

The Senate

Foreign Affairs, Defence and Trade
Legislation Committee

Defence Legislation Amendment (Security of Defence
Premises) Bill 2010 [Provisions]

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Table of contents

Members of the committee	iii
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Chapter 1

Introduction	1
Referral of the bill	1
Purpose of the bill.....	1
Submissions	2
Scrutiny of Bills Committee	2
Acknowledgments	3

Chapter 2

Background to and purpose of the bill	5
The Department of Defence and its estate.....	5
Security risks	6
Response to new challenges	7
Objectives and scope of the bill.....	10
Views on the bill.....	12

Chapter 3

Consensual and non-consensual security functions	15
Statutory regime of search and seizure powers	15
Update of trespass offence and associated arrest power	29
Optical surveillance	30
Powers in relation to protests	30
Committee conclusion	30

Chapter 4

The use of force	31
Legal regime for the use of force involving death or grievous bodily harm.....	31
Legal regime for the use of non-lethal force	33
Scope of defence premises	33
Committee conclusion	34

Chapter 5

Training of defence security officials.....	35
Adequacy of training	35
Training requirements in legislative instruments	36

Appendix 1

Public submissions.....	41
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Appendix 2

Supplementary submission—Department of Defence	43
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Chapter 1

Introduction

Referral of the bill

1.1 On 24 June 2010, the Defence Legislation Amendment (Security of Defence Premises) Bill 2010 was introduced in the Senate. On the same day, the Senate referred the bill to the Senate Foreign Affairs, Defence and Trade Legislation Committee for inquiry and report by 24 August 2010. On 19 July 2010, the Governor-General prorogued the 42nd Parliament and dissolved the House of Representatives. After due consideration, the committee reported to the Senate that it had resolved not to continue its inquiry into the provisions of the bill.

1.2 On 29 September, the bill was reintroduced in the House of Representatives. The following day, the Senate referred the provisions of the bill to the committee for inquiry and report by 16 November 2010. On 16 November, the Senate granted an extension of time to report to the last day of the second sitting week in February 2011 with 3 March 2011 set as the tabling date.

1.3 Apart from two minor technical additions, which do not alter the substance or intent of the legislation, the bill is substantially the same as that introduced in the previous Parliament. The amendments are intended to clarify the safeguards that would apply to the use of force where a person is fleeing and to make clear that the Secretary of the Department of Defence's approval of identity cards for Defence security officials must be in writing.¹

Purpose of the bill

1.4 The Defence Legislation Amendment (Security of Defence Premises) Bill 2010 (the bill) will insert a new Part VIA in the *Defence Act 1903* (the Act) and make associated amendments to the *Australian Federal Police Act 1979*.

1.5 The Explanatory Memorandum notes that the bill gives effect to 'Australian Government initiatives to enhance the security of Defence bases, facilities, assets, and personnel within Australia in response to the changing nature of security threats'.² The amendments to the Act would:

- clarify that appropriately authorised members of the Defence Force may use 'reasonable and necessary force, including lethal force, to prevent the death of, or serious injury to a person in connection with an attack on Defence premises';

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

2 *Explanatory Memorandum*, Defence Legislation Amendment (Security of Defence Premises) Bill 2010, p. 1.

- establish a statutory regime of search and seizure powers to operate at defence premises to 'reduce the risk of dangerous items entering Defence facilities, or material and classified information being unlawfully removed';
- update and relocate the trespass offence and related arrest power in section 82 of the *Defence Act 1903*;
- support the enforcement of the trespass offence by authorising Defence to use overt optical surveillance devices to monitor the security of Defence premises and to disclose the information captured by these devices to law enforcement agencies and Commonwealth, state and territory public prosecution authorities; and
- clarify that this Part of the bill does not limit the exercise of powers of a defence security official, member of Defence or any other person, under the act or any other law.³

Submissions

1.6 The committee advertised the inquiry on its website and in *The Australian* on 5, 9, 16 and 30 June, 14 July, 11 August and 13 October 2010. The committee wrote to the Minister for Defence and respective federal, state and territory governments and police forces, inviting them or their departments or related agencies to make a submission. A number of other organisations, commentators, and academics were also contacted and invited to make submissions to the inquiry. The committee received 10 submissions, which are listed at Appendix 1.

Scrutiny of Bills Committee

1.7 The Senate Standing Committee for the Scrutiny of Bills considered the bill and raised a number of concerns in relation to various powers conferred on defence security officials. These concerns are detailed and discussed throughout the report. At the centre of such concerns is whether powers conferred on defence security officials, including the authority to use lethal force and perform non-consensual security functions, unduly trespass on personal rights and liberties. Underlying the concerns of the scrutiny committee was whether security interests were balanced with that of individual rights: In its view:

...the general question of whether an appropriate balance has been struck in these provisions between (1) personal rights and liberties and (2) interests in maintaining the security of Defence bases and responding to security threats is a question which may appropriately be **left to the consideration of the Senate as a whole**.⁴

3 *Explanatory Memorandum*, Defence Legislation Amendment (Security of Defence Premises) Bill 2010, p. 2.

4 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 8 of 2010*, 27 October 2010, p. 33.

1.8 This matter of appropriate balance will be central to the committee's consideration.

Acknowledgments

1.9 The committee thanks those who assisted with the inquiry.

1.10 The committee would also like to take the opportunity to note that the Explanatory Memorandum provides useful information on the intentions of the bill and its key provisions.

Chapter 2

Background to and purpose of the bill

2.1 The bill gives effect to initiatives to enhance the security of Defence bases, facilities, assets and personnel within Australia. This chapter considers the main security threats to Defence personnel and property in Australia and the government's legislative response.

