AUSTRALIA'S EXPANDED MILITARY CALL-OUT POWERS: CAUSES FOR CONCERN

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I. INTRODUCTION

The *Defence Legislation Amendment (Aid to Civilian Authorities) Act 2006* (Cth) was passed in February 2006, considerably expanding the military call-out powers, first enacted in 2000. This amending legislation, and the manner and circumstances in which it was adopted, underscore the concerns that this author has expressed previously about the preparations to use the armed forces against civilians on domestic soil[1]. After a debate lasting only a total of about six hours in the Senate and House of Representatives, the Commonwealth parliament passed the amendments to the *Defence Act 1903* (Cth) ('the Act') with little public discussion or media coverage, on the basis of essential agreement between the Howard government and the Labor opposition.

For the second time in just over five years, the government, supported by Labor, cited the need to protect an international sporting event – the March 2006 Commonwealth Games in Melbourne – from terrorism as the reason to enact military call-out powers. In 2000, the Sydney Olympic Games provided the immediate rationale for legislation that eroded the basic political and legal principle – dating back to the overthrow of the absolute monarchy in Britain in the seventeenth century – against using

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1 Michael Head, 'The Military Call-Out Legislation – Some Legal and Constitutional Questions' (2001) 29 *Federal Law Review* 273 [hereinafter Head (2001)]; Michael Head, 'Calling Out the Troops – Disturbing Trends and Unanswered Questions' (2005) 28 *UNSWLJ* 479 [Head (2005)].

the armed forces to deal with civilian disturbances.[2] Despite producing no evidence of any actual terrorist threat to the Olympics, the government mobilised 4000 troops, including Special Air Services (SAS) commandos, for the 2000 Games, although it did not activate the provisions during the Games.[3] Amendments proposing a sunset clause were rejected, so the legislation remained on the books after the Games, authorising the government to deploy troops on home soil if it alleged a threat to 'Commonwealth interests' or a danger of 'domestic violence' beyond the capacity of a state or territory government.

Following the September 11 terrorist attacks in the US and the launching of the 'war on terror,' the government concluded that the requirements in the Act for deploying the armed forces were too restrictive. In 2003, as required by s 51XA of the Act,[4] it commissioned a review by former military, police and public service chiefs, which recommended expanding the powers.[5] That report was published in early 2004. Yet, the government waited until late 2005 before bringing forward the new legislation, using the occasion of the Commonwealth Games. Again without claiming any specific terrorist threat to the Games, the government announced that 2,600 Australian Defence Forces (ADF) personnel would be deployed for the event. The 'security contingent' included an SAS Tactical Assault Group, Blackhawk helicopters and F/A 18 Hornet jet fighters, communications units and specialised teams to search venues and operate vehicle checkpoints.[6]

This article will suggest that the changes to Part IIIAAA of the Act significantly, and disturbingly, enhance the government's

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2 Head (2001) 278–284.

3 Ibid 274–275.

4 Section 51XA of the *Defence Act 1903* (Cth) ('the Act') required either a parliamentary report or a Ministerially-appointed 'independent' review to be convened within six months of the making of orders under the 2000 legislation, or, if no orders were made, within three years of the commencement of the legislation.

5 Department of Defence, *Statutory Review of Part IIIAAA of the Defence Act 1903 (Aid to Civilian Authorities)*, Australian Government, Canberra (2004).

6 Defence Media Release, 'ADF 'ready' to support the Commonwealth Games' Thursday 16 February 2006.

unilateral power to mobilise troops internally and give the military unprecedented domestic powers, including to interrogate civilians and seize documents, and considerably wider and legally protected rights to use lethal force. It will further argue that there is no reason to trust the present federal government, nor any future government, with the use of such powers, and that there are clear dangers of the powers being used to target social unrest and political dissent. In fact, it will be contended that the 'war on terror' is being utilised to condition public opinion to accept the internal deployment of the armed forces for broader political purposes, and that there is no genuine need to call out the military to combat terrorism. These concerns have been further amplified by the November 2006 publication of an Australian Strategic Policy Institute report advocating 10 steps to establishing domestic security as a 'core business' of the ADF.[7]

II. OVERVIEW OF THE LEGISLATION

The original call-out legislation passed in 2000 limited deployments to where the government alleged that a danger of 'domestic violence' existed which required the protection of 'Commonwealth interests' or the protection of a State or Territory where the State or Territory could not, or was unlikely to be able to, protect itself.[8] Although 'domestic violence' – a term derived from section 119 of the Constitution – was nowhere defined legally, it was derived from American usage and meant to relate to intense political, industrial or social crises that imperilled the very existence of the state.[9] Adopted in the wake of the great strike struggles in Australia during the 1890s, which saw troops deployed against demonstrations with orders to shoot to kill strikers and their supporters,[10] the term could cover a general strike or widespread popular movement against a government.

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7 Anthony Bergin and Andrew Smith, *Australian Domestic Security: The Role of Defence* (2006).

8 Sections 51A, 51B, 51C.

9 Head (2001) 281.

10 Ibid, 280.

However, as will be discussed in detail below, the amendments adopted in 2006 permit the air force and navy, as well as the army, to be mobilised significantly more broadly and routinely to deal with lesser incidents, including any alleged act or danger of terrorism. According to the Explanatory Memorandum for the legislation, the amended Act would also apply to 'mobile terrorist incidents,'[11] allowing for military mobilisations under the broad banner of combatting terrorist acts and for deployments to roam across areas and jurisdictions, rather than being confined to designated zones, as presently provided for. Incidents in the air and offshore waters are specifically covered.

