are conferred on defence security officials only for the purpose of placing the individual into the custody of a police officer at the earliest practicable time.⁹ The use of force in the application of this power should, in accordance with the general rule on the use of force, be 'reasonable and necessary'.¹⁰

3.7 In relation to the practical application of division 3, the Minister for Defence noted that the consensual identification and search powers 'will generally be exercised by contracted security guards on a random basis on entry to and exit from defence premises at low to medium threat levels'.¹¹

3.8 The consensual search powers conferred on defence contracted security guards received support from some witnesses.¹² Mr Clive Williams argued that the contracting of guarding services to civilian contractors who did not have the right to search had created problems at defence facilities in the past. He emphasised that guard staff at defence facilities should have the 'power to search all persons and vehicles that enter or leave the facility'.¹³

3.9 Some witnesses, however, had reservations. While in support of the 'general thrust' of the bill, the Police Federation of Australia (PFA) raised concerns about what it termed 'police-style powers being granted to persons other than fully trained and sworn police officers'.¹⁴ It emphasised the need to avoid the introduction of a 'second-tier of policing' particularly in relation to contracted defence security guards.¹⁵ The PFA also voiced concerns about the provision of search powers to contracted defence security guards, stating that 'we are mindful of not conceding such powers being granted away from Defence premises'. It emphasised the importance of defining the

8 Defence Legislation Amendment (Security of Defence Premises) Bill 2010, Schedule 1, Part 1.

9 Defence Legislation Amendment (Security of Defence Premises) Bill 2010, s. 72J.

10 Defence Legislation Amendment (Security of Defence Premises) Bill 2010, ss. 72G(1).

11 The Hon Stephen Smith MP, Minister for Defence, Second Reading Speech, *House Hansard*, 29 September 2010, p. 12.

12 Section 71B of the bill defines a contracted defence security guard as a person who is party to or a subcontractor for a contract with the Commonwealth or a Commonwealth entity or an employee of one or the other and has satisfied the training and qualification requirements as determined by the Minister by legislative instrument.

13 Clive Williams, *Submission 1*, p. 3.

14 Police Federation of Australia, *Submission 4*, p. 1.

15 Police Federation of Australia, *Submission 4*, p. 1.

scope of the work of contracted defence security guards and ensuring that their functions were 'strictly confined to defence bases and premises and the immediate surrounds of those establishments'.¹⁶

3.10 Defence responded to the PFA's concerns:

The Bill does not alter the primacy of civil law enforcement authorities in responding to security incidents at Defence premises. The proposed statutory regime incorporates safeguards that ensure that personnel exercising powers under the Bill have been authorised by the Minister for Defence and have satisfied a minimum level of training and qualification requirements as determined by the Minister or his delegate.¹⁷

3.11 Furthermore, the Explanatory Memorandum is clear about the limitations placed upon security guards' powers:

Contracted defence security guards will only be authorised under the Act to request evidence of a person's identification, conduct consensual searches and, in defined circumstances, restrain and detain a person for the purposes of placing them in the custody of a law enforcement officer.¹⁸

3.12 Defence also highlighted that the training requirements for contracted security guards will 'build upon and enhance the existing training regime as mandated in Defence security policy'. In its supplementary submission, the department listed the mandatory requirements which contracted security guards must meet including the successful completion of a Certificate II in Security Operations.¹⁹

3.13 In response to suggestions that ADF members provide security at the entrances and perimeters to Defence bases instead of contracted defence security guards, Defence held that:

The use of ADF members to undertake routine 'static' guarding duties at low threat levels across all Defence sites is not a cost effective use of this highly trained resource. Moreover, noting the significant personnel numbers that would be involved, this would also have an adverse impact on ADF training and operational availability.