The Department of Defence and its estate

2.2 The mission of the Department of Defence (Defence) is to 'defend Australia and its interests' and:

Defence resources, including equipment and personnel, will be directed to support this mission as first priority.¹

2.3 In sustaining its mission, Defence's primary focus is to 'protect and advance Australia's strategic interests by providing support to the Government and the Australian Defence Force (ADF) for the direct defence of Australia and its unique strategic interests'.² In this context, the Defence White Paper 2009 recognises Defence bases and infrastructure as 'enabling functions' which, together with other support mechanisms, are considered to be the 'backbone' of Defence business.³ The facilities and infrastructure of the Defence estate support the activities of over 90,000 people across the country.⁴ In relation to its estate, Defence noted that it is:

... the largest and most complex land and property holding in Australia. It provides the facilities which directly enable the generation, projection and sustainment of operational capability. The Defence estate also supports our personnel, providing them with a safe place to work and their families to live.⁵

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- 1 Department of Defence website, <http://www.defence.gov.au/footer/contacts.htm> (accessed 2 November 2010).
 - 2 Department of Defence, 'Portfolio Overview', *Portfolio Budget Statements 2010–11*, Commonwealth of Australia, Canberra, p. 3, http://www.defence.gov.au/budget/10-11/pbs/2010-2011_Defence_PBS_02_overview.pdf (accessed 2 November 2010).
 - 3 Department of Defence, *Defending Australia in the Asia Pacific Century: Force 2030*, Defence White Paper 2009, p. 119, http://www.defence.gov.au/whitepaper/docs/defence_white_paper_2009.pdf (accessed 2 November 2010).
 - 4 Department of Defence Infrastructure Division, *A Message from HI—Infrastructure Division*, John Owens—Head Infrastructure Division, undated, <http://www.defence.gov.au/id/Message%20from%20HI.htm> (accessed 2 November 2010).
 - 5 Department of Defence, *Defending Australia in the Asia Pacific Century: Force 2030*, Defence White Paper 2009, p. 121, http://www.defence.gov.au/whitepaper/docs/defence_white_paper_2009.pdf (accessed 2 November 2010).

2.4 There are approximately 88 major Defence bases or Defence premises in Australia.⁶ The Defence estate which covers 3.4 million hectares of land⁷ comprises approximately 370 owned properties and an additional 350 under lease.⁸ The estate includes 34,000 structures and consists of training areas; command headquarters; airfields; ship repair and wharfing facilities; accommodation; depots; warehouses and explosive ordnance storehouses; training, education, research and testing facilities; and office buildings. The estimated gross replacement value of the estate is over \$64 billion.⁹

Security risks

2.5 Mr Clive Williams from the Strategic and Defence Studies Centre noted that theft by insiders as well as external parties of hard-to-obtain and valuable items stored at defence facilities was the main security threat to Defence bases, facilities, assets and personnel in Australia. He commented that:

Such items can include night vision devices, operational military equipment, weapons and ammunition, and military ordnance and explosives. The ongoing concern at some Defence facilities is the potential for an organised attempt to gain access to weapons and explosives.¹⁰

2.6 In addition, Defence cited the threat of terrorism as real, persistent and evolving and that 'Defence personnel and premises are potentially attractive targets for terrorist groups'. It informed the committee that:

To meet these challenges, Defence maintains a framework of protective security measures to safeguard its personnel and premises. This framework consists of a range of physical and personnel security measures, coupled with intelligence, to provide a layered response to mitigate threats.¹¹

2.7 Defence noted, however, that large numbers of people regularly flow in and out of Defence premises on a daily basis. Moreover, under the current regime, a

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

7 Department of Defence, *Defending Australia in the Asia Pacific Century: Force 2030*, Defence White Paper 2009, p. 122, http://www.defence.gov.au/whitepaper/docs/defence_white_paper_2009.pdf (accessed 2 November 2010).

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

9 Defence Support Group, Department of Defence, *Overview of Facility Operations*, March 2009, p. 7, http://www.defence.gov.au/im/estate_maintenance/11/docs/gesst/11.180a%20GESST16%20FACOPS%20Overview%20090513.ppt (accessed 2 November 2010). Department of Defence Infrastructure Division, *A Message from HI—Infrastructure Division*, John Owens—Head Infrastructure Division, undated, <http://www.defence.gov.au/id/Message%20from%20HI.htm> (accessed 2 November 2010).

10 Clive Williams, *Submission 1*, p. 1.

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

Defence Force member or Australian Public Service (APS) employee cannot be denied access to Defence premises because of a refusal to consent to a search or detained on exit unless there is a reasonable suspicion that the individual had committed an offence.¹² It identified a number of other restrictions in relation to security functions on Defence premises. For example, whilst access by contractors can be made conditional, at present the ability to conduct a search in relation to a contractor is dependent on the terms of their contract. Further, even though visitors may be subject to a consensual search on entry, any attempt to conduct a search on exit is dependent on consent being given to that action, unless there is reasonable suspicion that the individual has committed an offence. In relation to these restrictions, Defence stated:

The present lack of explicit search, seizure and related powers significantly impedes Defence's ability to reduce the risk of unauthorised items being brought onto Defence premises and dangerous, restricted or classified items and information being improperly removed.¹³

Response to new challenges

2.8 Two high profile incidents highlighted the need for Defence to review its security arrangements. In 2008, a former army captain was convicted and imprisoned in relation to 21 offences over the theft and illicit sale of ten rocket launchers between 2001 and 2003 to a convicted criminal with terrorist links.¹⁴ The case illustrated the 'risk of improper removal of dangerous, restricted or classified items from defence bases'.¹⁵ Similarly, in 2007 seven M72 shoulder-fired launchers were stolen from an ADF depot at Orange Hills.¹⁶

2.9 The second major public incident happened on 4 August 2009 when five individuals were arrested on allegations of planning an armed attack on the Holsworthy Army Base.¹⁷ The alleged plan involved storming the barracks with automatic weapons and shooting army personnel or others until they had used up their

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

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

14 Sally Neighbour, 'No sign of stolen rocket-launchers', *The Australian*, 17 October 2009, <http://www.theaustralian.com.au/news/no-sign-of-stolen-rocket-launchers/story-e6frg6o6-1225787746734> (accessed 1 October 2010), 'Terror arms soldier Shane Della-Vedova jailed', *The Daily Telegraph*, 16 May 2008, <http://www.dailytelegraph.com.au/news/nsw-act/terror-arms-soldier-jailed/story-e6freuzi-1111116354690> (accessed 1 October 2010).

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

16 Sally Neighbour, 'No sign of stolen rocket-launchers', *The Australian*, 17 October 2009, <http://www.theaustralian.com.au/news/no-sign-of-stolen-rocket-launchers/story-e6frg6o6-1225787746734> (accessed 1 October 2010).