Because of the wide definition of terrorism in the counter-terrorism legislation passed since 2001, which can cover many traditional forms of political protest, such as mass demonstrations, blockades and picket lines,[12] this could permit the armed forces to be called out for political purposes. While s100.1(3) of the *Criminal Code Act 1995* (Cth) exempts 'advocacy, protest, dissent or industrial action' from the definition of terrorism, that exemption is substantially nullified by the proviso that the action must not be intended to cause physical harm to a person or 'create a serious risk to the health or safety of the public or a section of the public'. During questioning in a Senate committee hearing on the anti-terrorist legislation, the Attorney-General's representatives admitted that someone who cut through a fence at the Easter 2002 protest at the Woomera refugee detention centre or who invaded the parliament building during a 1996 trade union rally could have been charged with terrorism.[13]

Significantly, the 2006 amendments authorise ADF operations against threats to physical property, judged by ministers to be 'critical infrastructure,' rather than threats to people.[14] These

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11 Explanatory Memorandum, Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005 (Cth) 2 <http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=2144&TABLE=OLDEMS> at 16 May 2006.

12 *Criminal Code 1995* (Cth) 100.1. See Michael Head, 'Counter-Terrorism Laws: A Threat to Political Freedom, Civil Liberties and Constitutional Rights' (2002) 26 *Melbourne University Law Review* 666, 673.

13 Ibid 674.

14 Section 51CB(2).

physical assets can include public transport and utilities, that are not Commonwealth, but state or territory responsibilities. A late amendment underscored the thrust of this change by providing that the ADF can be called out regardless of whether a State or Territory government agrees to the intervention.[15]

Moreover, the procedures for calling out the ADF have been expedited so that in 'sudden and extraordinary emergency' situations the Prime Minister or two other 'authorising ministers' can give the order, which does not need to be in writing. Another late amendment extended the list of 'authorising ministers' to include the Deputy Prime Minister, Foreign Affairs Minister and Treasurer, as well as the Defence Minister and Attorney-General.[16] Moreover, standing orders can be issued for the activation of the ADF whenever the Chief of the Armed Forces deems it necessary.[17]

In the Senate, the Greens attempted to create a parliamentary checking mechanism on the exercise of these powers, by proposing an amendment that any ADF call-out be followed by the swift recall of parliament with the power to disallow the decision. The proposal was dismissed by the government and Labor with no debate, except for brief statements by Greens leader Senator Bob Brown and Senator Andrew Bartlett from the Australian Democrats.[18] This rejection of immediate accountability to parliament places great power in the hands of the executive, exercisable by the Governor-General, Prime Minister, two cabinet ministers or the ADF chief. Moreover, the 2006 amendments also permit the authorising Ministers to dispense with a previous requirement under ss51K to notify both Houses of Parliament (and the general public) within 24 hours of the declaration of a 'general security area'.[19] Section 51X provides

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15 Section 51CB (5).

16 Ibid s 51CA(2).

17 Section 51AB.

18 Commonwealth, *Parliamentary Debates*, Senate, 8 February 2006, 23–24 (Bob Brown, Andrew Bartlett).

19 Section 51K requires a recall of both Houses of Parliament within six days of a declaration of a 'general security area', but provides that failure to do so 'does not make the declaration ineffective to any extent'. Under the 2006 amendments, s 51K(2AA) permits the authorising ministers to avoid

for reports to parliament on the use of the call-out powers, but after they have been exercised and with no right of disallowance.[20]

In a previous article I pointed to 'a creeping militarisation of the state apparatus' designed to accustom public opinion to the increased use of the ADF in civilian settings, and to train and prepare military personnel for that use. Since 2001, this has occurred most notably in (1) dispatching naval vessels to repel refugee boats, (2) frequent anti-terrorism exercises involving heavily-armed ADF members alongside police and intelligence officers and (3) deployments in Afghanistan, Iraq and the Solomon Islands.[21] Since 2000, the armed forces have been used also in highly-publicised shows of strength, including air force jets and helicopters flying overhead, during major political events, notably for the 2002 Commonwealth Heads of Government Meeting at Coolum, Queensland and US President Bush's visit to Australia in 2003.

On none of these domestic occasions were the call-out provisions utilised. Instead, the government invoked the vague, judicially ill-defined and therefore unsatisfactory 'executive power' under section 61 of the Constitution.[22] As I have explained elsewhere, many grey areas remained legally. These included constitutional doubts, the lawfulness of using lethal force, the relevance of Rules of Engagement, the role of superior orders as a defence and the ability of citizens to legally challenge actions taken during a call-out.[23] The purpose of many of the latest amendments to the Act is to give ADF officers and members explicit powers and provide immunity from legal action when their exercise results in death, injury or loss. As reviewed below, once deployed, the military will be legally authorised, inter alia,

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notifying parliament (and the public) of such a declaration, if they are satisfied that it 'would prejudice the exercise of powers'.

20 Section 51X requires a report to be tabled in both Houses of Parliament or circulated to Members and Senators within seven days of an order being issued under Part IIIAAA.

21 Head (2005) 484–492.

22 *Statutory Review*, above n 5, 8.

23 Head (2005) 493–504.

to shoot down aircraft, sink ships, use deadly force, demand answers to questions and require the production of documents.