At lower threat levels, security at Defence bases will involve a combination of contracted security guards, civil police and, at some sites, Australian Federal Police (AFP) Protective Service Officers. At higher threat levels, ADF members would likely takeover the guarding function at Defence bases given their increased range of powers under the Bill, vis-a-vis

16 Police Federation of Australia, *Submission 4*, pp. 1– 2.

17 Department of Defence, *Submission 8A*, p. 8.

18 *Explanatory Memorandum*, Defence Legislation Amendment (Security of Defence Premises) Bill 2010, p. 4.

19 Department of Defence, *Submission 8A*, p. 5. Details of the mandatory requirements for contracted security guards and the training package are provided in the department's supplementary submission which is provided in Appendix 2 to this report.

contracted security guards, including the power to require identification, conduct non-consensual searches, seize items and, if necessary, take action to make a seized item safe.²⁰

3.14 With regard to exercising this power outside Defence premises, the respective sections of the bill make a distinction between when a person or vehicle, vessel or aircraft is about to pass a defence access point, in which case they can only be refused to pass, and when they are on defence premises.²¹ Defence further noted that:

The powers contained in the Bill for all categories of Defence security officials are only exercisable on Defence premises. This is defined as any area of land or other place, a building or other structure, a vehicle, vessel or aircraft, or a prohibited area within the meaning of the *Defence (Special Undertakings) Act 1952*, which is located in Australia and is owned or occupied by the Commonwealth for use by the Defence Force or the Department.²²

3.15 Defence also drew attention to the limitations on the powers to restrain and detain. Such powers are applicable only on Defence premises and in relation to a person who refuses or fails to comply with an identification or search requirement, or as a result of complying, the Defence security official reasonably believes that the person is not authorised to be on the premises, constitutes a threat to safety or has (or may) commit a criminal offence. Defence emphasised, moreover, that the ability to restrain and detain was a 'fundamental component of the proposed search regime' detailed in the bill, and that:

Without the ability to restrain and detain people for the purposes of placing them in police custody, Defence will be unable to mitigate the risk of dangerous, restricted or classified items and information being improperly removed from Defence premises.²³

The role and powers of Defence security officials in relation to the police

3.16 Concerns were raised regarding the role of Defence security officials in relation to the police and of the need for clear demarcation between their respective powers and responsibilities. The Western Australia Department of the Premier and Cabinet emphasised that if the bill is enacted:

...there needs to be clear delineation of each agency's role and powers during the response phase to avoid any confusion.²⁴

3.17 The Northern Territory Government identified:

20 Department of Defence, *Submission 8A*, p. 1.

21 Clauses 71H–71N.

22 Department of Defence, *Submission 8A*, p. 9.

23 Department of Defence, *Submission 8*, p. 4.

24 Western Australia Department of the Premier and Cabinet, *Submission 9*, p. 2.

...a need for the Defence Force to engage with Northern Territory Police once the legislation is in place, to ensure agreements are considered regarding response arrangements and any subsequent investigations arising from the use of these new powers.²⁵

3.18 Rather than demarcate respective powers, Victoria Police argued that the police should be provided the same security powers as defence security officials on the basis that:

There may be some circumstances involving remote defence facilities, for example where there is only one Security Official present, where support from the Federal or State/Territory police forces is required and as such, it would be prudent for members of those police forces to have the same clearly defined legislative powers for security.²⁶

3.19 The committee understands the concerns regarding the need for clear demarcation between the respective roles and powers of defence officials and the police. In the committee's view, these concerns relate particularly to the practical manner in which such powers are exercised. It recognises the need for Defence to work with the respective police forces to establish clear understandings of the extent and scope of these Defence powers and how they interact or meld with civilian police.

