CHAPTER 2

CONSIDERATION OF THE BILL

Introduction and overview

2.1 In her second reading speech, Senator Coonan noted that the broad purpose of the Bill:

> is to permit the utilisation of the ADF to protect States and Territories against domestic violence and to protect Commonwealth interests where State and Territory jurisdictions do not apply.
>
> And it:
>
> will enhance the ADF's ability to contribute to operations in support of domestic security and provide appropriate powers and protections for ADF personnel during call-out.[1]

2.2 The Bill addresses nine principal areas, many of which were identified by the report on Part IIIAAA by Blunn et al.[2] The amendments:

- provide that the Commonwealth assume all power with respect to criminal offences committed by ADF personnel when operating under Part IIIAAA;
- ensure that any ADF elements (including the Reserves) can be employed effectively in operations in support of domestic security;
- allow the use of reasonable and necessary force when protecting critical infrastructure designated by the authorising Ministers;
- enable 'call-out' of the ADF to respond to incidents or threats to Commonwealth interests in the air environment;
- enable 'call-out' of the ADF to respond to incidents or threats to Commonwealth interests) in the offshore areas;
- ensure that ADF members acting under Division 2 are not required to wear surname and identification if those same members are also called upon to act under Division 3;
- provide that in the event that the broadcast of Division 3 would jeopardise an operation, the broadcast provisions outlined in 51K(2) do not apply;
- ensure that the powers conferred to the ADF under Part IIIAAA can be accorded the ADF in the course of dealing with a mobile terrorist incident and a range of threats to Australia's security; and

---

1 Senator the Hon. Helen Coonan, *Senate Hansard,* 7 December 2005, p. 17.

2 Blunn, Anthony (AO), Baker, General John (Retd) (AC DSM), Johnson, John (AO APM QPM), *Statutory Review of Part IIIAAA of the Defence Act 1903 (Aid to Civilian Authorities)*, AGPS, Canberra, 2004.

- provide expedited call-out arrangements where the Prime Minister, or the other two authorising Ministers, authorise call-out and the CDF utilises the ADF in the event of a sudden and extraordinary emergency.[3]

2.3 This chapter first examines the widened 'triggers' proposed for the call-out of the ADF, which are at the heart of the Bill. The remainder of the chapter then considers other aspects of the proposals.

The call-out provisions

2.4 Central to the Bill is the notion of calling out the ADF to protect Commonwealth interests, as well as states and self-governing territories against domestic violence. The existing legislation has been criticised for its 'static' approach. The report by Blunn et al noted that there was a common view among the departments and agencies consulted for the review that the application of Part IIIAAA is too narrowly focussed to be of use in any situation but that of a siege/hostage, and even then its use is limited.[4] The Bill addresses this by providing for call-out in a number or situations.

2.5 Under the existing section 51A an order for call-out can be made if the authorising Ministers are satisfied that:

> (a) domestic violence is occurring or is likely to occur in Australia; and
>
> (b) if the domestic violence is occurring or is likely to occur in a State or self-governing Territory – the State or Territory is not, or is unlikely to be, able to protect Commonwealth interests against the domestic violence; and
>
> (c) the Defence Force should be called out and the Chief of the Defence Force should be directed to utilise the Defence Force to protect the Commonwealth interests against the domestic violence; and
>
> (d) either Division 2 or Division 3, or both, and Division 4 should apply in relation to the order.

2.6 The Governor General under the existing subsection 51A(2) may then by written order call out the Defence Force.

2.7 The Bill proposes adding four additional call-out mechanisms. The first three, covering incidents relating to critical infrastructure, incidents offshore and in the air, are discussed below, while the special expedited call-out provision is discussed separately.

---

3 *Explanatory Memorandum*, Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005, pp 2-3.

4 Blunn et al, *op.cit.,* p. 8.

New provision: critical infrastructure

2.8 The bill then adds further circumstances in which this can occur. Schedule 2 of the bill allows the ADF to provide protection for infrastructure designated by the government as critical, and allows the ADF to be authorised to use reasonable and necessary force in doing so.

2.9 Proposed subsection 51CB(2) allows the designation 'critical infrastructure' by authorising ministers where they believe:

> (a) there is a threat of damage or disruption to the operation of the infrastructure or the part of the infrastructure; and
>
> (b) the damage or disruption would directly or indirectly endanger the life of, or cause serious injury to, other persons.

New Provision: incidents offshore

2.10 Schedule 1 of the bill extends the powers for call-out where incidents take place offshore. Currently, these operations are authorised under executive power. As the Explanatory Memorandum[5] points out, the consequence of this is that military personnel do not receive the same protection for maritime operations as those conducting similar operations on land.

2.11 To invoke this provision, the authorising minister must be satisfied that there is a threat to Commonwealth interests in an off-shore area. Unlike other call-out provisions in Part IIIAAA, this applies only to Commonwealth interests.

New provision: aviation incidents

2.12 There is no current provision which allows for countering aerial threats. As with the offshore provisions, these are dealt with by the use of the power of the Executive. A similar problem exists for ADF personnel as for the offshore provisions.

2.13 Schedule 3 provides a mechanism for not only calling out the ADF but also a process for preparatory authorisation by the authorising Ministers for call-out under specified circumstances, thus providing authorisation before an incident arises.

2.14 Proposed section 51AB(1) sets out the criteria which must apply before an authorising Minister can make an order. They are:

> (a) if specified circumstances were to arise:
>
> (i) domestic violence would occur or would be likely to occur in Australia that would, or would be likely to, affect Commonwealth interests; or
>
> (ii) there would be, or it is likely there would be, a threat in the Australian offshore area to Commonwealth interests (whether in that

5 *Explanatory Memorandum*, pp 4-5.

area or elsewhere); and, for reasons of urgency, it would be impracticable for the Governor-General to make an order under section 51A; and

(b) if subparagraph (a)(i) applies – the domestic violence would occur or would be likely to occur in a State or self-governing Territory that would not be, or is unlikely to be, able to protect the Commonwealth interests against the domestic violence; and

(c) the Chief of the Defence Force should be directed to utilise the Defence Force to protect the Commonwealth interests against the violence, or the threat in the Australian offshore area, if the specified circumstances arise; and

(d) Divisions 3B and 4 should apply in relation to the order.

2.15 Division 3B sets out the powers relating to aircraft and Division 4 consolidates the provisions common to Division 2 and 3B. The proposed Division 2 deals with the powers to recapture locations or things, prevent or end acts of violence and protect persons from acts of violence. This has been expanded from the existing powers to recapture buildings and free hostages.

General concerns over call-out – the blurring of police and military functions

2.16 The Committee received a number of submissions which contend that the proposals would erode long standing protections against the potential for capricious use of the military in civilian matters, and represent a blurring of the important distinction between the role of the police and that of the military.

