

Chapter 4

The use of force

4.1 A key recommendation of the Review of Defence Protective Security Arrangements (the review) was to clarify the legal issues around Defence Force members acting in self-defence in the event of a no-warning armed attack on a defence base.¹ In this chapter, the committee considers areas of concern associated with the powers providing for the use of force including lethal force.

Legal regime for the use of force involving death or grievous bodily harm

4.2 Respective Commonwealth, state and territory legislation recognise the right to defend oneself and others who are threatened. Although Defence security officials have such rights, the bill seeks to clarify the legal issues surrounding designated Defence Force officials acting in self defence in the event of a no-warning attack on Defence premises. In this regard, Defence noted that the bill:

...will provide certainty as to the scope of actions that authorised and appropriately trained Defence Force members could take, rather than having to refer to the various Commonwealth, State and Territory legislative provisions that provide a defence of self-defence.²

4.3 Sections 72H, 71X and 72G of the bill deal with the use of force by security authorised members of the Defence Force.³ Section 71X empowers such officials to take action to protect themselves or others in response to an actual or imminent attack on defence premises which is likely or intended to cause death or serious injury. According to the Explanatory Memorandum, for this purpose, an 'attack':

...covers an armed attack, attack by the detonation of an explosive device or any other conduct, whether or not involving firearms or explosives, which is designed to kill or could result in the death or serious injury of persons on defence premises.⁴

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- 1 'Defence allowed to shoot terrorists', *The Sydney Morning Herald*, 24 June 2010, <http://news.smh.com.au/breaking-news-national/defence-allowed-to-shoot-terrorists20100624z38y.html> (accessed 1 October 2010), Senator the Hon Mark Arbib, Second Reading Speech, *Senate Hansard*, 24 June 2010, p. 4337.
 - 2 Department of Defence, *Submission 8*, p. 5.
 - 3 A security authorised member of the Defence Force is a person who is an ADF member and authorised by the Minister or included in a class of persons authorised by the Minister and satisfies the training and qualification requirements determined by the Minister. See further section 71C of the Defence Legislation Amendment (Security of Defence Premises) Bill 2010.
 - 4 *Explanatory Memorandum*, Defence Legislation Amendment (Security of Defence Premises) Bill 2010, p. 14.

4.4 Subsection 72H(1) specifies that in using force, such an official must not do anything likely to cause the death of, or grievous bodily harm to, the person, unless there are reasonable grounds to believe that:

- a) doing so is necessary to prevent the death of, or serious injury to, another person (including themselves); and
- b) the threat of death or injury is caused by an attack on defence premises, or on people on defence premises, that is occurring or is imminent.

4.5 Provisions contained in 71X and 72H(1) provide, therefore, explicit authority to security authorised members of the Defence Force to use lethal force when under attack to prevent death or serious injury to themselves or others. No other defence security official is authorised under provisions of the bill to exercise force likely to cause death or grievous bodily harm.⁵ However, as a general rule applicable to all defence security officials including security authorised members of the Defence Force, the use of force must be 'necessary and reasonable'.⁶ The bill does not provide, therefore, protection to a security authorised member of the Defence Force who uses force that is greater than that authorised.

4.6 Subsection 72H(2) provides that a security authorised member of the Defence Force may use lethal force on a person attempting to escape being detained by fleeing if the person has been called on to surrender and the official believes on reasonable grounds that the person cannot be apprehended in any other manner. Subject to provisions contained in subsection 72H(1), the use of lethal force on such a person is only authorised if such a course of action is necessary to prevent death or serious injury to persons on defence premises in the event of an attack that is imminent or occurring.