3.20 In this regard, the committee notes that Defence has and will continue to take steps to ensure that misunderstandings about the exercise of power do not arise and that the respective responsibilities of defence and civilian police do not clash. For example, Defence has established a Working Group comprising inter-departmental representation to finalise policy and procedural arrangements. The Working Group includes representation from the Australian Federal Police (AFP) and the Australian Customs and Border Protection Service to enable Defence to 'draw on the experience these agencies have with implementing and managing comparable legislative powers'.²⁷ Defence has also initiated consultation with the states and territories through the Legal Issues Sub-Committee of the National Counter Terrorism Committee on potential implementation of the bill. Defence noted, moreover, that:

Consultation with relevant State and Territory agencies will continue and will inform final implementation arrangements and procedures.²⁸

3.21 Defence noted its intention to continue to consult with union representatives through Defence's National Workplace Relations Committee.

3.22 The committee supports the initiative that Defence has taken to engage in a consultation process with the AFP and other federal agencies including the Australian

25 Northern Territory Government, *Submission 5*, p. 1.

26 Victoria Police, *Submission 3*, p. 1.

27 Department of Defence, *Submission 8*, p. 12.

28 Department of Defence, *Submission 8*, p. 12.

Customs and Border Protection Service to, amongst other things, identify 'appropriate training and qualification requirements for Defence security officials'.²⁹

3.23 The committee believes that Defence and the respective police forces need to develop memoranda of understanding supported by joint training exercises between defence security officials and state and federal police in order to address or alleviate some of the concerns relating to military and civilian cooperation.

Non-consensual security functions

3.24 Division 4 of the bill details arrangements for identification and searches which are non-consensual. Under these provisions, officials 'require' rather than 'request' identification and other information in contrast to their consensual security function. The powers are conferred on special defence security officials who include security authorised members of the Defence Force and defence security screening employees.³⁰ For example, special defence security officials are empowered under the bill to:

- require a person to produce evidence of their identity and authority to pass the access control point;³¹
- search a person, vehicle, vessel or aircraft about to pass a defence access control point on defence premises or which is on defence premises or to request a search if the person, vehicle, vessel or aircraft is not on defence premises;³²
- refuse, in defined circumstances, to allow a person, vehicle, vessel or aircraft to pass a defence access control point;³³ and
- restrain and detain a person on defence premises or any person in a vehicle, vessel or aircraft who has been refused permission to pass a defence access control point or request that the person leave defence premises and remove them if they refuse to do so.³⁴

3.25 The same powers apply, if a person, vehicle, vessel, or aircraft is on defence premises and the special defence official 'reasonably believes' that they;

29 Department of Defence, *Submission 8*, p. 4.

30 Such officials are defined in sections 71C and 71D respectively of the bill.

31 Defence Legislation Amendment (Security of Defence Premises) Bill 2010, ss. 71R(1) and 71T(1)

32 Defence Legislation Amendment (Security of Defence Premises) Bill 2010, ss. 71R(2), 71S(1), 71T(3) and 71U(2).

33 Defence Legislation Amendment (Security of Defence Premises) Bill 2010, ss. 71R(3) and 71S(2).

34 Defence Legislation Amendment (Security of Defence Premises) Bill 2010, ss. 71R(4), 71S(3), 71T(4) and 71U(3).

- are not authorised to be on the premises, or
- constitute a threat to the safety of persons on the defence premises, or
- have committed, or may commit, a criminal offence on, or in relation to, the premises (in the case of a person) or relates to a criminal offence on or in relation to the defence premises (in the case of a vehicle, vessel or aircraft).³⁵

3.26 A search of a person under the non-consensual search regime has the same meaning as that in section 51 of the *Defence Act 1903* which deals with Defence Force assistance to the civil authority under Part IIIAAA. That definition is based on the definitions of frisk search and ordinary search which are contained in Part 1AA of the *Crimes Act 1914*. In terms of the search function, whereas a consensual search or limited search provided for in division 3 involves requesting the person to remove outer clothing and inspection of items given voluntarily, a search for the purposes of division 4 requires the removal of specified items of clothing for search purposes.