ADF personnel had powers to use lethal force under the existing legislation but the use of 'reasonable and necessary force' was restricted to where they believed it was needed to protect the life of, or prevent serious harm to, another person.[24] The changes extend the use of potentially lethal force to where it is considered necessary to protect any infrastructure that the government designates as 'critical'.[25] According to the Explanatory Memorandum, this power may be used in alerts relating to mass transit systems, mass gatherings, sporting events or 'other areas that may require protection'.[26] These provisions raise the possibility of soldiers, who are specifically trained to shoot to kill, being responsible for incidents such as the killing of an innocent civilian during 2005—Jean Charles de Menezes in the London underground.[27]

The new interrogation and document-production powers are far-reaching. No one will have the right to refuse to answer questions or hand over material on the grounds of self-incrimination. Instead, they can be jailed for non-compliance.[28] Similar powers have been given to the intelligence and police agencies where people are detained without trial under the counter-terrorism laws passed since 2002[29], but their extension to the military raises even greater issues of civil liberties, given the lethal weaponry available to the armed forces, which may potentially be used to enforce compliance.

From 2000, Part IIIAAA of the Act had already given ADF personnel sweeping powers.[30] Under s 51I, any member of the

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24 Section 51T.

25 Section 51T(2A).

26 Explanatory Memorandum, above n 11, 12.

27 British Independent Police Complaint Commission (IPCC) reports on this killing have been submitted to the British government and the Crown Prosecution Service but not yet released to the public. See the IPCC media release: <http://www.ipcc.gov.uk/pr140306_stockwell.htm> at 7 December 2006.

28 Section 51SO.

29 For example, Australian Security Intelligence Organisation Act 1979 (Cth) s 34G.

30 Head (2001) 285–286.

Defence Force may seize buildings, places and means of transport, detain people, search premises and seize possessions. If the authorising Ministers declare a 'general security area' under s 51K, these powers are expanded to include personal searches, erection of barriers and stopping means of transport. If a 'designated area' is declared within a general security zone under s 51Q, the military can halt and control all movements of traffic and people, issue directions to individuals and 'compel' people to comply with directions. Under the amendments, all the ADF powers are now protected by a defence of 'superior orders,' which exempt ADF members from criminal liability, except if the order they obeyed was 'manifestly unlawful'.[31] They no longer have to wear name tags during operations.[32] Furthermore, any criminal prosecutions will be handled by federal authorities under federal law, overriding state laws.[33]

III. DETAILS AND IMPLICATIONS

This article reviews eight areas of particular concern, primarily where the power to call out the armed forces is significantly expanded, the capacity of federal ministers to issue such an order is increased, and the powers assumed by ADF personnel are enlarged and protected from legal review. Also of concern is the removal of public notice requirements, the ability to call out Reserves and the refusal to insert a 'last resort' clause in the legislation.

A. *Increased scope – beyond 'Commonwealth interests' and 'domestic violence'*

Both politically and legally, the most significant change in the legislation is the broadening of its scope beyond responses to threatened 'domestic violence', and the defence of 'Commonwealth interests' or the protection of States or Territories. Non-defined or ill-defined concepts such as 'mobile terrorism', 'critical infrastructure', 'aviation incidents' and 'offshore area incidents' have been introduced, either in the legislation itself or

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31 Section 51WB.

32 Section 51S(1)(b).

33 Section 51WA.

in its Explanatory Memorandum, that have the potential to make resort to military powers much more likely and commonplace, as well as constitutionally dubious.

The terms 'Commonwealth interests' and 'domestic violence', although not defined by the legislation or the Constitution, at least have constitutional connotations and parameters. Section 119 of the Constitution states: 'The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.' The expression 'domestic violence' was borrowed from article IV of the United States Constitution, s 4 of which specifies that the United States shall protect each State, on the application of its legislature, against 'domestic violence'. The statutory embodiment of this provision in 10 USC § 331 (1964) uses the more specific term 'insurrection', suggesting that a serious level of rebellion must be involved — one that threatens the very existence of a state government.[34] 'Commonwealth interests' would generally involve a breach of a Commonwealth law, although it has been asserted that other valid Commonwealth interests might exist that are not governed by statute.[35] I have argued elsewhere that Part IIIAAA of the Act already exceeded federal legislative power, by going beyond s 119 of the Constitution in allowing troop deployments to defend 'Commonwealth interests' in a State without that government's consent and by permitting call-outs in anticipation of domestic violence that is 'likely to occur' rather than where the threat has already arisen.[36] Nevertheless, the restriction of military mobilisations to protect 'Commonwealth interests' or respond to threatened 'domestic violence' preserved some federal-state and military-civil demarcations.

Section 51CB permits the authorising ministers to designate any infrastructure in Australia or the Australian offshore area as 'critical'. Infrastructure is defined to include 'physical facilities, supply chains, information technologies and communications

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34 See generally M Cherif Bassiouni, *The Law of Dissent and Riots* (1971).

35 Robert Hope, *Protective Security Review Report* (1979) 151; H P Lee, *Emergency Powers* (1984) 224; *R v Sharkey* (1949) 79 CLR 121, 151 (Dixon J); Head (2001) 281, 286-289

36 Head (2001), 286-287.

networks or systems'.[37] These words are sufficiently broad to apply to a vast range of ordinary domestic facilities, such as roads, railways, buildings, sporting arenas, schools, universities, hospitals, telephone and power lines, dams and water pipelines, mass media outlets and computer networks. Most of these are State or Territory responsibilities, yet there is no need to obtain State or Territory consent before sending in troops to protect such assets.