2.17 Of particular concern is the apparent 'permanent militarisation' of society,[6] and the 'para-militarisation of domestic policing'.[7] This reflects the view that the use of the ADF should be reserved exclusively for the purpose of defending Australia against external military threats.

2.18 This concern is essentially underpinned by three issues. The first is the fear that military force will be used against legitimate forms of protest or civil disobedience. The second is that the very nature of the military – to apply decisive violence to win armed conflict – creates an unacceptably high risk of the use of excessive force if deployed in a civilian environment. Thirdly, there is concern that the Executive may use the military in pursuit of partisan purposes.

2.19 In relation to this last point, it is relevant to note the legislative differences that underlie the operational control of the military versus the police. Under section 8 of the *Defence Act 1903* (the Act) it is the Minister who has the 'general control and administration' of the ADF. In contrast under the *Australian Federal Police Act 1979*,

6 NSW Council for Civil Liberties, *Submission 5,* p. 1; Federation of Victorian Community Legal Centres (Vic) Inc, *Submission 8*, p. 6.

7 Australian Muslim Civil Rights Advocacy Network (AMCRAN), *Submission 7*, p. 6.

(section 37) it is the Commissioner who has the general administration and the control of the operations of the Australian Federal Police. The independence of the office of Commissioner therefore allows police to operate with community confidence in their objectivity and independence, and lack of political interference.

2.20 While the training and resources available to police are becoming more sophisticated, their function has not fundamentally altered over time. In the event of an imminent terrorist threat, it is quite foreseeable that the scale of resources available to police would be insufficient, because of the nature of the work they ordinarily undertake. The Committee notes the point made by Mr James of the Australian Defence Association, that 'there will always be situations where they will need to call on the resources of the rest of the government apparatus', and ironically, to handle lots of things the military would otherwise be called upon to do, the police would need to be militarised in ways that are probably not desirable either.[8]

Committee view

2.21 The Committee acknowledges the concerns expressed, but considers that they must be weighed against the reality of changed circumstances. The old neat distinctions between external threats of invasion by another sovereign state, responded to by the military, and the internal threat of civil unrest against the elected government, for which the police were responsible, simply no longer applies. As events overseas have unpleasantly demonstrated, there is a real possibility that threats or attacks may occur that are beyond the technical expertise or manpower of the relevant police force. In such circumstances, it is inconceivable that the ADF would collectively 'sit on its hands' and not provide assistance.

2.22 Attempting to adhere to a legislative structure that was designed to meet outdated circumstances may conceivably be more dangerous to civil liberties than accepting present realities and creating a legislative framework that provides rules and procedures for the proper exercise of defence powers.

Definitions in the call-out powers

2.23 Several submissions observed that the definitions in the bill are either vague or non-existent. Examples include 'domestic violence' and 'critical infrastructure'.

2.24 In his submission to this inquiry, Dr Michael Head observed that:

> 'Domestic violence' is a vague expression, which is undefined legislatively or judicially. It is found in s 119 of the Constitution, which provides that 'the Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State protect such State against domestic violence'. The term was borrowed from article IV of the United States Constitution … The statutory embodiment of this provision in 10 USC § 331 (1964) uses the more specific term 'insurrection', suggesting

8 Mr James, *Committee Hansard*, 31 January 2006, p. 28.

> that an extremely serious level of rebellion must be involved – one that threatens the very existence of a State government.[9]

2.25 The Australian Muslim Civil Rights Advocacy Network (AMCRAN) also criticised the bill for its lack of a precise definition of 'domestic violence' both in its submission[10] and in evidence. In evidence Mr Khan, Executive Member remarked:

> 'domestic violence'… is a vague expression which is undefined both legislatively and judicially … Constitutional case law suggests the term is to be read extremely broadly, to encompass more than terrorism. Strikes, political demonstrations and industrial action may fall within its meaning. In fact, in the last 50 years the ADF has been used four times invoking this power and all four times it has been in industrial action. This raises the worrying prospect of any protest against government policy facing a broadly empowered ADF personnel.[11]

2.26 The Federation of Victorian Community Legal Centres is similarly concerned that the term could be very broadly or narrowly construed, and therefore applied to situations as wide ranging as industrial action or political protest.[12]

2.27 The Defence Department acknowledged the lack of a definition of 'domestic violence'. However, Mr Pezzullo, the Deputy Secretary, Strategy told the Committee that:

> there are, in my view, sturdy and robust arrangements in place that I think predated 2002 but have now been codified and formalised through the intergovernmental agreement that are now practised regularly … I think it would become a matter of common view that an incident was about to occur, was likely to occur or could be anticipated to occur and that ministers in all jurisdictions would give quite clear guidance – to the ADF in our case at the Commonwealth level and no doubt to the police forces at the other levels – as to where the different capabilities that each jurisdiction had were applicable.[13]

2.28 A further term which provoked criticism for being undefined was 'critical infrastructure'. Clause 2 of Schedule 2 to the bill inserts in subsection 51(1) a definition of infrastructure. It includes physical facilities, supply chains, information technologies and communication networks or systems. The task of declaring infrastructure or part of it, to be critical infrastructure falls to the Attorney General, the Defence Minister and the Prime Minister.

---

9 Head, Michael, *Submission 1,* p. 2.

10 *Submission 7,* p. 4.

11 Mr Khan, *Committee Hansard,* 31 January 2006, p. 13.

12 Federation of Victorian Community Legal Centres (Inc), *Submission 8*, pp. 11-12.

13 Mr Pezzullo, *Committee Hansard,* 31 January 2006, p. 13.

2.29 Clause 3 of Schedule 2 inserts proposed section 51CB (2): before declaring infrastructure to be critical infrastructure, the authorising Ministers must believe on reasonable grounds that:

> (a) there is a threat of damage or disruption to the operation of the infrastructure or the part of the infrastructure; and
>
> (b) the damage or disruption would directly or indirectly endanger the life of, or cause serious injury to, other persons.

2.30 In evidence, Mr Khan of AMCRAN noted:

> 'critical infrastructure' is loosely defined to conceivably include anything from a building to a computer, to a road, to a telephone network. In addition to this lack of clarity, the term 'critical' itself remains undefined.[14]

2.31 The Federation of Community Legal Centres in Victoria made a similar observation in their submission to the Inquiry.[15]

2.32 In relation to critical infrastructure, the definition of 'infrastructure' covers a range of essential services. Whether it is 'critical' infrastructure is a matter for authorising Ministers to determine in accordance with proposed section 51CB, which provides:

> (1) The authorising Ministers may, in writing, declare that particular infrastructure, or a part of particular infrastructure, in Australia or in the Australian offshore area is designated critical infrastructure.
>
> (2) However the authorising Ministers may do so only if they believe on reasonable grounds that
>
> (a) there is a threat of damage or disruption to the operation of the infrastructure or the part of the infrastructure; and
>
> (b) the damage or disruption would directly or indirectly endanger the life of, or cause serious injury to, other persons.