17 Milanda Rout, 'Jihad's motley crew', *The Australian*, 30 October 2009, <http://www.theaustralian.com.au/news/features/jihads-motley-crew/story-e6frg6z6-1225792580038> (accessed 1 October 2010).

ammunition, were captured or killed.¹⁸ On 23 December 2010, three of the men were found guilty of conspiring to prepare for or plan a terrorist act. The two other men were acquitted.¹⁹

2.10 Exposure of the planned attack raised concerns regarding the security of Defence bases. Mr Clive Williams, for example, argued that terrorism, and particularly Australian home grown extremism, was one of the main security threats to defence facilities. He noted, moreover, that at least three of the Islamic extremist terrorism cases in Australia since 9/11 have involved plans to attack defence facilities using explosives or firearms.²⁰

2.11 Following the arrests in relation to the planned attack on the Holsworthy base, then Prime Minister the Hon Kevin Rudd MP convened a meeting of the National Security Committee of Federal Cabinet the same day. Whilst noting the advice from the Chief of the Defence Force (CDF) Air Chief Marshal Angus Houston that security arrangements were 'adequate', Mr Rudd requested that the CDF and Defence undertake an 'immediate and comprehensive review of adequacy, given these new developments'.²¹

2.12 Reports suggested that within hours of Mr Rudd's order for an inquiry into security arrangements, two employees of the *Daily Telegraph* newspaper were caught by Defence personnel taking photographs inside the Holsworthy base for which they were charged.²² The incident prompted fresh calls for unarmed private security guards who provide frontline security at defence bases to be replaced with armed soldiers.²³

2.13 The Review of Defence Protective Security Arrangements (the review) produced a number of recommendations concerning both policy and physical security

18 Cameron Stewart and Milanda Rout, 'Somali extremists on a 'fatwa order' from God', *The Australia*, 5 August 2010, <http://www.theaustralian.com.au/news/nation/somali-extremists-on-a-fatwa-order-from-god/story-e6frg6nf-1225758010718> (accessed 1 October 2010). Paul Anderson and Norrie Ross, 'Three Melbourne men guilty of planning terror attack on NSW army base', *The Daily Telegraph*, 23 December 2010, <http://www.dailytelegraph.com.au/news/nsw-act/three-melbourne-men-guilty-of-planning-terror-attack-on-nsw-army-base/story-e6freuzi-1225975368101> (accessed 23 December 2010).

19 'Three guilty of planning terror attack', *ABC News*, 23 December 2010, <http://www.abc.net.au/news/stories/2010/12/23/3100126.htm> (accessed 24 December 2010).

20 Clive Williams, *Submission 1*, p. 1.

21 The Hon Kevin Rudd MP, Prime Minister, Transcript of Interview, *ABC Radio AM Program*, 5 August 2009, http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/9ZBU6/upload_binary/9zbu60.pdf;fileType=application/pdf (accessed 1 October 2010).

22 'Holsworthy review 'will take one month'', *The Age*, 6 August 2009, <http://news.theage.com.au/breaking-news-national/holsworthy-review-will-take-one-month-20090806-eadp.html> (accessed 1 October 2010).

23 Sean Rubinsztein-Dunlop, 'Journalists caught inside Sydney army base', *ABC News*, <http://www.abc.net.au/news/stories/2009/08/05/2647236.htm> (accessed 12 October 2010).

measures. The need to clarify legal issues surrounding Australian Defence Force (ADF) members acting in self defence in the event of a no-warning attack was one such recommendation.²⁴

2.14 On 22 October 2009, the Secretary of Defence, Dr Ian Watt, stated that the department was in the process of implementing a range of measures in accordance with the findings and recommendations of the review. He stated in this regard that:

These initiatives include strengthening Defence's protective security alert system and other policy underpinning security arrangements, additional patrolling presence by the Australian Federal Police and contracted security guards, and a range of physical security measures.²⁵

2.15 The same Defence media release also noted that no further details about the security review, its recommendations and enhanced security measures would be released.²⁶

2.16 In its submission, Defence noted that the review led to the introduction of a number of policy and security initiatives to complement pre-existing arrangements at Defence premises. It noted:

These initiatives include strengthening security policy and arrangements relating to access control, incident response and contractor guarding, together with physical measures such as improvements in perimeter fencing, security lighting, alarm systems and increased security patrols.²⁷

2.17 In the second reading speech in relation to the bill, the Defence Minister, the Hon Stephen Smith MP, stated that one of the recommendations of the review was to 'bring forward' a number of legislative amendments. These proposals are incorporated in the bill. To this extent, therefore, the bill seeks to implement recommendations of the review pertaining to legislative reform.²⁸

24 'Defence allowed to shoot terrorists', *The Sydney Morning Herald*, 24 June 2010, <http://news.smh.com.au/breaking-news-national/defence-allowed-to-shoot-terrorists-20100624-z38y.html> (accessed 1 October 2010).

25 Department of Defence, 'Defence Base Security Review–Update', *Defence Media Release*, MSPA 361/09, 22 October 2009, <http://www.defence.gov.au/media/DepartmentalTpl.cfm?CurrentId=9612> (accessed 1 October 2010).

26 Department of Defence, 'Defence Base Security Review–Update', *Defence Media Release*, MSPA 361/09, 22 October 2009, <http://www.defence.gov.au/media/DepartmentalTpl.cfm?CurrentId=9612> (accessed 1 October 2010).

27 Department of Defence, *Submission 8*, p. 5.

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

2.18 Defence argued that the implementation of provisions contained in the bill are required to continue to meet the challenges created by the 'changeable nature of security threats, to ensure the continued security and safety of Defence premises, personnel and assets within Australia'. According to Defence, the bill 'represents the first phase of legislative amendments and provides provisions of common application across Defence to deal effectively with the security of Defence premises, assets and personnel'.²⁹ A second phase will consider the requirement to implement proposals that raise more complex legal and practical issues including powers for the protection of naval vessels.

Objectives and scope of the bill

2.19 According to the Minister, the bill reflects 'the importance the government places on the security and safety of ADF members, defence employees and the Australian public'.³⁰ The bill will insert a new Part (Part VIA) into the *Defence Act 1903* to give effect to initiatives directed at enhancing the security of Defence bases, facilities, assets and personnel within Australia. In broad terms, the bill introduces measures in three key areas designed to:

- strengthen the legal regime for Defence Force members who may be required to use force involving death or grievous bodily harm;
- establish a statutory regime of search and seizure powers; and
- update the existing trespass offence and associated arrest power in the *Defence Act 1903*.