Moreover, no criteria are stated for designating facilities as 'critical', except that the ministers must reasonably believe that there is a threat of damage or disruption to the infrastructure that would 'directly or indirectly endanger the life of, or cause serious injury to, other persons'.[38] Apart from the vague and subjective character of such a test, it is not confined to a 'terrorist' threat. The alleged danger could come from a political demonstration, riot, industrial action, picket line or blockade. The Explanatory Memorandum refers to 'a terrorist threat *or heightened alert* relating to mass transit systems, mass gatherings (sporting events etc.), critical infrastructure *or other areas* that may require protection' [emphasis added].[39]

Section 51IB provides that military call-outs to respond to such dangers remain confined by Part IIIAAA's overall requirement of a threat to 'Commonwealth interests' or of 'domestic violence', but the very specification of powers to protect critical infrastructure is likely to expand the interpretation of those concepts. Section 51IB permits the use of called-out military personnel to 'prevent or put an end to, damage or disruption to the operation of the designated critical infrastructure' or 'prevent, or put an end to, acts of violence'. It enumerates specific powers, including to detain people, control movements, carry out evacuations, search people and seize things, as well as 'anything incidental' to these powers.

The Act does not define 'acts of violence', which may not be restricted to terrorist violence. It is open to a government to allege that planned political or industrial actions, or various forms of civil unrest, could involve violence. Indeed, the Act

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37 Section 51(1).

38 Section 51CB(2).

39 Explanatory Memorandum, above n 11, 12.

nowhere specifically refers to terrorism. Even if it did, as noted above, the definition of terrorism in the counter-terrorism legislation introduced since 2001 is wide enough to cover some customary forms of political and industrial activity.

The Explanatory Memorandum's reference to the ADF being used to deal with 'a mobile terrorist incident and a range of threats to Australia's security'[40] also raises significant questions. Although these phrases are not used in the amended Act, their presence in the Memorandum conveys an intention that the powers conferred on the ADF can be activated across jurisdictions in a broad context of responding to threats of terrorism or other forms of violence. To this end, s 51I(1) has added broad definitions of 'location' (includes any premise or place) and 'thing' (includes any means of transport, except an airborne aircraft) that will facilitate wide-ranging military operations.

As with s 51IB relating to critical infrastructure, s 51I(1) also significantly expands the special powers of called-out personnel by authorising them generally to 'prevent, or put an end to, acts of violence'. In addition, the section specifically empowers the ADF to (inter alia) detain people reasonably believed to have committed an offence, control the movement of persons or means of transport, and search persons or locations or things.

On the face of it, the extensions of the call-out power to cover 'aviation incidents' and 'Australian offshore areas' may seem unexceptional. However, both considerably expand the scope of the legislation, complete with the legal immunities attached to it, and create the conditions for regular use at sea and in the skies.

'Australian offshore areas' are defined to include the exclusive economic zone of Australia (which extends up to 200 nautical miles or 370 kilometres off the coast), the sea over the continental shelf of Australia and any area prescribed by regulations.[41] Moreover, s 51AA, which covers offshore areas, also covers the internal waters of a State or Territory, permitting troops to be dispatched there to protect Commonwealth interests against domestic violence, whether or not the State or Territory government agrees to the deployment, or has even been

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40 Ibid, 2.

41 Section 51 (1).

consulted for reasons of urgency. As the Law Council of Australia pointed out in its submission to the Senate Legal and Constitutional Committee, no reason is given in the legislation or the Explanatory Memorandum for this extension into areas normally subject to State jurisdiction.[42]

'Aviation incidents' are not defined by the Act. Indeed, the use of that heading in Schedule 3 of the Bill seems to be misleading because the relevant section, s 51AB, is not confined to aerial situations. Instead, as discussed below, it provides authorisation in advance for callouts in 'specified circumstances' identified by the authorising Ministers. The only connection to aircraft or aerial incidents is provided by s 51ST, which authorises measures against aircraft, up to and including destroying aircraft.

B. *Expedited and pre-programmed callouts*

Under the legislation passed in 2000, a callout had to be ordered by the Governor-General in writing, acting on the advice of the authorising Ministers. Section 51CA now allows the Prime Minister or the two other authorising Ministers to issue a callout order if a 'sudden and extraordinary emergency' makes it not practicable for an order to be made by the Governor-General. Furthermore, an order does not need to be in writing, but can be simply noted in a written record. Failure to supply a copy of the record to the Governor-General and the Chief of the Defence Force does not affect the validity of the order. In its testimony to the Senate Legal and Constitutional Legislation Committee, the Department of Defence offered the following justification:

> [W]e need to have a circumstance where members of the executive, who are much better connected these days than they ever have 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.[43]

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[42] Evidence to Senate Legal and Constitutional Committee, Inquiry into the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005, Parliament of Australia, Canberra, Submission 17, p3 (Law Council of Australia) <http://www.aph.gov.au/senate/committee/legcon_ctte/defence/submissions/sublist.htm> at 7 December 2006.

[43] Commonwealth, *Parliamentary Debates*, Senate, Mr Pezzullo 31 January 2006, 34 (Mr Pezzullo); The Senate, Legal and Constitutional Legislation

In other words, authorisation for what used to be regarded as a rare, exceptional and significant decision – to override the tradition against the domestic deployment of the armed forces – can now be made via a quick phone conversation. Section 51AB goes further, permitting the authorising Ministers to specify circumstances in advance in which the Chief of the Defence Forces may utilise the ADF to protect Commonwealth interests against domestic violence. In effect, this provides for pre-programmed callouts, in which the ADF chief can deploy the military 'for reasons of urgency' without a specific order from the government. The section does not define the 'specified circumstances,' which are left to the authorising ministers to identify, nor does it require the 'specified circumstances' to be notified to the public.