Committee view

2.33 The Committee observes that while there is no definition of 'domestic violence', there are consultative arrangements at a number of levels in each jurisdiction which would ensure that only incidents of an extremely serious nature invoked the provisions of the proposed Part IIIAAA.

2.34 The Committee is satisfied that while the terms 'domestic violence' and 'critical infrastructure' remain undefined, the circumstances in which they will be invoked contain sufficient checks and balances to ensure that they will not be capable of unreasonably broad interpretation.

---

14 Mr Khan, *Committee Hansard*, 31 January 2006, p. 14.

15 *Submission 8*, p. 11.

The constitutionality of the call-out powers

2.35 A number of submissions questioned the constitutionality of the bill. In his submission, the barrister Mr Warwick Johnson, stated his concern that 'the proposed amendments may be a partial divestment or at least an erosion of the Governor General's power'.

2.36 Mr Johnson explained that this is because section 68 of the Constitution provides:

> The command in chief of the naval and military forces of the Commonwealth is vested in the Governor General as the Queen's representative.[16]

2.37 The reservations expressed by Mr Johnson were canvassed in an article written by Sir Ninian Stephen in 1983;[17] an article also referred to by the Defence Department in evidence to the Committee.[18]

2.38 Sir Ninian Stephen concluded that the title of Commander in Chief is a purely titular one, although it represents a relationship which expresses both the nation's pride in and respect for, its armed forces, and the willing subordination of those forces to the civil power.[19] In practice, this means that the Governor General is obliged to take the advice of the relevant Minister in when acting in his capacity as Commander in Chief. Accordingly, the proposals do not, in this view, erode the power of the Governor General.

2.39 Other submissions commented on the constitutionality in the light of section 119 of the Constitution. The NSW Council for Civil Liberties said:

> Provisions allowing for the domestic call out of ADF personnel without the consent of relevant State governments extend the powers of the Commonwealth government beyond those conferred by s 119 of the Constitution. It is highly questionable if such provisions are supported by a constitutional head of power, as such the proposed amendments may be constitutionally flawed.[20]

2.40 Similar concerns were expressed by AMCRAN both in their submission[21] and evidence.[22]

---

16 Johnson, Warwick, *Submission 4,* p.1

17 Stephen, His Excellency the Rt Hon Sir Ninian (AK GCMG GCVO KBE KSt J), *The Role of the Governor General as Commander in Chief of the Australian Defence Forces*, Defence Force Journal, No 43, November/December 1983.

18 *Committee Hansard,* 31 January 2006 pp 35-36.

19 Stephen, His Excellency the Rt Hon Sir Ninian, *ibid.*, p. 9.

20 *Submission 5,* p. 1.

21 *Submission 7,* p. 4.

Committee view

2.41 The Committee notes the section 119 issues, and that they are also partly bound up with the definitional issues concerning the nature of 'domestic violence'. The Committee considers that the constitutional support for these amendments is found in section 51(vi) and in the executive power in s. 61 of the Constitution.

2.42 In a research paper first written in 1991 and updated in 1998, Elizabeth Ward argues that:

> The Commonwealth's inherent power to call out the troops on its own initiative is based chiefly upon the executive power (Section 61 of the Constitution) but other powers which are also relevant are Section 68 and the legislative powers contained in Sections 51(vi) and 51(xxxix) of the Constitution.[23]

2.43 Ms Ward also suggests that the external affairs power (Section 51(xxix)) supports anti-terrorist measures. The examples given are those contained in the *Crimes (Aviation) Act 1991* and the *Crimes (Foreign Incursions and Recruitment) Act 1978.*

2.44 The Committee considers that there is adequate constitutional support for the amendments proposed in the Bill.

Ensuring the call-out powers are a 'A last resort'

2.45 The Explanatory Memorandum notes in the Outline to the Memorandum that:

> The underlying principles that inform the operation of Part IIIAAA remain the same, namely:
>
> - the ADF should only be called out as a last resort where civilian authorities are unable to deal with an incident;

2.46 Both the Defence Department submission and the second reading speech also noted that 'use of the ADF in domestic security will be a last resort only'.[24] However, nowhere in the bill is this articulated specifically.

2.47 The decision to call out the ADF in a civil matter, in the circumstances described in the Bill requires the person authorising the order to take into account certain factors. For example, the decision by a Minister to authorise the use of ADF personnel offshore, must first be satisfied that the threat actually exists. However there is no further guidance in the proposals as to what factors should lead to the authorisation.

---

22 *Committee Hansard,* 31 January 2006, p. 14.

23 Ward, E, *Call Out the Troops: an examination of the legal basis for Australian Defence Force involvement in 'non-defence' matters*, Research Paper 8, 1997-98 Australian Parliament.

24 *Submission 6,* p.1; *Senate Hansard,* 7 Dec 2005, p. 17.

2.48 The practical difficulty in articulating the 'last resort' limit is that a definition has the capacity to inhibit the civilian deployment of defence personnel in situations where it may be well justified. The Committee considers that in line with its recommendation 1 concerning the proportionality test in Schedules 1 and 3 of the Bill, the amendments to Part IIIAAA should include a statement of intent that the Part should apply only when all other avenues have been considered.

Recommendation 1

2.49 The Committee recommends that the amendments to Part IIIAAA should include a statement of intent that the Part should apply only when all other avenues have been considered and rejected.

Ending the call-out

2.50 The existing provisions require that Governor General end the call-out when the conditions no longer apply. In any event, the orders cease to be in force 20 days after they are made, unless revoked earlier (paragraph 51A(4)(b)). The process for revocation requires the authorising Ministers to be satisfied that the conditions contained in subsection 51A(1) no longer apply.

2.51 Several witnesses to the inquiry considered that there should be some fail-safe capacity for a review of the decision for call-out, and several possibilities can be briefly canvassed.

2.52 The first is a review of the actual decision by the Governor General or the decision making ministers. Given that the underlying purpose of the Bill is to create a legislative framework for rapid and emergency responses to emerging threats, any process of reviewing these decisions is self-evidently too time consuming and would render the legislative inoperable. For this reason, this possibility will not be discussed further.

2.53 However, a more plausible consideration is to introduce some capacity for a third party to end the call-out – effectively a form of review. The two institutions most likely to exercise such a right are the Federal Parliament or the courts.

2.54 The current provisions under section 51X merely require a report be made to Parliament after the order for call-out has ceased. However, there is no requirement for the Parliament to discuss or sanction it in any way.