3.27 In terms of seizure, division 5 provides special defence security officials with the power to seize a thing on defence premises or a thing found as a result of a search if there are grounds to believe that it constitutes a threat or is related to a criminal offence committed or may be committed on or in relation to defence premises. In this regard, a security authorised member of the Defence Force has the power to:

- make the thing safe or prevent it from being used;
- provide a receipt for the thing if practicable; and
- hand it over to the AFP or member of the respective state or territory police if there are reasonable grounds to believe that the thing has been used or involved in the commission of a criminal offence; or
- return the thing within 7 days if practicable to do so; or
- give it to a member of the AFP or respective state or territory police force at the earliest practicable time.³⁶

3.28 Section 72A establishes that the powers conferred upon special defence security officials under divisions 4 and 5 may be exercised by a defence security screening employee only if it is not practicable for the power to be exercised by a security authorised member of the Defence Force. Defence Minister the Hon Stephen Smith MP stated that the non-consensual identification, search and seizure powers contained in divisions 4 and 5 will be:

...exercised by security authorised members of the Defence Force or, where such members are not reasonably available, by defence security screening APS employees during higher threat levels on all defence premises and at all times at defence's more sensitive sites. Under these circumstances, the

35 Defence Legislation Amendment (Security of Defence Premises) Bill 2010, ss. 71T and 71U.

36 Defence Legislation Amendment (Security of Defence Premises) Bill 2010, s. 72.

powers would be exercised on a more frequent basis to provide an increased level of security in line with the assessed risk.³⁷

The use of a dog to perform security functions

3.29 In performing security functions, a security authorised member of the Defence Force may, if considered 'reasonably necessary', use a dog to:

- (a) assist with the conduct of a search (including a limited search);
- (b) assist a defence security official to restrain or detain, or remove a person;
- (c) assist a member of the Defence Force to arrest a person for trespass; or
- (d) assist a defence security official to perform a function or exercise a power under Part IVA.³⁸

3.30 The Explanatory Memorandum states that the use of dogs under this provision is intended to improve Defence's capability to detect explosives and other hazardous materials and to detect and detain trespassers.³⁹ Defence noted, moreover, that military working dogs are presently employed at a number of Defence sites, in particular around Air Force bases and that they are used to assist with 'protecting people and assets over an extended area, which can often be difficult to protect effectively through other means'.⁴⁰

3.31 The Senate Standing Committee for the Scrutiny of Bills recognised that the use of dogs would improve capability to detect explosives and other hazardous material. However, it sought advice from the Minister about the justification for the need for dogs in relation to functions other than that to detect explosives and other hazardous material.⁴¹ Defence responded that:

The presence of military working dogs can also be a very effective deterrent to trespassers and assist in avoiding a situation escalating to a point where injury to personnel or damage to assets may occur.⁴²

3.32 Defence further emphasised that it maintains 'stringent policies and procedures around the training and use of military working dogs' and that working dog handlers 'are required to only use such force as is reasonable and necessary and direct

37 The Hon Stephen Smith MP, Minister for Defence, Second Reading Speech, *House Hansard*, 29 September 2010, p. 12.

38 Defence Legislation Amendment (Security of Defence Premises) Bill 2010, s. 72M.

39 *Explanatory Memorandum*, Defence Legislation Amendment (Security of Defence Premises) Bill 2010, p. 19.

40 Department of Defence, *Submission 8A*, p. 7.

41 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 8 of 2010*, 27 October 2010, p. 37.

42 Department of Defence, *Submission 8A*, p. 7.

their dogs in such a manner as to prevent unreasonable injury to persons or damage to property'. Defence emphasised that the use of dogs to assist with the conduct of searchers or other functions and powers under the bill is 'limited to security authorised Defence Force members who are also fully qualified dog handlers'.⁴³

3.33 In relation to the use of a dog to conduct security functions, there are similar provisions in both federal and state legislation. Section 12A of the *Australian Federal Police Act 1979* provides that an 'AFP dog handler' (who is a member or a protective service officer) is entitled, in entering, or being on or in, the premises or place, to be accompanied by an AFP dog.