2.20 The powers introduced in the new Part confer security functions, including identity and authorisation checks, search and seizure powers, on three classes of officials, otherwise termed 'defence security officials' including:

- (a) defence contracted security guards;
- (b) security authorised members of the Defence Force; and
- (c) defence security screening employees who are Australian Public Service employees of the Department of Defence.

2.21 The role of (a) defence contracted security guards is principally restricted to performing the consensual security functions. The non-consensual powers are largely reserved for (b) security authorised members of the Defence Force and (c) defence security screening employees. Whilst all three classes of official are empowered to use force in restricted circumstances including that to restrain and detain a person, the principle that underlies such action is that such force shall be 'necessary and reasonable'. The power to use force likely to cause death or grievous bodily harm is

29 Department of Defence, *Submission 8*, p. 5.

30 The Hon Stephen Smith MP, Minister for Defence, Second Reading Speech, *House Hansard*, 29 September 2010, p. 89.

restricted to security authorised members of the Defence Force only in the context of a current or imminent attack on defence premises which is likely to cause death or serious injury to persons on defence premises. Other defence security officials are not so authorised.

2.22 In terms of the scope of application, the bill distinguishes between three locations: defence access control points, defence premises, and locations external to defence premises. The concept of a 'defence access control point' is introduced in the bill and defined in section 71A as:

...a point of entry to, or exit from, defence premises or a part of defence premises, where entry or exit is controlled or limited by any means, including but not limited to control by means of:

- (a) guarding by defence security officials; or
- (b) physical barriers such as security screens, locked doors or gates.

2.23 According to the Explanatory Memorandum, the purpose of the definition is to create identified points on defence premises where defence security officials are 'expressly authorised to exercise the identification, search and related enforcement powers proposed in the new Part' and that:

The mere presence, on Defence premises, of a sign or boundary marker, for example a fence or a painted line on a road or airport tarmac, does not of itself constitute a defence access control point for the purposes of this Part. A defence access control point will use one or more measures to limit or control access to defence premises, or a part thereof, either by identifying the person or confirming their authority to access the premises, or a part thereof. These measures may include, but are not limited to, the use of one or more of the following: the presence of defence security officials, the requirement to present access cards or other identification for inspection, electronic security barriers fitted with access card readers, electronic handheld access card readers, retinal scanners, hand scanners and comparable devices. These measures may be used in conjunction with, but not limited to, any of the following physical security controls: gates, boom gates, security bollards, locked or electronically controlled doors, and entry points to vehicles, vessels or aircrafts including gangways and stairs. In relation to the latter, a defence access control point may be established at the base of the gangway to a vessel, the stairs leading up to an aircraft or a ramp providing access to a vehicle.³¹

2.24 Defence premises is also defined in the bill to be in Australia, owned or occupied by the Commonwealth for use by the Defence Force or the Department and:

- (a) an area of land or any other place (whether or not it is enclosed or built on);

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

- (b) a building or other structure;
- (c) a vehicle, vessel or aircraft, including any fixed or moveable ramp, stairs or other means of access to, or exit from, the vehicle, vessel or aircraft;
- (d) a prohibited area, within the meaning of the *Defence (Special Undertakings) Act 1952*.³²

Views on the bill

2.25 Overall, submitters recognised the importance of this legislation and in general supported the objectives. For example, the Chief Minister, Minister for Police, Fire and Emergency Services of the Northern Territory stated:

It is quite clear that these amendments are needed and will certainly enhance the security of Defence bases, facilities, assets and personnel, which is especially relevant given the current security environment.³³

2.26 The ACT's Attorney-General and Minister for Police and Emergency Services had no concerns about the bill and emphasised that the AFP had 'substantial involvement in drafting the amendments'.³⁴ The New South Wales Department of Premier and Cabinet advised that the New South Wales Police Force also had no major concerns in relation to the bill.³⁵ The South Australia Police, the Victoria Police and Police Federation of Australia offered general support for the bill while Tasmania Police supported the proposed amendments on the basis that training and accountability provisions are put in place.³⁶ Mr Clive Williams supported an extension of the powers conferred under the bill.³⁷

2.27 Although in favour of the bill, a number of submitters raised a few concerns such as the need for delineation between the role and powers of defence security officials in relation to those of the police. They also drew attention to issues with the implementation of the provisions especially the importance of training. The Standing Committee on the Scrutiny of Bills, however, registered a number of concerns relating to undue trespass on personal rights and liberties and strict liability provisions.

32 This includes a place occupied for a special defence undertaking (section 7) and any area of land and/or water declared by the Minister to be a prohibited area for the purposes of the defence of the Commonwealth (section 8).

33 *Submission 5*.

34 ACT Legislative Assembly, *Submission 6*, p. 1.

35 New South Wales Department of Premier and Cabinet, *Submission 7*, p. 1.

36 South Australia Police, *Submission 2*, Victoria Police, *Submission 3 and 3A*, Police Federation of Australia, *Submission 4*, Western Australia Department of the Premier and Cabinet, *Submission 9*; Commissioner of Police, Tasmania, *Submission 10*.

37 Mr Clive Williams, *Submission 1*.

2.28 In the following chapters, the committee examines the provisions of the bill and key issues.

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

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.

noted, 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.

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.

Chapter 5

Training of defence security officials

Adequacy of training

5.1 When referring the bill for inquiry, the Senate Standing Committee for the Selection of Bills identified two issues dealing with training for the committee's consideration including 'whether defence personnel are adequately trained and equipped to safely detain civilians in accordance with the bill'.¹

5.2 Indeed, the importance of training was one of the dominant messages coming from the submissions. Victoria Police was firmly of the view that authorised officers and contracted defence security guards would require specialist training to ensure the appropriate exercise of search and related powers. It noted that they would need this training, 'to deal with statutory powers of arrest, detention, search of persons as well as search and seizure of property for both safety and evidence purposes'.² Similarly, the Tasmania Police referred to Defence's 'obligation to provide training for security officers at an appropriate level in relation to any legislative authorities, especially stop, search and detention issues for people and the use of lethal force'.³ The Senate Standing Committee for the Scrutiny of Bills also raised questions in relation to the powers of defence security officials, including contracted security guards, to restrain and detain. It took the view that the bill 'does not deal with the adequacy of the training of defence security officials to ensure these 'police powers' are exercised safely and appropriately'.⁴

5.3 Clearly, training is important to ensure that defence security officials carry out their duties appropriately. Training is especially important for officers authorised to use lethal force. Thus, although the New South Wales Police did not have any major concerns in relation to the bill, it did comment on training requirements for staff authorised to use lethal force.⁵