2.55 In relation to the courts, a central concern would be the matter of determining who has standing to bring such a challenge. In asking Dr Khan how he would propose to launch a challenge to a determination on critical infrastructure, Senator Ludwig said:

> The difficulty is also that you are describing something that would be interlocutory in nature. The difficulty then is whether you intend to have merits review under section 39B of the ADJR Act or use the original jurisdiction of the High Court for prerogative writs. What you are trying to

> suggest is very hazy, unless you can bring to it a bit more sharpness. It does not seem to make sense to me, unfortunately, unless you can explain how you intend to define 'standing'. In other words, is 'standing', in being able to take an action—where that action is going to be interlocutory in nature because it is going to stop the military or the minister from doing some action or force the minister to revoke a ministerial decision-going to be based on merits review or law?[25]

Committee view

2.56 The Committee considers that there is a need for accountability and transparency, particularly in matters which are designed to be used as a last resort. However, these measures must be practical.

2.57 As noted above, no form of interlocutory review is feasible by reason of the time constraints. It should also be recognised that any government that chooses to exercise these provisions must face the political consequences of their decision. If there is a genuine national emergency of the sort envisaged by the Bill, there is unlikely to be any significant disagreement with the decision. However, where the grounds for the call-out were dubious, the government would face considerable criticism. This is likely to act as a genuine deterrent to any of the more opportunistic or cynical deployments under the proposed law.

2.58 In recognition of this, the Committee does see merit in providing for the recall of Parliament within a short time of the call-out, in order to debate the decision. Parliament should have the opportunity to be informed about and discuss the order at the earliest possible opportunity. If the call-out has genuinely been a 'last resort' measure in conditions of national emergency, it would be expected that the Parliament would convene anyway, so such a requirement would amount to regulating best-practice, while at the same time instituting an important procedural guarantee. The Committee does not however, consider that it is appropriate or necessary to grant the Parliament a power to end the call-out. As Mr James pointed out, these decisions are traditionally the preserve of the Executive, and in any case, Parliament retains the rights to curtail an overly adventurous Executive by reason of its control of the purse-strings.[26]

25 *Committee Hansard,* 31 January 2006, p. 16.

26 Mr James, *Committee Hansard,* 31 January 2006, p. 29.

Considerations of other aspects of the Bill

2.59 The provisions of the Bill will be discussed in the order in which they are summarised in the Explanatory Memorandum.

Application of criminal laws

2.60 The current Part IIIAAA contains no provision for dealing with offences alleged to have occurred during a domestic security operation. The proposed Division 4A inserts section 51WA which provides:

> (1) The substantive criminal law of the Jervis Bay Territory, as in force from time to time, applies in relation to a criminal act of a member of the Defence Force that is done, or purported to be done, under this Part.
>
> (2) The substantive criminal law of the States and the other Territories, as in force from time to time, does not apply in relation to a criminal act of a member of the Defence Force that is done, or purported to be done, under this Part.

2.61 The Commonwealth Director of Public Prosecutions (DPP) will prosecute the offences.

2.62 The Bill also provides a defence of 'superior orders' in certain circumstances where

> (a) the criminal act was done by the member under an order of a superior; and
>
> (b) the member was under a legal obligation to obey the order; and
>
> (c) the order was not manifestly unlawful; and
>
> (d) the member had no reason to believe that circumstances had changed in a material respect since the order was given; and
>
> (e) the member had no reason to believe that the order was based on a mistake as to a material fact; and
>
> (f) the action taken was reasonable and necessary to give effect to the order.

2.63 While it is clear that there are advantages in having a single set of laws apply to defence personnel involved in a call-out for a domestic violence incident, concerns were expressed at the immunity from state and territory laws. The Federation of Community Legal Centres in Victoria said;

> These provisions … act to significantly impede the community's capacity to make ADF members accountable for their actions during a call-out. This lack of accountability not only means that the response to criminal acts by ADF personnel may be inadequate, but furthermore this lack of accountability may also make the occurrence of criminal acts more likely.[27]

27 *Submission 8*, p. 17.

2.64 Both the Federation of Community Legal Centres and Dr Ben Saul[28] noted the potential for the Commonwealth DPP to be pressured in relation to prosecutions for excessive use of force. Dr Saul also suggested that the defence of superior orders is inappropriate in a domestic context as it has its origins in the law relating to armed conflict.

2.65 The NSW Cabinet Office sought clarification as to the process for prosecution of these offences. The Director, Mr Roger Wilkins noted:

> This raises a number of questions in regard to practical matters. For example, if a soldier were to commit a criminal offence in Western Australia, but was liable under ACT law, who would investigate the offence? Under what powers could the person be arrested and questioned outside the ACT? How would the person be granted his or her bail rights? The transfer of the trial to the ACT Supreme Court may also cause logistical problems for victims and witnesses. These matters require clarification.[29]

2.66 In evidence, Mr Mark Cunliffe Head of Defence Legal, Department of Defence responded to Mr Wilkins' concerns and indicated that it was not the intention of the bill to suggest that all matters would be prosecuted or considered for prosecution in an ACT court. He continued;

> The structure creates Commonwealth offences in a similar way to some other Commonwealth legislation, such as the Customs Act. They are not ACT criminal offences, and they could in fact be prosecuted wherever. The law that will apply will be the law in the Jervis Bay territory. That in actual terms is ACT criminal law, but the prosecution might be in Queensland, Western Australia, Tasmania or wherever it happened to be.[30]

Committee view

2.67 The Committee considers that it is important to provide a consistent framework for dealing with offences committed by the military during a call-out. This cannot be achieved if the behaviour of troops is subject to the variable laws of the states and territories. It is also notable that should the state or territory wish to do so, there is nothing in the legislation which prevents state or territory police investigating an offence purported to be done by defence force members when operating under Part IIIAAA.[31] The Committee also considers that as a federal entity, ADF prosecutions rightly should be conducted by the Commonwealth DPP, an independent statutory appointee.

---

28 Faculty of Law, University of New South Wales, *Submission 10*, p. 2.

29 The Cabinet Office, New South Wales, *Submission 16*, p. 2.

30 Mr Cunliffe, *Committee Hansard,* 31 January 2006, p. 34.

31 *Explanatory Memorandum*, p. 5.

The use of Reserve Forces in domestic security operations

2.68 The amendments to Clause 6 of Schedule 6 of the Bill remove the restrictions on the use of Defence Force Reserves to support domestic security operations.

2.69 Section 51G of the *Defence Act 1903* ('the Act') currently restricts certain utilisation of Defence Force personnel:

> In utilising the Defence Force in accordance with section 51D, the Chief of the Defence Force must not:
>
> …
>
> (b) utilise the Reserves unless the Minister, after consulting the Chief of the Defence Force, is satisfied that sufficient numbers of the Permanent Forces are not available.