3.34 In New South Wales, Part 11 and 13 respectively of the *Law Enforcement (Powers and Responsibilities) Act 2002* entitle police officers to use a dog to search a person for the purpose of detecting a drug offence or a relevant firearm or explosives offence. Under the Act, police can also use a dog to carry out general drug detection in relation to persons in or outside pubs and clubs, sporting events, concerts and other places of public entertainment as well as on certain public transport vehicles, platforms or stops. The Act requires that a police officer keep the dog under control and take reasonable precautions to ensure that it does not touch the person.

3.35 The committee recognises that the use of dogs can be an important and valuable aspect of policing when conducting searches and related security functions. The committee has considered the concerns raised by the Committee for the Scrutiny of Bills that dogs may be used by security authorised members to assist in restraining, detaining or removing persons. It notes, however, the limitation imposed by the legislation that dogs can only be used if considered 'reasonably necessary' and is satisfied by the assurances of Defence in regard to the training of the dogs and their handlers.

Safeguards on the exercise of power

3.36 Division 6 of the bill details the limitations and safeguards on the exercise of power by defence security officials.

3.37 In exercising their power, defence security officials are required under section 72B to produce an identity card for inspection by the person and to inform them of the effect of a refusal to comply with a request or requirement before making such a request or requirement. Similarly, defence security officials must not conduct a search (including a limited search) of a person, vehicle, vessel or aircraft without first producing their identity cards for inspection. Where the search is non-consensual, such officials must inform the person of the effect of hindering or obstructing the search before it is conducted.⁴⁴

43 Department of Defence, *Submission 8A*, p. 7.

44 Defence Legislation Amendment (Security of Defence Premises) Bill 2010, ss. 72B(2).

3.38 There are, however, exceptions to this provision. Under subsection 72B(3), officials are not obliged to produce their identity card or inform the person of the effect of hindering or obstructing the search prior to undertaking it where:

- a non-consensual search is required of a person, vehicle, vessel or aircraft about to pass a defence access control point; and
- there is reasonable grounds to believe that the person, vehicle, vessel or aircraft constitutes a threat to the safety of persons on defence premises; and
- the defence security official conducting the search produces his/her identity card as soon as practicable during or after the search and at that time, informs the person of the effect of hindering or obstructing the search.⁴⁵

Protective service offences

3.39 The bill creates three new protective service offences:

- section 71V: refusing to provide evidence required under Division 4;
- section 71W: hindering or obstructing a search under Division 4; and
- section 72P: unauthorised entry on defence premises or defence accommodation.

3.40 In relation to section 71V, the Explanatory Memorandum states:

To assist with the enforcement of the non-consensual identification requirements under Division 4 of this Part, this section establishes an offence, carrying a maximum penalty of 20 penalty units, if a person who is on defence premises refuses or fails to provide evidence of their identity or authority to be on the premises, or provides information that is false in a material particular.

However, the offence will not apply if the special defence security official did not comply with the requirement to produce their identity card and explain the effect of refusing to comply with the requirement, as stipulated at section 72B, before exercising a power under this Part.⁴⁶

3.41 The Explanatory Memorandum also elaborated on section 71W, noting that this section carries a maximum penalty of 50 penalty units, 'if a person hinders or obstructs a search'. It also indicated that:

...the offence will not apply if the special defence security official did not comply with the requirement to produce their identity card and explain the

45 Defence Legislation Amendment (Security of Defence Premises) Bill 2010, ss. 72B(3) and *Explanatory Memorandum*, Defence Legislation Amendment (Security of Defence Premises) Bill 2010, p. 16.