4.7 This provision is modelled on Section 51T of the *Defence Act 1903* which applies to the use of reasonable and necessary force by Defence Force members in assisting civilian authorities under Part IIIAAA. According to the Explanatory Memorandum, consistency across both sections will ensure the same rules apply to the use of force under Part IIIAAA and this new Part, thereby providing, from an operational perspective, 'certainty in situations where both regimes could potentially apply at different points of time'.⁷

4.8 Whilst clarifying the powers of appropriately trained and authorised members of the Defence Force in relation to the use of lethal force, the bill does not alter the primacy of civil law enforcement authorities in responding to security incidents at

5 *Explanatory Memorandum*, Defence Legislation Amendment (Security of Defence Premises) Bill 2010, pp. 14, 17–18.

6 Defence Legislation Amendment (Security of Defence Premises) Bill 2010, ss. 71G(1).

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

defence premises. Defence Minister, the Hon Stephen Smith MP stated in this regard that:

A full response to a terrorist incident clearly remains the responsibility of civil law enforcement authorities, and would be managed under the National Counter-Terrorism Plan.⁸

4.9 The Senate Scrutiny of Bills Committee voiced concerns in relation to the extraordinary power of lethal force. The committee raised the general question of whether an 'appropriate balance had been struck' between 'personal rights and liberties and interests' in maintaining the security of Defence bases and responding to security threats.⁹ The scrutiny committee took the view that the central question of whether these significant new powers trespass on personal rights and liberties unduly is a matter 'to be **left to the Senate as a whole**'.¹⁰

Legal regime for the use of non-lethal force

4.10 In contrast to the powers granted to security authorised members of the Defence Force, contracted defence security guards and defence security screening employees who are Australian Public Service employees of the Department of Defence are not empowered to use lethal force.

4.11 Subsection 72G(2) specifies that a contracted defence security guard or defence security screening employee must not, in using force, 'do anything that is likely to cause the death of, or grievous bodily harm to, the person'.

4.12 Whilst the use of lethal force is prohibited under this provision, such officials would be able, when acting in self-defence, to rely upon Commonwealth, state and territory statutory offences and the common law on self-defence as previously noted.

Scope of defence premises

4.13 The Senate Standing Committee for the Scrutiny of Bills raised concerns about the scope of defence premises in light of the seriousness of the powers conferred on officials including non-consensual search powers and the use of lethal force. It queried whether defence premises as defined in section 71A 'includes land which may have a defence purpose, but which is also being used for another purpose (such as an

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

9 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 8 of 2010*, 27 October 2010, p. 35.

10 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 8 of 2010*, 27 October 2010, p. 35.

immigration facility)'. It also questioned whether it was appropriate for such powers to apply in relation to all defence premises.¹¹

4.14 The committee notes that Defence leases property and office space to contractors, other government agencies and to local civic authorities. The terms of such leases range from 1 year to 99 years.¹² It also notes that the bill defines defence premises as land, place, building or other structure, vessel, vehicle or aircraft 'that is in Australia, and is owned or occupied by the Commonwealth for use by the Defence Force or the Department'.¹³ In light of questions surrounding the scope of Defence premises, Defence highlighted that land or buildings that may have a Defence purposes, 'but which are not currently used by the Defence Force or the Department of Defence do not meet the definition of defence premises included in the Bill'. It noted in its supplementary submission that the Explanatory Memorandum would be amended to include a statement to this effect.¹⁴

4.15 The committee recommends that the government look closely at the definition of defence premises in the bill to ensure that its meaning is clear and unambiguous and does not extend to Defence property that is being used in part, temporarily or otherwise for other purposes.

Committee conclusion

4.16 The committee recognises that the bill provides a range of powers to designated defence security officials to enable the ADF and Defence to deter, detect and respond to incidents that threaten the security of Defence bases, facilities, assets and personnel within Australia. It is satisfied that the safeguards placed on the powers conferred on defence security officials are adequate to ensure that such powers are utilised appropriately.

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

12 Department of Defence, *Defence Annual Report 2008-09*, Schedule of Commitments as at 30 June 2009, http://www.defence.gov.au/budget/08-09/dar/vol1/append09_08.htm (accessed 9 November 2010).

13 Defence Legislation Amendment (Security of Defence Premises) Bill 2010, s.71A.

14 Department of Defence, *Submission 8A*, p. 3.