2.70 The current exclusion in subsection 51G(a) of the Act on the Chief of the Defence Force utilising Reserves to 'stop or restrict any protest, dissent, assembly or industrial action' is not the subject of amendment.[32]

2.71 Mr Pezzulo (Department of Defence) stated:

> We are seeking several changes to the legislation that concern operational realities. They include: recognising that reserves are very much integrated into certain parts of our force structure and, therefore, we think it is no longer logical to seek an extinguishment of the use of permanent forces before we can use reserves…[33]

2.72 Mr Khan, representing AMCRAN, outlined some objections to the use of Reserves in domestic security operations:

> The powers conferred on [Australian Defence Force] ADF personnel are not extended to reserve or emergency forces. These groups of personnel lack the experience, training and professionalism of full-time ADF members. They represent the clearest and most obvious potential for misuse and abuse of the proposed extension to ADF personnel powers.[34]

2.73 Whilst AMCRAN did not recommend any changes to the provisions of the Act made in 2000 that allow for the call-out of Reserves, they argued that Reserves should only be called out as 'a last resort' (that is, when no other ADF staff are available).[35]

---

32 The exceptions to the prohibition contained in subsection 51G(a) on using Reserves in connection with an industrial dispute are where there is a reasonable likelihood of the death of, or serious injury to, persons or serious damage to property.

33 Mr Pezzullo, *Committee Hansard*, 31 January 2006, p. 32.

34 Mr Khan, *Committee Hansard*, 31 January 2006, p. 14.

35 *Ibid.*

2.74 The New South Wales (NSW) Cabinet Office advised that the NSW Police Force thought that 'the use of Reserves in tactical assault situations is not appropriate'.[36] They recommended that 'consideration should therefore be given to excluding the use of Reserves in exercising powers' under the Defence Act.[37]

2.75 Submissions from the Department of Defence and the Australia Defence Association (ADA) both supported the use of Reserves in domestic security operations. It was argued that current restrictions in the Defence Force Act do not reflect the increasingly integrated force structure of the Defence Force. The ADA submitted that 'it is simply not operationally possible to make strict definitions about when you can and cannot use part-time and full-time forces'.[38]

2.76 There were also criticisms of the level of training which reserves possess compared to full time service persons. In evidence Mr Khan of AMCRAN said:

> We also recommend that the powers conferred on ADF personnel are not extended to reserve or emergency forces. These groups of personnel lack the experience, training and professionalism of full-time ADF members. They represent the clearest and most obvious potential for misuse and abuse of the proposed extension of ADF personnel powers.[39]

2.77 In evidence both Mr James of the Australia Defence Association and Mr of the Defence depertment vigorously refuted this argument. Mr James said:

> There seems to be in a number of the public submissions … a complete misunderstanding of the new, modern, integrated structure of the Defence Force. It is simply not operationally possible to make very strict definitions about when you can and cannot use part-time and full-time forces, because a number of the units are now so integrated that it would just be operationally ludicrous to try.[40]

2.78 Mr Pezzullo observed:

> … reserves are very much integrated into certain parts of our force structure and, therefore, we think it is no longer logical to seek an extinguishment of the use of permanent forces before we can use reserves; [41]

---

36 *Submission* 16, p. 2.

37 *Ibid.*, p. 2.

38 Mr James, *Committee Hansard*, 31 January 2006, p. 27.

39 *Committee Hansard,* 31 January 2006, p. 14

40 *Committee Hansard*, 31 January 2006, p. 27

41 *Committee Hansard* 31 January 2006, p. 32

Committee view

2.79 The Committee acknowledges the arguments expressed by AMCRAN and the NSW Cabinet Office regarding the removal of the restrictions on use of Reserves. In response to AMCRAN's concerns, the committee is of the view that Reserves, if required, can support Permanent Forces in providing responses to security incidents on Australian soil. The Committee certainly recognises that the Reserves are becoming increasingly integrated into parts of the Defence Force structure and that the professionalism and level of training received is appropriate to take action in domestic incidents. The committee considers that there is no in-principle reason why Reserves should not be freely available to the Chief of the Defence Force (CDF) to deploy. The key issue is one of training and capability of the units and individuals concerned – a matter common to all forces, both permanent and reserve. This is a matter appropriately left to the discretion of the CDF. Maintaining the current exclusion on the use of Reserves in 'strike-breaking' is supported by the Committee. The Committee is of the view that the clause be passed in its current form. The Committee endorses the provisions in the bill concerning the use of reserves.

Use of force to protect critical infrastructure

2.80 The Bill authorises the use of force to protect critical infrastructure. Currently, State and Commonwealth law only authorises force where an attack on infrastructure is likely to cause immediate death or injury. The change is said to be necessary because:

> The increasingly close interrelationships between infrastructure, critical services and facilities means that the destruction or disabling of a system or structure could have significant flow-on effects that may result in loss of life or serious injury. Examples include the potential loss of power to a hospital, the disruption of communications and the interruption of vital utilities. Sophisticated terrorists may employ tactics that could disable critical infrastructure without posing an immediate and direct threat to those within its environs.[42]

2.81 Once the declaration to call out the ADF has been made, the ADF is then authorised to protect critical infrastructure by use of force. However this is circumscribed by proposed section 51T(2A) which provides that in using force against a person, a member of the ADF must not:

> (a) do anything that is likely to cause the death of, or grievous bodily harm to, the person unless the member believes on reasonable grounds that doing that thing is necessary to:
>
> > (i) protect the life of, or to prevent serious injury to another person (including the member); or
> >
> > (ii) protect, against the threat concerned, the designated critical infrastructure in respect of which the powers are being exercised; or

---

31 January 2006, p 42 Explanatory Memorandum, p. 13.

> (b) subject the person to greater indignity than is reasonable and necessary in the circumstances.

2.82 The authorisation of 'lethal force' to protect property was a source of some comment by submissions and evidence to the Committee.

2.83 AMCRAN expressed reservations regarding the use of force, and contends that the provision deviates from a long held legal principle that killing or causing grievous bodily harm to protect property is not permissible.[43]

2.84 Mr Bhasin from the NSW Council for Civil Liberties outlined the Council's concern with the provision:

> … the right to life is considered a supreme right which cannot be abrogated even in times of public emergency. As such, the intentional lethal use of force by the state should be strictly limited to circumstances where it is unavoidable to protect life. It is an extreme measure only to be used in the most extreme circumstances. However, as currently drafted, at a minimum, proposed section 51CB(2)(b) only requires that authorising ministers reasonably believe that there is a threat of damage or disruption to infrastructure that would 'indirectly endanger the life of, or cause serious injury to, other persons'.[44]

2.85 The Human Rights and Equal Opportunity Commission (HREOC) took the view that the provision should be excised from the Bill as it potentially places Australia in breach of article 6 of the International Covenant on Civil and Political Rights.[45]

2.86 In contrast, the Australia Defence Association noted 'that current laws do not cover the protection of critical infrastructure from attack' and endorses the proposal noting that there are safeguards: notably that the authorising Minister must:

> be first satisfied that an attack on the designated infrastructure will result in direct or indirect loss of life or serious injury before the ADF can be so used.[46]

2.87 In evidence, Mr Neil James, Executive Director of the Association observed that, since Federation, the Defence Force has only been called out to provide aid to the civil power in a 'force situation' on three occasions, and in two of these situations, force was not used.