46 *Explanatory Memorandum*, Defence Legislation Amendment (Security of Defence Premises) Bill 2010, p. 14.

effect of refusing to comply with a search, as stipulated at section 72B, before exercising a power under this Part.⁴⁷

3.42 The Senate Standing Committee for the Scrutiny of Bills argued that both section 71V and section 71W respectively amounted to a strict liability offence.⁴⁸ It noted that whilst 71W was not expressed as such in the bill, the Explanatory Memorandum claims that it is.⁴⁹ The committee sought clarification from the Minister as to whether and if so, why, it was intended that the offence proposed in section 71W be a strict liability offence. In its supplementary submission, Defence clarified that the Explanatory Memorandum 'incorrectly states' that 71W is a strict liability offence and that its text would be amended.⁵⁰ The scrutiny committee raised a further matter as to whether consideration had been given to 'adequately warning' persons entering defence premises that they may be subject to a non-consensual search. It suggested that such a warning 'may offer a practical protection to personal rights without undermining the purposes sought to be achieved by the amendments'.⁵¹ Similarly, Victoria Police took the view that it was appropriate to inform persons entering defence premises that they may be subject to a non-consensual search and of the subsequent offence of refusal.⁵²

3.43 When referring the bill for inquiry, the Selection of Bills Committee also noted 'whether the bill ought to provide for people entering defence premises to be notified that they may be subject to a non-consensual search and may be guilty of an offence if they do not cooperate'.⁵³

3.44 Such notification could be either oral or written. In terms of the latter, there are signboards at the entrance to Defence bases including that at the Holsworthy Base which state that it is a condition of entry that 'all persons present, upon request, any vehicle, bag, briefcase, or other container for security inspection upon entering and leaving'. Similar notification is explicitly provided for in relation to declared explosive ordnance depots under paragraph 71L(1)(b) of subdivision B of the bill:

Signs stating that it is a condition of entry that persons consent to searches as provided by this subdivision are to be prominently displayed at the

47 *Explanatory Memorandum*, Defence Legislation Amendment (Security of Defence Premises) Bill 2010, p. 14.

48 The application of strict liability negates the requirement to prove fault (*A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, December 2007, p. 24).

49 *Explanatory Memorandum*, Defence Legislation Amendment (Security of Defence Premises) Bill 2010, p. 14.

50 Department of Defence, *Submission 8A*, p. 6.

51 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 8 of 2010*, 27 October 2010, p. 34.

52 Victoria Police, *Submission 3A*, p. 1.

53 Senate Standing Committee for the Selection of Bills, *Report No. 11 of 2010*, 30 September 2010, Appendix 11.

entrance to the declared explosive ordnance depot and at regular intervals around the perimeter.⁵⁴

3.45 However, there is no requirement at Defence bases or declared explosive ordnance depots for written notification of a possible non-consensual search and of the offence of non-compliance. Under subsection 71L(1), notification signs stating that a condition of entry is that a person consent to a search must be displayed at the entrance of such a depot and at regular intervals around the perimeter.

3.46 The only other requirement is that in relation to Commonwealth land. The *Crimes Act 1914* (subsection 89A(5)) determines that a notice is posted on prohibited Commonwealth land 'to the effect that trespassing upon the land is prohibited'.⁵⁵ The sign at the North Bandiana barracks for example states:

Trespassing is prohibited. It is a punishable offence for a person to be on this property without lawful excuse.

3.47 The Western Australia Department of the Premier and Cabinet advised that the view of the Western Australia Police was that 'posted signage outlining these requirements would be sufficient to notify people entering defence premises'.⁵⁶

3.48 In response to such views and concerns about appropriate notification, Defence stated that it intends to implement a number of administrative measures appropriate to the nature and composition of Defence premises (which includes movable assets including aircraft). Such measures would include:

- (a) prominently displaying signs at the entrance to Defence bases or facilities notifying people that they, their carried items and vehicles may be subject to consensual and non-consensual searches;
- (b) conducting a comprehensive awareness campaign, prior to the introduction of the Bill's measures to ensure that all Defence personnel and contractors are aware of the Bill's provisions and their rights and responsibilities in relation to consensual and non-consensual searches;
- (c) incorporating appropriate advice on the Bill's provisions in recruitment material for all advertised Defence vacancies and tender to ensure prospective employees and contractors are aware of Defence's expectations and security requirements;
- (d) addressing the Bill's provisions during staff and contractor induction training and in regular, mandatory security awareness training; and

54 *Explanatory Memorandum*, Defence Legislation Amendment (Security of Defence Premises) Bill 2010, p. 11.