C. *Wider powers, including to use lethal force*

In addition to the broad array of powers created by the 2000 legislation, the amended Act grants the ADF quite extraordinary new powers in various circumstances. They include to use lethal force (s 51T(2A)), shoot down planes (s 51ST), sink ships (s 51SE), interrogate people and command the handing over of documents (s 51SO), search people and premises (s 51SK) and seize things (s 51SG). Many of these powers exceed those held by police officers, notwithstanding the expansion of police powers by the anti-terrorism legislation adopted by the federal, state and territory parliaments in late 2005. The only prerequisite for their use – that ADF personnel consider them 'reasonable and necessary in the circumstances – provides little real safeguard against misuse or overuse.

The military's lethal force powers have been extended beyond the original Act – which allowed for reasonable force to protect people from death or injury – to the protection of physical assets. The relevant part of s 51T now reads:

> (2A) Despite subsection (1), in exercising powers under Division 2A, a member of the Defence Force must not, in using force against a person:

Committee, Commonwealth Parliament, *Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005* (2006) 35.

> (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:
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> (i) protect the life of, or to prevent serious injury to, another person (including the member); or
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> (ii) protect, against the threat concerned, the designated critical infrastructure in respect of which the powers are being exercised; or
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> (b) subject the person to greater indignity than is reasonable and necessary in the circumstances.

The new subsection 51(2A)(a)(ii) could justify shooting people to stop a threatened disruption of any facility, without any alleged direct danger to human life. In submissions to the Senate Legal and Constitutional Committee, the Australian Muslim Civil Rights Advocacy Network and the NSW Council for Civil Liberties pointed out that the provision deviates from the long-held legal principle that killing of causing serious injury to protect property is not permissible.[44] The Human Rights and Equal Opportunity Commission (HREOC) called for the provision to be excised from the Bill because it potentially placed Australia in breach of article 6 of the International Covenant on Civil and Political Rights.[45] The ICCPR article 6 (1) provides: 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.'

These objections were rejected by the Senate Committee on the grounds that the power would be used only in 'the most extreme circumstances' and that an attack on any critical infrastructure has 'the potential to threaten life indirectly as well as compromise the ability of the country to defend itself'.[46] Such vague formulations add to the concern that lethal force can now be used to protect facilities on the basis of military judgments about their importance to national defence.

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[44] Ibid 25.

[45] Ibid 25.

[46] Ibid 26.

Another section that raises concerns is s 51SO, which empowers a called-out ADF member to 'require a person to answer a question put by the member or to produce a particular document to the member' (ss(1)). The only qualification is that the ADF member must believe on reasonable grounds that it is necessary for preserving the life or safety of other persons or 'to protect Commonwealth interests against the threat concerned' (ss(2)). This latter phrase is especially susceptible to wide application because 'Commonwealth interests' are not defined by the Act, while the nature of the requisite 'threat' is also unspecified. A person who fails to comply faces a penalty of 30 units (ss(3)), and is not excused on the ground of possible self-incrimination (ss(4)), although any answer given or document produced is not admissible in most criminal proceedings. These provisions open the prospect of interrogation of civilians by heavily-armed military personnel, something normally associated with military regimes.

D. *'Superior orders'*

The potential for misuse of the call-out powers has been increased by overturning the common law's rejection of a general defence of superior orders[47] and also providing expanded legal immunities from prosecution for ADF personnel. Under s 51WB, it is now a defence to a criminal act done, or purported to be done, by an ADF member under the call-out provisions that (a) the act was done under an order of a superior, (b) the member was under a legal obligation to obey the order, (c) the order was not manifestly unlawful, (d) there was no reason to believe that the circumstances had changed materially since the order was given, (e) there was 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.

The Explanatory Memorandum states that on occasion, military service 'will require unhesitating compliance with orders'.[48] It also states: 'As matters currently stand, an ADF member prosecuted for a crime will have a defence if they can show they acted under lawful authority.'[49] In other words, the key proviso is

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47 Head (2005) 498–501.

48 Explanatory Memorandum, above n 11, 25.

49 Ibid 26.

the extension of the defence to cover unlawful superior orders that were not 'manifestly unlawful'.

Superior orders defences have traditionally been confined to armed conflicts, and none currently exist for Australian police officers.[50] Even in combat situations, the *Defence Force Discipline Act 1982* (Cth) ('*DFDA*') and explanatory *Australian Defence Force Discipline Act 1982 Manual* provide that only lawful commands need to be obeyed.[51] It is a defence to any offence under the *DFDA* that an act or omission was performed in obedience to 'an unlawful order that the person did not know, and could not reasonably be expected to have known, was unlawful'.[52] The new 'manifestly unlawful' defence is arguably wider than the *DFDA* defence. This shift in the law opens up dangers that military personnel can kill, maim or seriously violate the rights of civilians with impunity. It may be argued that the new formulation is similar to that in Article 33 of the 1998 Rome Statute of the International Criminal Court.[53] The adoption of the 'manifestly unlawful' test in the Rome Statute remains controversial, however, because it is arguably a retreat from the standard applied at the post-World War II Nuremburg tribunals.[54]

This issue was barely mentioned in the report of the Senate Legal and Constitution Legislation Committee, and met with no objection, except to a limited extent in the dissenting report by Greens Senator Bob Brown.[55] In the Senate debate, Brown argued that s 51WB overturned the Nuremburg tribunals'

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50 Senate Report, above n 43, 21, referring to Evidence to Senate Legal and Constitutional Committee, Inquiry into the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005, Parliament of Australia, Canberra, Submission 10 (Gilbert & Tobin Centre for Public Law, University of New South Wales).

51 *Defence Force Discipline Act 1982* (Cth) s 27; *Australian Defence Force Discipline Act 1982 Manu*al 4–33.

52 *Defence Force Discipline Act 1982* (Cth) s 14.