5.4 In response to the concerns about the training of security officials, Defence held that:

Under the provisions of the amendments, all Defence security officials must satisfy stringent training and qualification requirements before they can

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- 1 Senate Standing Committee for the Selection of Bills, *Report No. 11 of 2010*, 30 September 2010, Appendix 11.
 - 2 Victoria Police, *Submission 3A*, p. 1.
 - 3 Commissioner of Police, Tasmania, *Submission 10*, p. 1.
 - 4 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 8 of 2010*, 27 October 2010, p. 34.
 - 5 NSW Department of Premier and Cabinet, *Submission 7*, p. 1.

exercise any of the powers contained in this Bill, including the power to restrain and detain people. These training and qualification requirements, which will be specified in a legislative instrument, must be determined by the Minister for Defence or his delegate.⁶

5.5 The bill stipulates that the Minister must, by legislative instrument determine the training and qualification requirements for—contracted defence security guards; security authorised members of the Defence Force; defence security screening employees and those that apply to security authorised members of the Defence Force in relation to the use of dogs.⁷

5.6 In the case of contracted defence security guards and defence security screening employees; the Minister may by writing delegate this power to the Secretary or an APS employee holding or performing the duties of a SES band 3 position, an equivalent or higher position. For security authorised members of the Defence Force; the Minister may delegate this power by writing to an ADF officer of three star rank or higher. According to the Explanatory Memorandum:

This will allow developments in training associated with the use of force, to be more readily incorporated into the training requirements for security authorised members of the Defence Force.⁸

Training requirements in legislative instruments

5.7 While the Senate Standing Committee for the Scrutiny of Bills highlighted that the bill does not deal with the adequacy of training to ensure that conferred powers are exercised 'safely and appropriately' it also questioned whether 'appropriate parameters' for training requirements should be included in the bill.⁹ It questioned why training and qualifications in relation to security authorised members of the Defence Force were not dealt with in the primary legislation. Its concern was that there are no provisions which allow it to assess with confidence 'the question of whether officers entitled to use lethal force will have received appropriate training and instruction'.¹⁰ The Senate Standing Committee for the Selection of Bills also questioned whether it was appropriate to leave training requirements for officers authorised to exercise deadly force to be specified in legislative instrument.¹¹

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

7 Subsections 71B(4), 71C(4) and 71D(4) and paragraph 71C(5)(b).

8 *Explanatory Memorandum*, Defence Legislation Amendment (Security of Defence Premises) Bill 2010, p. 9.

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

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

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

5.8 The New South Wales Department of Premier and Cabinet, however, cautioned that if training requirements are embedded in the bill, there may be concerns that 'if an officer uses the requisite powers without having completed all of the training requirements then he or she may be acting unlawfully'.¹² The submission acknowledged, however, that the majority of these powers already exist in any event. Indeed, in such an event where force is used in a self-defence capacity, such officials would continue to be able to rely upon the federal and state or territory legislative provisions that provide a defence of self-defence.

5.9 Given the extraordinary powers involved, the committee acknowledges the concerns raised in relation to the training requirements for officers empowered to use deadly force being specified in legislative instrument rather than the primary legislation. However, it also appreciates that the security environment is fluid and dynamic and that training requirements must be responsive to such changes. In this regard, the need for training requirements in relation to all defence security personnel to adapt in a timely manner is vital to a dynamic security environment in which such officials operate. In its submission, Defence highlighted this consideration:

The use of a legislative instrument also enables the training and qualification requirements to be updated rapidly, for example in response to the availability of new technologies and equipments, without incurring the delays that would arise if these requirements were stipulated within the Bill itself.¹³

5.10 The committee recognises that delegation of legislative power would be more amenable to such adaptation. The Legislative Instruments Handbook notes in this regard:

Delegation of legislative power allows matters of a detailed technical nature to be dealt with more efficiently than is possible through the Parliamentary processes. Legislative instruments can be made and amended more quickly and easily than primary legislation. If Parliament did not delegate the power to make legislative instruments, the legislative process would become slower and more congested.¹⁴

5.11 The committee appreciates that any such legislative instrument would need to be tabled in both Houses of Parliament and be subject to disallowance in accordance with the *Legislative Instruments Act 2003*. Defence argued that this requirement provides significant protection:

As a legislative instrument is subject to tabling and potential disallowance in both houses of Parliament, the use of this mechanism affords significant protection. It ensures that the Parliament, at all times, has control over the nature and level of training and qualification requirements that will be

12 New South Wales Department of Premier and Cabinet, *Submission 7*, p. 1.

13 Department of Defence, *Submission 8*, p. 2.

14 Attorney-General's Department, *The Legislative Instruments Handbook*, December 2004, p. 8.

imposed on people who will be authorised to exercise powers under this Bill. This affords a far greater level of protection than having the training and qualification requirement set out in departmental administrative guidance.¹⁵

5.12 For comparative purposes, the committee looked at a relevant section of the AFP regime in relation to the use of force.

The AFP regime

5.13 Section 40EA of the *Australian Federal Police Act 1979* states that the Commissioner may declare an AFP employee (other than a member) to be a protective service officer if the Commissioner is satisfied that the employee meets the requirements specified in a determination under section 40EB which in turn states:

The Commissioner may, by written determination, specify either or both of the following for the purposes of section 40EA:

- (a) competency requirements;
- (b) qualification requirements.

5.14 In terms of overriding principles in relation to the application of the use of force, the AFP Commissioner's Order 3 sets out the operational guidelines. In the exercise of his or her powers under section 38, the Commissioner may, by writing, 'issue orders with respect to the general administration of, and the control of the operations of, the Australian Federal Police'. Furthermore, section 39 requires AFP appointees to comply with Commissioner's Orders. The AFP Commissioner's Order 3 sets out the operational guidelines for the use of force for AFP officers. Order 3 is an internally generated guideline which:

...gives effect to the policy of the AFP for the use of reasonable force and its implementation through the establishment and maintenance of appropriate competency standards, the accreditation of trainers, the qualification and re-qualification of AFP employees in the use of force, appropriate reporting mechanisms and management structures for training and monitoring use of force in the AFP.¹⁶

5.15 The purpose of order 3 is to ensure that the AFP operates to de-escalate potential conflict situations within the use of force continuum. The AFP 'stresses the use of minimum force and maintains the preference at all times to resolve incidents

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

16 Australian Federal Police, Submission No. 278 to the Senate Select Committee on Mental Health Inquiry into the Provision of Mental Health Services in Australia, 2006, http://www.afp.gov.au/senate/committee/mentalhealth_ctte/submissions/sub278.pdf (accessed 3 November 2010).

without force.'¹⁷ The order, which is a confidential document, notes that the 'use of reasonable force underpins all AFP conflict management strategies and the AFP's use of force model'.¹⁸ It determines that the use of reasonable force is the 'minimum force reasonably necessary in the circumstances of any particular case'.