55 Whilst there are trespass offences in the *Defence Act 1903*, there is no requirement for written notice of trespass equivalent to that in the *Crimes Act 1914*.

56 Western Australia Department of the Premier and Cabinet, *Submission 9*, p. 1.

- (e) requiring Defence Force members and public servants who are hosting or escorting visitors on Defence premises to notify visitors of search requirements.⁵⁷

3.49 In terms of oral notification, as previously noted, subsection 72B(2) regarding non-consensual searches requires a defence security official to inform the person of the effect of hindering or obstructing the search before it is undertaken. Even in circumstances of exemption from this provision where there is reason to believe that the person or vehicle constitutes a threat, the involved official is required to inform the person of the effect of hindering or obstructing the search 'as soon as practicable while conducting, or after conducting, the search'.⁵⁸

Committee view

3.50 The need for adequate notification (oral and written) must be balanced against the need for practicality to ensure that provisions for notification are not overly onerous. Given the extent of Defence's estate which, according to the Minister covers in excess of three million hectares of land, the committee appreciates that the provision of signs across vast stretches of land would be an impractical undertaking.⁵⁹ It does, however, recognise the various administrative measures that Defence has committed to implement to provide practical and effective alternatives. Such measures supplement the trespass signage required under the *Crimes Act 1914* which already serves as a warning of entry to Commonwealth land. The committee considers this requirement as adequate notification in relation to the bill's third protective service offence concerning unauthorised entry on defence premises or defence accommodation (section 72P).

3.51 The committee recognises that the commitment of Defence to display signs prominently at the entrance to Defence bases or facilities notifying people of consensual and non-consensual searches requirements may alleviate the concerns raised by the scrutiny committee. It holds the view, however, that as the bill creates new offences, prior written warning about these offences should also be provided. It recommends, therefore, that such signs also clearly state that penalties apply for non-compliance.

3.52 Written notification of the protective service offences of refusing to provide evidence when required or giving false evidence (71V) and hindering or obstructing a search (71W) coupled with the requirements on the part of defence security officials to inform the person orally of the effect of non-compliance would provide adequate and appropriate notification.

57 Department of Defence, *Submission 8*, p. 3.

58 Defence Legislation Amendment (Security of Defence Premises) Bill 2010, ss. 72B(3)(c).

59 The Hon Stephen Smith MP, Minister for Defence, Second Reading Speech, *House Hansard*, 29 September 2010, p. 13.

Recommendation 1

3.53 The committee recommends that the Department of Defence signs at entrances to Defence bases and facilities provide notification that penalties may apply for offences under sections 71V and 71W respectively of the bill.

Update of trespass offence and associated arrest power

3.54 Item 2 of the bill repeals the existing subsection 82(3) of the *Defence Act 1903* and replaces it with section 72P to ensure consistency with other provisions in the bill regarding defence premises. Under the new provisions, unauthorised entry or trespass is defined in the Act as an offence if the person enters or is on defence premises or defence accommodation and is not authorised to be there. The Explanatory Memorandum provides the rationale for the provision's extension to include Defence accommodation within Australia:

Noting that accommodation buildings which are used by numerous Defence Force members represent a potentially attractive terrorist target, the policy intent is to ensure that defence accommodation has explicit coverage for the purposes of the trespass offence and related arrest power in the new Part. It is not intended, however, that the proposed search and related enforcement powers provided in the new Part will be exercised on defence accommodation.⁶⁰

3.55 The proposed subsection 72P(2) seeks to empower members of the ADF, AFP and state/territory police to arrest any person without a warrant if it is believed that the person has committed an offence of trespass. The offence of trespass is a protective service offence for the purposes of the *Australian Federal Police Act 1979*.