53 Rome Statute of the International Criminal Court <http://www.un.org/law/icc/statute/romefra.htm> at 7 December 2006.

54 For a discussion of this issue, see C Garraway, 'Superior orders and the International Criminal Court: Justice delivered or justice denied' (1999) *International Review of the Red Cross* No. 836, 785–794.

55 Senate Report, above n 43, 43–44.

dismissal of the superior orders defence. He suggested that soldiers who killed people during a protest could plead that they were taking orders.[56] At Nuremberg, Article 8 of the Charter of the International Military Tribunal stated:

> The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

This principle was adopted to prevent Nazi officials and officers from escaping liability for the violence and denial of basic human rights they committed against civilians, notably Jews. The experience of fascist totalitarianism was so horrific that people around the world demanded that such conduct never be permitted again. Nevertheless, Brown came under intense criticism in parliament for raising this issue. During the brief debates on the Bill in both houses, numbers of speakers condemned him. Defence Minister Brendan Nelson accused him of likening Australian servicemen and women to Nazis. The minister said it was

> [A]bsurd and an indictment of the Greens, as a political voice in the Senate, that anyone would so illegitimately situate Australia's Defence Force personnel within such a dreadful and heinous period of Western history.[57]

Brown did not accuse soldiers of being Nazis, but pointed to the dangers of abuse of power inherent in repudiating a longstanding legal principle. The logic of Nelson's denunciation is that it is politically illegitimate for anyone to even call into question the basis on which troops might be mobilised against civilians and given orders to use lethal force.

E. *Exclusive Commonwealth jurisdiction*

Another new provision of the Act, s 51WA, removes ADF personnel from the jurisdiction of State and Territory criminal law and gives the Commonwealth Director of Public Prosecutions exclusive coverage of all prosecutions arising from

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[56] Commonwealth, *Parliamentary Debates*, Senate, 8 February 2006, 18 (Bob Brown).

[57] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2006, 55 (Brendan Nelson).

acts done in a military call-out. Barring State and Territory prosecutors from instituting proceedings against ADF members who may act illegally during a call-out is a further serious abrogation of citizens' rights to be protected from criminal actions by the military.

Moreover, as pointed out in a submission to the Senate committee by the Gilbert and Tobin Centre of Public Law, s 51WA also applies the substantive criminal law of the Jervis Bay Territory to call-out operations.[58] The Jervis Bay law is the law of the Australian Capital Territory to the extent that it is not inconsistent with an Ordinance, and may be amended or repealed by an Ordinance.[59] By exercising the power of the Governor-General to make Ordinances 'for the peace, order and good government' of the Jervis Bay, and the power to make regulations under an ordinance[60], the federal government can readily change the applicable criminal law without parliamentary authority, subject only to possible later disallowance in the Senate. This power is enhanced by s 51(1)(e), which defines 'substantive criminal law' as including 'other subjects declared by regulation to be within the ambit of the substantive criminal law of the Jervis Bay Territory'.

In the Centre of Public Law submission, Ben Saul pointed out that

> any decision to deploy the Australian military in Australia is likely to be highly politically sensitive. This may result in pressure being brought to bear on the Commonwealth DPP not to prosecute excessive uses of force by Defence Forces personnel, and to defer to the federal government in security matters.[61]

Saul suggested that State and Territory prosecutors be empowered to investigate and prosecute where the Commonwealth DPP was unable or unwilling to do so, under a complementarity regime similar to that applicable under the Rome Statute of the International Criminal Court. However, State or Territory prosecutors would most likely come under

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58 Submission 10, above n 50, 2.

59 Jervis Bay Territory Acceptance Act 1915 (Cth) ss 4A, 4C.

60 Ibid, ss 4F–4L.

61 Submission 10, above n 50, 2.

similar political pressure not to intervene. Nor would this proposal overcome the underlying problems that Jervis Bay law would apply and that criminal acts could be protected by the superior orders defence.

Prosecutions may be further hampered by the dropping of the previous requirement that ADF members be identified on their uniform by surname when called-out. Section 51S(1)(b) now permits military personnel to wear combinations of numbers and letters of the alphabet. Members of the public will have no independent means of identifying any soldiers or officers who violate their rights. The Senate Committee endorsed this provision, arguing that it is important to preserve the 'anonymity of special forces personnel in the public arena'.[62]

F. *Removal of requirements for public notice*

Ordinary citizens may be confronted by armed troops and subjected to their operations and commands without knowing that a call-out has been ordered. Under the previous provisions, where a 'general security area' was declared or an area 'designated' for the application of special powers, that fact had to be broadcast on radio or television. Sections 51K(2)(2AA) and 51Q(4) now provide exemptions from that requirement where the authorising ministers are satisfied that such publicity would prejudice an operation. Taken by surprise, citizens may be unfamiliar with their rights and submit to commands that exceed the military's authority or, alternatively, they may defy lawful commands by military personnel and thus expose themselves to the use of potentially lethal force, as well as subsequent criminal charges.

As noted earlier, this exemption also applies to the requirement to notify parliament within 24 hours of a proclamation under s 51K. Keeping operations secret from parliament is not only anti-democratic in principle, it also prevents parliament from meeting within six days of the declaration, as it otherwise must under s 51K. In effect, any convening of parliament is delayed until six days after the government notifies the presiding officers of each House of Parliament of the declaration.

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62 Ibid 32.