5.16 Whilst setting out the basis on which equipment and munitions can be used and emphasising the importance of non-violent options including negotiation, the code requires officers to submit an AFP Use of Force Report following its application and detailing the circumstances and manner in which force was applied.¹⁹

Committee view

5.17 The committee underscores the importance of training in relation to defence security officials and emphasises that training undertaken by such officials should be informed by the AFP and state police regimes. Given the fluidity of the security environment in which they are expected to operate, the training regime for defence security officials must be both robust and responsive. To this end, the committee reaffirms the importance of ongoing consultation between Defence and the AFP and other federal agencies as well as regular joint exercises.

5.18 The committee considers that determining training requirements in legislative instrument is appropriate to the extent that flexibility is required to enable timely modifications to the training requirements in response to the changing nature of security threats. It notes, moreover, that any such modifications would attract parliamentary scrutiny to ensure that provisions therein are balanced.

5.19 The committee recognises the importance of the principle of proportionality on which all training should be based especially when officers are empowered to use lethal force. It encourages the ADF to consider inclusion of the principle in delegated legislation. In this regard, the committee notes the AFP Commissioner's Order and encourages the ADF to give consideration to it.

17 Australian Federal Police evidence to ACT Legislative Assembly Standing Committee on Legal Affairs, *Police Powers of Crowd Control*, Report 6, May 1997, p. 42, <http://www.parliament.act.gov.au/downloads/reports/06%20police%20powers%20final.pdf> (accessed 3 November 2010).

18 Commissioner's Order 3 cited in ACT Legislative Assembly Standing Committee on Legal Affairs, *Police Powers of Crowd Control*, Report 6, May 1997, p. 35, <http://www.parliament.act.gov.au/downloads/reports/06%20police%20powers%20final.pdf> (accessed 3 November 2010).

19 Australian Federal Police evidence to ACT Legislative Assembly Standing Committee on Legal Affairs, *Police Powers of Crowd Control*, Report 6, May 1997, p. 35, <http://www.parliament.act.gov.au/downloads/reports/06%20police%20powers%20final.pdf> (accessed 3 November 2010).

Recommendation 2

5.20 The committee recommends that the Australian Defence Force give consideration to the utility of the inclusion of the 'reasonable and necessary' principle in delegated legislation.

Committee conclusion

5.21 The committee recognises that the bill provides a range of powers to defence security officials to enhance security of Defence bases, facilities, assets, and personnel within Australia. Notwithstanding its recommendation that training be consistent with the 'reasonable and necessary' principle, the committee is satisfied that the safeguards on the powers conferred on defence security officials are adequate to ensure that such powers are utilised appropriately.

Recommendation 3

5.22 The committee recommends that the Senate pass the bill.

5.23 Whilst noting that the bill introduces new provisions in relation to defence personnel including the power to exercise lethal force, to search and seize, restrain and detain, the committee appreciates that security threats are dynamic in nature. To ensure that such provisions are adequately responsive to ever-changing security risks and meet their objectives, the committee proposes to review the operation of the bill three years after enactment, having specific regard to matters considered in this report and any other concerns raised during its lifetime.

Recommendation 4

5.24 That the Senate Standing Committee on Foreign Affairs, Defence and Trade review the operation of enacted provisions of the bill in early 2014.

SENATOR MARK BISHOP
CHAIR

Appendix 1

Public submissions

- 1 Mr Clive Williams
- 2 South Australia Police
- 3 Victoria Police
- 3A Victoria Police
- 4 Police Federation of Australia
- 5 Northern Territory Government
- 6 ACT Legislative Assembly
- 7 NSW Department of Premier and Cabinet
- 8 Department of Defence
- 8A Department of Defence
- 9 WA Department of the Premier and Cabinet
- 10 Commissioner of Police, Tasmania

Appendix 2

Supplementary submission—Department of Defence

**SUPPLEMENTARY DEPARTMENTAL SUBMISSION TO
THE SENATE FOREIGN AFFAIRS, DEFENCE AND TRADE
LEGISLATION COMMITTEE ON THE
*DEFENCE LEGISLATION AMENDMENT (SECURITY OF DEFENCE
PREMISES) BILL 2010***

**Department of Defence
January 2011**

TABLE OF CONTENTS

	Page
Section 1: Response to the House debate, 25 October 2010 and the Bills Digest No 29 of 2010-11, dated 29 October 2010	1
Section 2: Response to the Senate Standing Committee for the Scrutiny of Bills, regarding issues in Alert Digest 8/10 of 27 October 2010	3
Section 3: Response to other submissions lodged with the Senate Foreign Affairs, Defence and Trade Legislation Committee	8

Section 1: Response to the House debate, 25 October 2010 and the Bills Digest No. 29 of 2010-11, dated 29 October 2010

Issue - In what circumstances and manner may Australian Defence Force members use lethal force under the provisions contained in this Bill.

- 1.1 Detailed information on the Department's protective security arrangements, including the proposed rules of engagement for authorised Australian Defence Force (ADF) members using reasonable and necessary force in the event of an attack on a Defence base, are not publicly released for security reasons. However, in accordance with this legislation, potentially lethal force will only be used by authorised ADF members to protect people on a base from death or serious injury in the event of an attack that is imminent or occurring. Authorised ADF members will only draw weapons and ammunition on the order of the senior ADF officer on base, or in accordance with the base response plan. Provision will be made, as appropriate, for suitably trained and authorised ADF members to have ready but controlled access to weapons and ammunition to allow them to protect life in the event of an attack. The use of force in this context will be supported by training and rehearsals.
- 1.2 The purpose of the provisions addressing the use of lethal force is to protect people. That said, the protection of people would, of course, extend to people working on, or securing assets located on Defence premises, therefore indirectly protecting those assets.