> In fact, in New Britain in 1970, while the call out was proclaimed, the troops were not actually used. In 1978, while the troops were called out and were used, no force was actually applied to anyone. In the Victoria police

---

43 *Submission 7*, pp 6-7.

44 Mr Bhasin, *Committee Hansard,* 31 January 2006, p. 2.

45 Human Rights and Equal Opportunity Commission, *Submission 13*, pp 11-13.

46 Australia Defence Association, *Submission 11,* p. 7.

> strike of the mid 1920s the limited numbers of troops then available to the Victorian government were provided by the Commonwealth at the Victorian government's request when there was reasonably serious rioting in the centre of Melbourne, and much looting. So in 105 years there have only been three incidents of this type of activity being required and all of them in quite extreme circumstances.[47]

Committee view

2.88 The Committee notes the concerns expressed in the submissions regarding the use of lethal force and the protection of critical infrastructure. However, the Committee considers that it is essential to recognise that the powers for which provision is being made are for implementation in the most extreme circumstances. It is also important to recognise that our society is highly dependent on complex and all-encompassing infrastructure. An attack on any part of it has the potential to threaten life indirectly as well as compromise the ability of the country to defend itself.

2.89 The Committee considers that the requirement in proposed section 51CB for the authorising minister to believe on reasonable grounds that there is threat of damage or disruption to critical infrastructure, and that there is a direct or indirect danger to the other persons, is sufficient to ensure that the provisions will be exercised only in extreme circumstances. The Committee supports the proposals contained in the Bill concerning the use of force.

Responding to incidents or threats to Commonwealth interests in the air and to off-shore interests and internal waters

2.90 Currently there are no provisions in Part IIIAAA of the Act to enable the Defence Force to conduct operations against threats in the air, in the Australian offshore area or in internal waters.[48] Current operations in these areas are authorised under the Government's Executive Power under section 61 of the Constitution. The previous section discussed the call-out triggers for using the ADF in these circumstances. This section focuses on the conditions imposed by the Bill for the use of force once call-out is put into effect.

2.91 Schedules 1 and 3 grant broadly similar powers to the Defence Force to enable a response to threats to Commonwealth interests in the Australian offshore area and in the internal waters of a State or Territory, or in the air.[49] The schedules authorises two levels of involvement by an ADF member with respect to the taking of measures against a vessel or aircraft: first, the ADF member actually using force, and second, for the ADF member giving the order.[50]

---

47 Mr James, *Committee Hansard,* 31 January 2006, p. 26.

48 *Submission* 6, p. 10.

49 Clause 51AA, Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005.

50 *Explanatory Memorandum*, pp 7-8.

2.92 The Bill imposes conditions on the use of these measures, maintaining strict control over the engagement of any vessel or aircraft through the process of Defence Force personnel being given and responding to orders. The specific limits imposed draw upon the principles that would apply to acting under lawful authority.

2.93 Four key tests are laid down:

- The member must not believe the order to which they are responding is unlawful, nor must the order be manifestly unlawful.
- The member does not have authority to act if the member has reason to believe that the circumstances have changed since the order they have received was given, or that the relevant order was based on a mistake as to a material fact.
- Measures taken must be reasonable and necessary to give effect to the order received by the ADF member.
- The giving of the order to use force must be reasonable and necessary to give effect to the relevant superior order.

2.94 A number of concerns were expressed about the powers afforded to the Defence Force by the amendments.

2.95 The first relates to the adequacy of the 'reasonable and necessary' test. HREOC acknowledges that the bill imposes conditions on the use of the powers of the Defence Force in Schedules 1 and 3, but 'submits that these safeguards should be strengthened or clarified'.[51]

> The commission's submission is that in view of the fact that these orders authorise measures that may well lead to the loss of life, 'reasonable and necessary' is not a stringent enough condition to reflect the international law requirement of proportionality.[52]

2.96 HREOC is concerned that the proposed amendments 'may not adequately safeguard the right to life under article 6 of the International Covenant on Civil and Political Rights (ICCPR)'.[53] HREOC submitted that the Bill should be amended to include stronger conditions than those already being proposed.

2.97 HREOC proposed the additional of a stronger proportionality test for Ministers authorising action and for members of the Defence Force giving orders potentially leading to the loss of life. It argued that this would ensure that only 'the most exceptional cases' could justify action being taken.[54] That is:

---

51 Ms O'Brien, *Committee Hansard,* 31 January 2006, p. 20.

52 *Ibid.*, p. 21.

53 *Submission 13*, p. 2.

54 *Ibid.*, p. 8.

> the process whereby the minister authorises the taking of new measures should be subject to the condition that the minister is satisfied that the purpose for which the measure is authorised cannot be achieved by a lesser measure.[55]

2.98 Ms O'Brien, a Senior Lawyer with HREOC, stated that the additional safeguard of 'the least restrictive means' does not add a level of complexity and analysis for serving personnel, but rather prompts personnel to question what is 'reasonable and necessary' in the circumstances.[56]

2.99 A key concern of the Committee is the operation of such a test and whether it is objective or subjective. In Committee hearings, Senator Johnston expressed concern that the test would require the member of the ADF to look at a 'quite complex matrix of adjudication of what is the lesser capability to be employed…' when interpreting and carrying out orders.[57] In response, HREOC submitted that 'that member [of the ADF] must be satisfied [that there is not a lesser measure that could achieve the aim], which will be a subjective test'.[58] It was emphasised that decisions that must be made rapidly, by soldiers in a high pressure situation, should not be subject to a later judgement made with the benefit of hindsight. Consideration was also given to the need for objectivity at the time an order is made, in the same way that the 'reasonable and necessary' test would be interpreted.[59]

2.100 A further issue arises in relation to the operation of proposed powers in the offshore area. In relation to an offshore designated area in the offshore general security area, proposed section 51SO introduces a power to require persons to answer questions or produce documents where it is reasonably necessary for: the purposes of preserving life; the safety of others; or the protection of Commonwealth interests.[60] Proposed subsection 51SO(4) deals with the issue of self-incrimination and reflects what the Explanatory Memorandum claims to be existing Commonwealth law on this issue.[61]

> (4) A person is not excused from answering a question or producing a document under this section on the ground that the answer to the question, or the production of the document, may tend to incriminate the person or make the person liable to a penalty.