G. *Use of Reserves*

Section 51G(b) previously outlawed the calling out of 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'. This restriction, which reflected concerns about the level of training of part-time personnel for highly contentious domestic interventions, also potentially limited the size and scope of any military mobilisation. However, it was abolished by the 2006 amendments, despite opposition by the Australian Muslim Civil Rights Advocacy Network, which told the Senate Legal and Constitutional Committee:

> 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.[63]

The NSW Cabinet Office advised the committee that the NSW Police Force thought that 'use of Reserves in tactical assault situations is not appropriate'.[64] The Defence Department advanced little justification for lifting the restriction, simply asserting that Reserves were now 'very much integrated into certain parts of our force structure'.[65] The committee briefly concluded there was 'no in-principle reason why the Reserves should not be freely available to the Chief of the Defence Force (CDF) to deploy'.[66] Given that the ADF has about 20,000 Reservists, alongside 52,000 permanent personnel[67], the change significantly increases the capacity for call-outs.

H. *No 'last resort' clause*

The Defence Department submission to the Senate committee echoed the claim made in the second reading speech that 'use of

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63 Senate Report, above 43, 22.

64 Ibid 23.

65 Ibid 22.

66 Ibid 24.

67 Australian Government, Department of Defence, *Annual Report 2004–05*, Canberra, 90.

the ADF in domestic security will be a last resort only'.[68] Likewise the Explanatory Memorandum stated 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;[69]

However, the government dismissed the Senate committee's recommendation to insert such a clause in the legislation. As the Senate report noted, the legislation gives little or no guidance as to the factors that should lead ministers to authorise a callout.[70] The committee recommended that the legislation include a statement of intent that its provisions should apply only when all other avenues had been considered and rejected.[71] The government's rejection of that proposal preserves the vagueness in ministerial power. It also confirms that military callouts could be ordered in circumstances that are not a 'last resort'.

In summary, as a result of the changes adopted in the eight areas of concern discussed above, it is now possible for one or two federal politicians and military officers to launch military mobilisations on home soil without effective parliamentary or legal avenues to challenge their decision. Without being officially notified, members of the public could find themselves confronted by troops wielding substantial powers, including the right to use lethal force, issue orders, seize documents and interrogate people, with a large degree of legal immunity.

IV. SHOULD WE HAVE 'FAITH' IN THE GOVERNMENT?

It has been argued that the concerns noted above are exaggerated or even unwarranted because one must trust elected governments to use the military for legitimate purposes only. In a 2005 journal article, for example, a barrister with previous military experience concluded that calling out the ADF was not 'the end of

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68 Senate Report, above n 43, 17.

69 Ibid.

70 Ibid.

71 Ibid 18.

civilisation' because 'the ADF will only ever be deployed for a legitimate purpose' and 'one must have faith in those elected representatives to undertake such a responsibility'.[72] Ironically, the article began by recalling the protests against the Vietnam War and President Richard Nixon's invasion of Cambodia, and the use of the Ohio National Guard to shoot down four innocent students at Kent State University in 1970. The article cited an address to the nation by Nixon just five days earlier, in which the United States president accused protesters of producing an 'age of anarchy' by making 'mindless attacks on all the great institutions'.[73] Although the article did not say so, Nixon's stance offers a salutary warning against the mobilisation of military personnel to quell civilian dissenters.

The article said there was concern in 2000, when the initial military call-out legislation was brought forward, that the ADF would be deployed into Australian streets to disperse such protestors if they too caused a serious civil disturbance. However, it argued that this 'fear and paranoia' subsided over the following four years because: 'The current climate of terror has created an overriding and shifting attitude towards the ADF being called out.'[74] This line of reasoning underscores the legitimate concern that the Howard government, with Labor's bipartisan support, has promoted and utilised 'the current climate of terror' to overcome legitimate public concern about the deployment of the ADF on the streets.

In some ways, another contributor to the same journal, a former Navy legal officer, went further. He argued that the September 11, 2001 terrorist attacks in the United States had demonstrated the overly-restricted character of the call-out powers. His article proposed broadening the scope of the legislation, particularly to cover aerial and naval operations and to more securely protect ADF members from legal liability. Alternatively, it suggested increased reliance on the Commonwealth government's broad,

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[72] Norman Laing, 'Call-out the Guards – Why Australia Should No Longer Fear the Deployment of Australian Troops on Home Soil' (2005) 28 *UNSWLJ* 507, 521.

[73] Ibid 507–508.

[74] Ibid 509.

albeit ill-defined, executive power to mobilise the ADF, describing the power as 'more important than ever before'.[75]

Another contributor, Justice Margaret White of the Queensland Supreme Court, a Commander in the naval reserve, was more cautious, pointing to 'deeply held, even if imperfectly understood' community reservations about military deployments on home soil.[76] The judge concluded:

> The use of the Defence Force for what might arguably be described as political purposes which do not command significant multi-partisan support within Australia would be a development to be deplored, and would put members of the Defence Force, particularly senior members, in a most awkward position.[77]

Unfortunately, recent years have already seen troops dispatched to invade a country and put down domestic resistance – in Iraq – on the basis of information supplied by intelligence agencies, security services and government leaders that is acknowledged to have been false. After the collapse of the falsifications used to justify the United States-led invasion – 'weapons of mass destruction', and Saddam Hussein's supposed links to terrorism – one is entitled, perhaps even obliged, to approach the entire 'war on terror' with considerable scepticism.

A 'war' of indefinite duration has been declared on vaguely defined 'enemies' whose only identifiable characteristic is that they pursue a set of tactics, tactics of acts of individual violence that can attract an array of disoriented and disaffected political, religious and ethnic currents. It is beyond the scope of this article to investigate the root causes of terrorism, but it must be said that the label is notoriously open to political dispute and abuse. After all, today's primary 'terrorist' targets – Al Qaeda-linked groups – were yesterday's 'freedom fighters' in the guerrilla war against the Soviet-backed regime in Afghanistan.[78] Likewise, Saddam

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75 Cameron Moore, 'The ADF and Internal Security – Some Old Issues With New Relevance' (2005) 28 *UNSWLJ* 523, 533.