Issue - Use of contracted security guards rather than Australian Defence Force members to provide security at the entrances and perimeters to Defence bases.

- 1.3 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.
- 1.4 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 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.
- 1.5 All bases will have well-rehearsed arrangements in place to deal with a no-warning attack.

Issue - Costs associated with the implementation of the Bill's measures.

- 1.6 Funding for implementation of the Bill's measures will be met from internal Defence resources that have been allocated to the Base Security Improvement Program. As is the case for the rest of Base Security Improvement Program, the extent of the implementation of the Bill's measures at each site will be informed by security risk assessments, with measures appropriately tailored to each site and the available budget allocation. This will ensure that the cost of implementing measures is proportionate to the anticipated risk reduction that can be achieved at each site and that Defence remains within its approved budget.

Comments in Bills Digest No. 29 of 2010-11

- 1.7 It is noted that the Law and Bills Digest Section of the Parliamentary Library have reported on the Bill. The Bill notes two issues.
- 1.8 The first issue identified in the Digest notes that the Bill does not define the term 'attack'. The term is used in the Bill in relation to the power of an authorised ADF member to use potentially lethal force if there is a threat of death or injury to a person caused by an attack on defence premises, or people on those premises, that is occurring or imminent. In this respect, any attempt to define terms relating to this provision risks limiting the broad protection that this provision currently affords authorised ADF members in protecting people on Defence premises.
- 1.9 The second issue noted by the Bills Digest is that the Bill does not provide protection to an ADF member who exercises greater force than is authorised. In the same context, the Digest notes that the Bill does not contain a provision corresponding to section 51WB in Part IIIAAA of the *Defence Act 1903*; a part that primarily deals with the utilisation of the Defence Force in situations of domestic violence, such as terrorist attacks. Section 51WB provides a defence to a charge if an ADF member has done a criminal act under an order of a superior, provided certain criteria can be made out. The section was inserted into Part IIIAAA as part of a package of measures that allowed action to be taken against aircraft (including passenger aircraft) or ships, which may have been taken over as part of a terrorist action for use against other sites. In these circumstances, such a provision was considered appropriate given the potential for mass innocent casualties flowing from Defence Force action.
- 1.10 That said, section 51WB is not limited on its face to this type of action and applies to any action covered by Part IIIAAA. Consequently, as implied by the Bills Digest, a corresponding provision could be inserted into the base security regime proposed in the Bill. This is not seen as desirable as the base security amendments are more limited and are intended to provide an immediate response to an attack on a base, rather than involving more complex use of force issues that arise in responding to a Part IIIAAA event, such as the need to consider shooting down a passenger aircraft over a major city.

Section 2: Response to the Senate Standing Committee for the Scrutiny of Bills, regarding issues in Alert Digest 8/10 of 27 October 2010

Issue: Whether the definition of defence premises includes land which may have a Defence purpose, but which is also being used for another purpose (such as an immigration facility) and generally whether it is appropriate for the amendments to apply to all defence premises.

- 2.1 Land or buildings that may have a Defence purpose, 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. So, for example, the provisions in the Bill would not apply to an immigration facility that is located on a former Defence base that is not currently used by the Defence Force or the Department. Similarly, if a portion of an operational base was set aside for a use that is unrelated to the Defence Force or the Department, the provisions of the Bill would not apply to that portion of the base. The Department will amend the Explanatory Memorandum to include a statement to this affect.
- 2.2 Defence facilities, assets and personnel are potentially attractive targets for terrorist groups. In addition, many Defence facilities house dangerous, restricted or classified items. To ensure that the Department can appropriately safeguard Defence facilities, assets and personnel and prevent the unlawful removal of dangerous or classified items, Defence requires the ability to exercise the powers contained in the Bill at all of its premises. In practice, the exercise of the powers contained in the Bill and the proposed use of the various classes of Defence security officials will be dependent on the nature of the site and the assessed level of the security threat, typically determined on the basis of intelligence.

Issue: Whether consideration has been given to adequately warning persons entering Defence premises that they may be subject to non-consensual searches.

- 2.3 The Department intends to implement a number of administrative measures to ensure that people entering Defence premises are aware of the requirements, obligations and consequences arising from the search regime in the Bill. Given the diverse nature and composition of Defence premises, the definition of which includes movable assets such as aircraft, vessels and vehicles, the selection and implementation of these measures will be tailored to the particular circumstances of each Defence premise. Measures will 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 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 tenders 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
- (e) requiring Defence Force members and public servants who are hosting or escorting visitors on Defence premises to notify visitors of search requirements.

2.4 Further, Defence would highlight that section 72B of the amendments require Defence security officials to notify people, before making a request or requirement under the Bill's provisions, of the affect of refusing or hindering the request or requirement.

Issue: Concerns about the adequacy of the training of Defence security officials to ensure the restrain and detain powers are exercised safely and appropriately, and whether appropriate parameters for training requirements can be included in the Bill.

- 2.5 The Bill makes provision for Defence security officials to restrain and detain a person for the purposes of placing them in the custody of police or a protective security officer at the earliest practicable time. This power can only be exercised if the person is located on Defence premises and either refuses or fails to comply with an identification or search requirement or, as a result of complying, the Defence security official reasonably believes the person is not authorised to be on the premises, constitutes a threat to safety or has (or may) commit a criminal offence.
- 2.6 The ability to restrain and detain people is a fundamental component of the proposed search regime detailed in the Bill. 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 or classified items being improperly removed from Defence premises.
- 2.7 Under the Bill, all Defence security officials must satisfy training and qualification requirements before they can exercise any of the powers contained in the Bill, including the power to restrain and detain people. These training and qualification requirements, which will be specified in a legislative instrument, must be determined by the Minister for Defence or his delegate and will be stringent.
- 2.8 Defence is currently consulting with other Federal agencies, such as the Australian Federal Police and the Australian Customs and Border Protection Service, to assist in identifying the appropriate training and qualification requirements for Defence security officials.