---

55 Ms O'Brien, *Committee Hansard,* 31 January 2006, p. 20; *Submission 13*, p. 3.

56 Ms O'Brien, *Committee Hansard,* 31 January 2006, p. 21.

57 Senator Johnston, *Committee Hansard*, 31 January 2006, p. 21.

58 Ms O'Brien, *Committee Hansard*, 31 January 2006, p. 21 and p. 23.

59 Ms O'Brien, *Committee Hansard*, 31 January 2006, pp 21-22.

60 Subclause 51SO(2), Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005.

61 *Explanatory Memorandum*, p. 11.

2.101 Senator Ludwig expressed concern about the broad nature of this power and questioned how the immunities operate to prevent future prosecution of relevant persons. Subsection 51SO(5) says that:

> (a) the answer given or document produced; or
>
> (b) answering the question or producing the document; or
>
> (c) any information, document or thing obtained as a direct or indirect consequence of the answering of the question or the production of the document;
>
> is not admissible in evidence against the person in criminal proceedings other than:
>
> (d) proceedings for an offence against subsection (3); or
>
> (e) proceedings for an offence against section 137.1 or 137.2 of the *Criminal Code* (about false or misleading information or documents) that relates to this section.

2.102 Senator Ludwig said:

> In a normal ACC [Australian Crime Commission] examination for the use of that power, they have trained persons who determine when they will ask the question, what questions will they ask and what documents they call for. There does not seem to be any limitation on how that power will operate … It seems to be a soldier on the beat, so to speak.[62]

2.103 In particular, the wording of this section suggests that too great a limit is put on the capacity to use material seized or answers given in subsequent prosecutions.

2.104 Mr Cunliffe, the Head of Defence Legal, Department of Defence, said that personnel would be trained and the context of the situation is likely to limit the actual use of the power (that is, in the offshore general security area).

> I would anticipate that the situation in which the person is, where the power exists, is already somewhat fraught and that they are attempting to do a particular exercise, not something which is a general investigation.[63]

2.105 In a written response to the Committee, expanding on this, the Defence Department said:

> • It is envisaged that the powers in this section would be used in limited circumstances. This may include a scenario where it may be required to compel a master or crew member to hand over the manifest or other documents which would show where dangerous goods/cargo were stored (so that an assessment could be made as to whether they posed a threat to persons/Commonwealth interest, or to assist in neutralising any threat).

---

62 Senator Ludwig, *Committee Hansard*, 31 January 2006, p. 44.

63 Mr Cunliffe, *Committee Hansard*, 31 January 2006, p. 44.

- The sub-section regarding immunity is consistent with other Commonwealth legislation which contains these provisions.
- This section does not provide immunity with regard to documents/information obtained. Rather, this provision makes the documents/information (or information/document/thing obtained as a direct or indirect consequence of the answering of the question/production of the document) inadmissible in evidence in any subsequent criminal proceedings.

2.106 Finally, the Federation of Community Legal Centres (Victoria) (the Federation) expressed concerns about the treatment of asylum seekers as a result of the new powers the Defence Force will have in the Australian offshore area. The Federation noted that the *Migration Act 1958* 'already permits the use of 'necessary and reasonable' force to prevent off-shore entry to Australia' and cautioned that the bill would permit the Defence Force to deter or prevent the arrival of unarmed asylum seekers in Australia with the use of weapons.[64] The Federation recommended that an exception for asylum seekers should be provided in the bill.[65]

2.107 The Department of Defence's submission highlights the changing nature of security threats and emphasises that the current Part IIIAAA is land-centric in its application. An extension of the Defence Force's powers to respond to threats to Commonwealth interests in aviation and maritime environments, recognises that the Defence Force is likely to be the only agency equipped to address issues in such situations and gives Defence Force personnel the same powers and protections afforded in land-based operations.

2.108 The Australia Defence Association also described the amendments as 'logical and justified'.[66]

Committee view

2.109 The Committee has considered the recommendations made by HREOC, and supports the inclusion of a stronger proportionality test in Schedules 1 and 3. In the Committee's view, the least restrictive means test is a more stringent proportionality test than simply considering what is 'reasonable and necessary'. The aim of such a test would be to seek a balance between community and social needs, the lawfulness of the objectives and the achievement of goals via the least restrictive means.

2.110 In relation to Australia's obligations under the ICCPR, the Committee does not recommend any changes to 51SC which states that:

64 *Ibid.*, p. 7.

65 *Ibid.*, p. 8.

66 *Submission 11*, p. 8.

> The authorising Ministers or an authorising Minister must, in giving an authorisation or making a declaration under this Division, have regard to Australia's international obligations.[67]

2.111 The submission from the Victorian Federation of Community Legal Centres outlined concerns about the potential for the exercise of disproportionate use of force on asylum seekers attempting to come to Australia. The Committee strongly recognises the importance of upholding Australia's international legal obligations and believes these principles are reflected in the proposed amendments.

2.112 The Committee believes that the proposed amendments will allow the Defence Force to be utilised appropriately in response to aerial and maritime threats to Commonwealth interests. As noted in the Explanatory Memorandum, such threats have the capacity to cause serious consequences, including mass casualties and destruction of property. The Committee recognises that the Defence Force is the principal agency equipped to take action in the event of a threat and also to undertake preparatory operations to minimise future risks from the air and water.

2.113 The legislation governing these actions, and the protections afforded to personnel, should be consistent with that already given to land-based activities. Given the changing nature of security threats against the Commonwealth, States and Territories, the proposed amendments to Part IIIAAA will provide clear parameters in which the Defence Force can operate.

Recommendation 2

2.114 The Committee recommends that a stronger proportionality test be included Schedules 1 and 3.

2.115 The Committee considers that the remainder of Schedules 1 and 3 be passed without amendment.

Numerical identification of ADF personnel in certain circumstances

2.116 The amendments to Part IIIAAA concerning surname identification are a result of the findings outlined in the Blunn Report.

2.117 According to the Report, existing provisions for ensuring appropriate identification of personnel in Divisions 2 and 3 of Part IIIAAA result in unintended consequences:

> If both Divisions are applied a member of the assault force may exercise any of the powers in Division 3 authorised, including the power to search persons, but must wear a uniform and identification including having his or her surname attached to the front of his or her uniform. This contrasts with the situation where a member exercising the powers authorised under

67 Clause 51SC, Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005.

> Division 2 is quite deliberately not required to wear name tags in order to protect their anonymity.

2.118 The rationale behind the amendments is to preserve anonymity of specialist forces. As the Australia Defence Association notes, it is proposed that such personnel will be identified only by a number, similar to police identification processes.

Committee view

2.119 The Committee believes that preserving the anonymity of special forces personnel in the public arena is important. As the Australian Defence Association highlights:

> ADF personnel are Australian citizens too. Given the many difficulties involved, they are entitled to protection and clear guidance when ordered to implement aid-to-the-civil-power support in emergency situations.[68]

2.120 Where identification by name is not appropriate, the Committee supports the development of a suitable numeric identification system. This will enable the involvement of individual personnel to be monitored and to ensure that appropriate accountability mechanisms are in place. The Committee endorses the proposals in the Bill concerning the wearing of identification by ADF personnel.