76 Margaret White, 'The Executive and the Military' (2005) 28 *UNSWLJ* 438, 457.

77 Ibid.

78 W Blum, *Rogue State: a guide to the world's only superpower* (2002) 155.

Hussein was once a close ally of Washington, particularly during the fratricidal Iran-Iraq war of the 1980s.[79]

The September 11, 2001 outrages in New York and Washington were reprehensible but there is ample evidence that they provided the pretext for the implementation of plans prepared in certain Washington political circles much earlier – during the 1990s – for the conquest of Afghanistan and Iraq.[80] The Middle East and Central Asia, as is well known, contain the largest proven concentrations of oil and natural gas reserves in the world. Washington and its allies have for decades financially, diplomatically and military supported dictatorial regimes like the Saudi monarchy and the Gulf kingdoms (and previously the Shah of Iran), in the interests of dominating resource-rich and strategically critical region.[81]

Domestically, there is no more reason to believe that the same US-allied governments are primarily motivated by the need to protect ordinary people from terrorism. Moreover, Australia's history is not lacking in examples where the armed forces have been called out for industrial and political purposes. Martial law was invoked several times in Australia during the 19th century to mobilise troops to suppress convicts, Aborigines and workers.[82] The strike struggles of the 1890s also saw troops used against demonstrations and gatherings, with orders to 'fire low and lay them out' in at least one incident during the extended maritime strike of 1890.[83] In the early years of the 20th century, Australian state governments requested military intervention on at least six occasions, to deal with such anticipated incidents as 'general strike riot and bloodshed', 'disturbances', wharf strike 'violence',

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79 Ibid 133–34, 145–46.

80 A Bacevich, American Empire: The Realities and Consequences of US Diplomacy (2002).

81 S Shalom, *Imperial Alibis: Rationalizing US Intervention After the Cold War* (1993) 63–88.

82 See S D Lendrum, 'The 'Corrong Massacre': Martial Law and the Aborigines at First Settlement' (1977) 6 *Adelaide Law Review* 26. See also Victor Windeyer, 'Certain Questions Concerning the Position of Members of the Defence Force When Called Out to Aid the Civil Power' in Robert Hope, *Protective Security Review Report* (1979) Appendix 9.

83 Brian McKinlay, *A Documentary History of the Australian Labor Movement, 1850–1975* (1979) 377.

'labour troubles' and the 1923 Victorian police strike. On each occasion, it seems, the Federal Government declined on the basis that the state police were capable of dealing with the threat (although troops were sent to guard federal buildings, including post offices, during the Victorian police strike).[84]

Troops were deployed to break strikes on several occasions during the post-World War II period, mostly by Labor governments. The Chifley Government sent in soldiers against the coal miners' strike of 1949, the Fraser Government used the RAAF to ferry passengers during the 1981 Qantas strike and the Hawke Government mobilised the airforce against striking pilots in 1989. These operations provoked bitter recriminations and questions as to their legality.[85] In a lesser known case, the Menzies Liberal Government sent troops to break a wharf labourers' strike in Bowen, Queensland in 1953, but was forced to withdraw the soldiers after tensions involving strikers and state police, followed by a protest by the Queensland Government.[86]

On several occasions in recent decades, soldiers have been deployed for political purposes. In 1970–71, the Gorton Government called out troops to suppress secessionist agitation in Papua New Guinea, then an Australian colony. Defence Minister Malcolm Fraser issued a secret Order-in-Council to authorise the call-out, but its constitutionality remains questionable.[87] The gravest political crisis came in 1975, when the Governor-General Sir John Kerr secretly placed the armed forces on alert after dismissing the Whitlam government.[88] In 1989, the Hawke Government authorised the dispatch of troops to combat protesters at the Nurrungar joint Australian-United States military satellite base. This deployment generated political controversy and legal uncertainty, particularly with regard to the

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84 H P Lee, *Emergency Powers* (1984), 201.

85 *Call Out the Troops: an examination of the legal basis for Australian Defence Force involvement in 'non-defence' matters*, Australian Parliamentary Research Paper 8 (1997–98), 19.

86 Ibid.

87 Ibid 13. See also B D Beddie and Stanley Moss, 'Some Aspects of Aid to the Civil Power in Australia' (1982) *Occasional Monograph No 2* (University of New South Wales Dept of Government) 55.

88 See *The Canberra Coup, Workers News* (1976).

potential use of soldiers to confront demonstrators outside the Nurrungar base perimeter.[89]

V. CONCLUSION

Overall, there are many reasons to be concerned about the expansion of military call-out powers. The legislative provisions have a wide, ill-defined scope, leaving broad discretions in the hands of government ministers and military officers. The enlarged scope, covering 'critical infrastructure' and 'acts of violence', could allow domestic military deployments to become much more common. Military personnel will have unprecedented powers, such as to shoot down passenger aircraft, use lethal force, interrogate civilians and seize documents. The exercise of these powers will be protected by legal immunities, including a 'superior orders' defence. These measures are part of a more general challenge to civil liberties in the context of the indefinite global 'war on terror' and can be misused for political and industrial purposes. Finally, the legislation has been advanced amid a broader, creeping militarisation of official policy, designed to accustom ordinary people to the sight of troops on the streets.

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[89] See *Call Out the Troops*, above n 85, 14–18.