- 2.9 The training requirement for contracted security guards under this Bill, and as determined by the Minister for Defence, will build upon and enhance the existing training regime as mandated in Defence security policy. Current Defence policy demands that contracted security guards meet a number of requirements that includes the successful completion of a Certificate II in Security Operations and the provision of services in accordance with relevant legislation, including general criminal legislation which controls the use of force. Additional mandatory requirements state that Defence contracted security guards:
- (a) must be licensed to carry out the required security function by the relevant State or Territory in which the Defence facility is located;
 - (b) must hold a minimum security clearance of CONFIDENTIAL;
 - (c) must provide services in accordance with any relevant enactment or direction by the regulatory authority in each State and Territory and Australian Standard (AS) 4421 Guards and Patrols; and
 - (d) must possess a current drivers licence and a first aid qualification or competency.
- 2.10 In addition, contracted security guards must complete a Defence-endorsed training package covering the following topics:
- (a) Defence security policy and relevant laws;
 - (b) Defence protocols such as rank structure and customer service;
 - (c) Defence security environment and awareness;
 - (d) Defence policing; and
 - (e) the Defence security alert system.
- 2.11 Australian Public Service employees who are to be appointed as Defence security screening employees and security authorised Defence Force members will be required to undergo comparable training to contracted security guards, appropriately augmented to address the additional powers available to these two categories of Defence security officials.
- 2.12 The Department's position is that it is appropriate from a legal policy perspective that the training and qualification requirements for Defence security officials, including training requirements for the restrain and detain powers, be specified in a legislative instrument. As a legislative instrument is subject to tabling and potential disallowance in both Houses of Parliament, the use of this mechanism affords significant protection. It ensures that the Parliament, at all times, has control over the nature and level of training and qualification requirements that will be imposed on people who will be authorised to exercise powers under this Bill. This affords a far greater level of protection than having the training and qualification requirement set out in departmental administrative guidance.

- 2.13 The use of a legislative instrument also enables the training and qualification requirements to be updated rapidly, for example in response to the availability of new technologies and equipment, without incurring the delays that would arise if these requirements were stipulated within the Bill itself.

Issue: Justification for the provisions allowing and limiting the use of deadly force, together with concerns about of the adequacy of the training and qualification requirements and whether parameters for these can be included within the primary legislation.

- 2.14 A key rationale behind the development of the Bill is the requirement to clarify the legal issues surrounding Defence Force members acting in self defence in the event of a no-warning attack on Defence premises.

- 2.15 Australian law recognises the right to protect yourself or others who are threatened. This currently provides a legal basis for Defence Force members to use reasonable and necessary force to protect themselves, or others, in the event of an attack on Defence premises. This Bill, however, 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.

- 2.16 The Department's position is that it is appropriate from a legal policy perspective that the training and qualification requirements for Defence security officials, including training requirements for appropriately authorised Defence Force members who may be required to exercise potentially lethal force in the context of base security, be specified in a legislative instrument. As a legislative instrument is subject to tabling and potential disallowance in both Houses of Parliament, the use of this mechanism affords significant protection. It ensures that the Parliament, at all times, has control over the nature and level of training and qualification requirements that will be imposed on people who will be authorised to exercise powers under this Bill. This affords a far greater level of protection than having the training and qualification requirement set out in departmental administrative guidance.

- 2.17 The use of a legislative instrument also enables the training and qualification requirements to be updated rapidly, for example in response to the availability of new technologies and equipment, without incurring the delays that would arise if these requirements were stipulated within the Bill itself.

Issue: Whether, and if so why, it is intended that the proposed offence @71W of hindering or obstructing a search be regarded as a strict liability offence.

- 2.18 The Explanatory Memorandum incorrectly states this is a strict liability offence. It will be amended to correct this error.

Issue: Justification of the use of dogs for functions other than to detect explosives or other hazardous materials.

- 2.19 The primary use of dogs is for the protection of people and assets. Apart from their role in the detection of explosives or other hazardous material, dogs may be used by security authorised Defence Force members to deter, detect and, if required, apprehend trespassers for the purposes of placing them in the custody of the police or a protective service officer at the earliest practicable time (ie restrain and detain).
- 2.20 Military working dogs are presently employed at a number of Defence sites, in particular around Air Force bases. They are used to assist with the protection of people and assets over an extended area, which can often be difficult to protect effectively through other means. 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.
- 2.21 Defence maintains stringent policies and procedures around the training and use of military working dogs and the training of dog handlers. At all times, military working dog handlers are required to only use such force as is reasonable and necessary and direct their dogs in such a manner as to prevent unreasonable injury to persons or damage to property.
- 2.22 The use of dogs to assist with the conduct of searches or other functions or powers under this Bill is limited to security authorised Defence Force members who are also fully qualified dog handlers.

Section 3: Response to other submissions lodged with the Senate Foreign Affairs, Defence and Trade Legislation Committee

- 3.1 While submissions to the Committee from other organisations were generally supportive, there were some instances when the submissions reflected a misunderstanding of some aspects of the Bill or its intended implementation. The following information is provided to clarify these matters.

Victoria Police – consideration should be given to legislate for Federal and State Police to have the same security powers as Defence Security Officials.

- 3.2 This is a matter for State and/or Federal government consideration and Defence has no position on this matter.

Police Federation of Australia – concerns with Police-style powers being granted to individuals who are not fully trained, sworn officers.

- 3.3 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. For further information on training of Defence security officials, please refer to our response to the Senate Standing Committee for the Scrutiny of Bills.

Police Federation of Australia – assurance as to the scope of work of contracted Defence security guards.

- 3.4 Contracted security guards currently perform a range of protective security functions at Defence bases. The powers available to contracted security guards under this Bill have been deliberately limited. Contracted security guards will only be authorised 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.
- 3.5 In addition, under the Bill contractors, subcontractors or their employees who provide security services at Defence premises must be authorised by the Minister by written instrument to be Defence contracted security guards. The Minister will only be able to authorise as contracted security guards, persons who have met a standard of security training as determined by the Minister by legislative instrument.

Police Federation of Australia – assurance that Defence security guards' functions will be strictly confined to Defence bases and premises and the immediate surrounds of those establishments.

- 3.6 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.

Government of Western Australia, Department of Premier and Cabinet, Office of the Director General – in regard to State or Federal police responding to incidents at Defence facilities, consideration could be given to a waiver of the screening of attending police to facilitate a timely response to an incident.

- 3.7 The powers contained in the Bill are discretionary and in practice the exercise of these powers by Defence security officials will be dependent on the nature of the site and the assessed level of security threat. In the event of a security incident requiring a police response, these arrangements will be altered accordingly if required.
- 3.8 Local emergency services are involved in the preparation of base security response plans to confirm response arrangements and assistance required in the event of a security incident. This would include procedures addressing the issue outlined above.