Public notification of some Defence Force activities

2.121 Where areas are 'designated' in the event of a domestic security incident, there is a requirement under the current law to broadcast its establishment on radio or television. Under the proposed amendments to Clause 11 of Schedule 6, the broadcast and notification requirements will be changed to provide an exemption from notifying where to do so would prejudice a specific operation.

2.122 This exemption is only available in limited and specific circumstances. An example of where exclusion from the Act may be required would include the resolution of a siege or hostage recovery operation.[69]

Committee view

2.123 The Committee believes that exceptions to the notification and broadcast requirements under the Defence Force Act are justified on practical grounds in the event of some national and localised security incidents. The Committee considers that the proposals in the Bill concerning notification and broadcast be passed without amendment.

---

68 *Submission 11*, p. 8.

69 *Submission 6*, p. 7.

Powers apply to a range of terrorist threats, including 'mobile' incidents

2.124 The existing Part IIIAAA was found by the Blunn Report to be inadequate in a number of ways. In particular, the report notes that the existing legislation:

> … covers only a limited set of circumstances, is fundamentally based on siege/hostage concepts and does not effectively cater for the wider range of terrorist scenarios now envisaged.[70]

2.125 As well as adding to Part IIIAAA to include maritime and aviation incidents, the proposed amendments repeals the current subsections 51I(1) and (2) and inserts new subsections which as the Explanatory Memorandum puts it, 'remove the 'land-centric' nature of the current wording.[71] The amendments also add definitions of 'location' (includes any premises or place) and 'thing' (includes any means of transport but does not include an aircraft that is airborne) to the list of definitions.

2.126 The effect of the amendments is to give the Defence Force powers to take action to recapture a location or thing; prevent or end acts of violence, and protect persons from acts of violence (proposed paragraph 51I(1)(a)).

2.127 In addition, in taking the action, the ADF may:

- free any hostage from a location or thing;
- detain persons whom the ADF member reasonably believes have committed a Commonwealth State or Territory offence;
- control the movement of persons or means of transport;
- evacuate persons to a place of safety;
- search persons or locations or things for dangerous things or other things related to the domestic violence that is occurring or is likely to occur;
- seize any dangerous thing, or other thing related to the domestic violence that is occurring or is likely to occur, found in such a search; and
- do anything incidental to anything noted above.

2.128 The action taken under these sections must be authorised in writing by an authorising Minister (proposed section 51(2)).

2.129 The submission by the Federation of Community Legal Centres in Victoria views these expanded powers with some concern. The submission notes:

> It is our submission that these extraordinary powers are excessive and unjustified given the current level of terrorist threat in Australia.

70 Blunn et al 2004, *op.cit.,* p. 12.

71 *Explanatory Memorandum*, p. 23.

> Furthermore, it is worrying that these powers are afforded without adequate mechanisms for accountability and transparency.[72]

2.130 The Defence Force explained to the Committee in evidence that;

> We are seeking several changes to the legislation that concern operational realities. They include: …recognising that modern threats can sometimes be mobile and not fixed in terms of premises; … It might help the Committee to think of it in terms of … recognising some operational and tactical realities of how our forces operate.[73]

Committee view

2.131 The need for accountability has featured in discussion in submissions as well as in evidence before the Committee. However, the expansion of Division 2 recognises the nature of modern threats, and addresses the need for a correspondingly more flexible legislative environment.

2.132 In relation to the extent of terrorist threats, the Committee takes the view that it impossible to assess them extent without the specialist knowledge possessed by those agencies whose job it is to collect it. Governments ignore at their peril, the possibility and consequences of terrorism; this Bill is an important part of government strategy to protect its citizens.

Expedited call-out

2.133 In their Report on Part IIIAAA, Blunn et al noted that the processes under Act 'are time consuming and complex and although emergency action is authorised this negates the process'.[74]

2.134 Proposed 51CA of the bill provides for an expedited call-out procedure which can be implemented at short notice, in situations such as rapidly developing aviation or maritime threats.[75] The Prime Minister will be able to make a call-out order (which the Governor General would ordinarily make) in the event of a sudden and extraordinary emergency where it is not practical for the usual call-out order to be made. Where the Prime Minister is not contactable, the order can be authorised by the two other authorising Ministers (s 51CA(2)).

2.135 Orders need not be in writing (proposed s 51CA(4)). However a written record of the order must be made, signed by the person(s) giving the order and witnessed.

---

72 *Submission 8*, p. 16.

73 Mr Pezzullo, *Committee Hansard,* 31 January 2006, p. 32.

74 Blunn et al 2004, *op.cit.*, p. 12

75 *Explanatory Memorandum*, p. 21.

2.136 The provisions are designed to meet situations which are fast developing. The Department of Defence gave the following example:

> Say the ADF was cooperating with civil authorities in relation to quarantine issues, people-smuggling issues and fisheries compliance issues and, under the cover of offshore maritime activities, a terrorist group decided to attack infrastructure, hijack craft, take people hostage and the like. Those developments might well break very quickly on you. Given the speed with which these things can unfold and the capabilities terrorists have these days in terms of communications and means of transportation, we think that in terms of combating that threat we need to have a circumstance where members of the executive, who are much better connected these days than they have ever been with secure communications, can quickly give effect to a call-out by doing something as simple as making a secure telephone call which can be properly and duly recorded later.[76]

2.137 There was little comment about these provisions in the submissions received by the Committee. The Federation of Community Legal Centres observed that the proposed section was of concern in the light of the lack of definition of key terms in the bill; the Federation's concern was that vagueness coupled with very broad discretions could result in very broad interpretations of what constitutes 'extraordinary' circumstances.

Committee view

2.138 The Committee notes the Department of Defence's explanation of the need for these provisions. The potential circumstances described by the Department require swift and emphatic action in ways not contemplated even 5 years ago.

76 Mr Pezzullo, *Committee Hansard,* 31 January 2006, p. 34.

2.139 The Committee also considers that the note in the explanatory memorandum, should be emphasised. Paragraph 136 states;

> This amendment is not intended to circumvent existing processes, and is instead only to be used in a sudden and extraordinary emergency (such as rapidly developing aviation or maritime threats).[77]

2.140 The Committee considers that the Bill provides as far as possible for the contingencies which could give rise to the need to call-out the ADF to assist civilian authorities.

2.141 In general, the Committee considers that the Bill meets the identified need for legislation that enumerates and clarifies the rules for the call-out of the ADF in the current security environment. In practice, the proper application of these considerable powers requires a high degree of training for ADF personnel and the support of carefully crafted military doctrine. The Committee notes the assurances it has received from the Department of Defence that these will occur.

Senator Marise Payne

Committee Chair

77 *Explanatory Memorandum*, p. 21.