3.56 Section 72K requires a member the Defence Force who has arrested a person for trespass to bring the person before the AFP or member of the state or territory police as soon as practicable after the arrest.

3.57 The bill proposes to amend the monetary penalty of \$40 for the offence of trespass with a new maximum penalty of \$5500 for the offence of trespassing on defence premises or accommodation. In arguing that one of the most fundamental means to improve security at Defence premises is to deter unauthorised access to such sites, Defence emphasised that the current penalty is not sufficient to act as an effective deterrent and does not reflect the potential threat posed to security.⁶¹ It noted,

60 *Explanatory Memorandum*, Defence Legislation Amendment (Security of Defence Premises) Bill 2010, p. 5. See also statement by the Minister for Defence that as the department's estate covers over three million hectares of land, Defence proposes to address the challenge of detecting trespassers by increasing the use of optical surveillance on defence premises which may include 'video surveillance, including close circuit television, or CCTV'. The Hon Stephen Smith MP, Minister for Defence, Second Reading Speech, *House Hansard*, 29 September 2010, p. 13.

61 Department of Defence, *Submission 8*, p. 6.

moreover, that the proposed penalty of 50 penalty points, equivalent to \$5500 is in line with current Commonwealth criminal law policy.⁶²

Optical surveillance

3.58 In light of the magnitude of Defence's holdings which pose a major challenge to detecting trespassers, particularly where detection is totally reliant upon the use of manned patrols, the bill introduces measures to enforce the new trespass offence. These measures facilitate the increased use of optical surveillance devices by Defence for the purposes of monitoring security at Defence premises and safety of people on them.⁶³

3.59 Section 72Q provides Defence, the ADF or a contracted security guard with the power to collect information, including personal information by way of an optical surveillance device. Thereafter, Defence or the ADF may disclose information collected in this manner to an intelligence or security agency, AFP or state/territory police force, or to the Director of Public Prosecutions of the Commonwealth or a state or territory. A disclosure of personal information in this form is authorised by law for the purposes of the Information Privacy Principle 11 in section 14 of the *Privacy Act 1988*.

Powers in relation to protests

3.60 Subsection 72L of the bill states that in exercising their powers, defence security officials 'must not stop or restrict any protest, dissent, assembly or industrial action', unless there is a reasonable likelihood of death or serious injury or the commission of a criminal offence.

Committee conclusion

3.61 Whilst the committee acknowledges the concerns raised by witnesses particularly in relation to the functions conferred on defence contracted security guards, it is satisfied that the limitations on their powers are adequate. The primary function of defence contracted security guards is to exercise powers with consent. Only in defined circumstances are they able to restrain and detain a person in order to place them into the custody of a law enforcement official. Similarly, the committee is satisfied that the various limitations on the use of force including the provision that such force be 'necessary and reasonable' provide adequate safeguards on the exercise of power.

3.62 The committee also recognises that ongoing consultation between Defence and the AFP and other federal agencies will be required to identify appropriate training for Defence security officials and address any concerns in relation to military

62 Department of Defence, *Submission 8*, p. 12.

63 Department of Defence, *Submission 8*, p. 7.

and civilian cooperation. It has noted that joint exercises between defence security officials and police may be an appropriate means to clarify the demarcation in power and responsibility between the respective forces.

3.63 Finally, the committee supports the initiative of Defence to display signs notifying people that they may be subject to consensual and non-consensual searches and recommends that in addition, such signs notify persons that penalties may apply for non-compliance with the non-consensual requirements.

