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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

DEFENCE LEGISLATION AMENDMENT (AID TO CIVILIAN AUTHORITIES)
BILL 2005

EXPLANATORY MEMORANDUM

(Circulated by the Minister for Defence, Senator Robert Hill)

DEFENCE LEGISLATION AMENDMENT (AID TO CIVILIAN AUTHORITIES) BILL 2005

OUTLINE

This Bill will amend Part IIIAAA of the *Defence Act 1903* and make consequential amendments to that Act and other Defence legislation.

The amendments to the *Defence Act 1903* have been drawn from certain recommendations made by Mr Tony Blunn AO PSM, MAJGEN John Baker AO and Mr John Johnson AO APM QPM in their Statutory Review of Part IIIAAA. Additionally, a number of the amendments give effect to Government initiatives to improve responsiveness of the Australian Defence Force (ADF) to domestic security incidents in the current threat environment.

In broad terms, the purpose of the amendments is to permit the utilisation of the ADF to protect States and self-governing Territories against domestic violence and to protect Commonwealth interests.

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 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

- 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.

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;
- where the ADF is called out the civil power remains paramount;
- ADF members remain under military command;
- if called out ADF members can only use force that is reasonable and necessary in the circumstances; and
- ADF personnel remain subject to the law and are accountable for their actions.

FINANCIAL IMPACT

The amendments in the Bill have no financial impact.

NOTES ON CLAUSES

Clause 1

1. Clause 1 is a formal provision specifying the short title of the Bill as the *Defence Legislation Amendment (Aid to Civilian Authorities) Act 2005*.

Clause 2

2. Clause 2 provides for the commencement of various provisions in the Bill. Commencement will occur the day after Royal Assent.

Clause 3

3. Clause 3 provides that the Acts specified in each of the Schedules to the Bill are amended as provided for in the identified items in each of those Schedules.

Schedule 1 – Incidents in the Australian Offshore Area

Defence Act 1903

4. The proposed amendments to the *Defence Act 1903* (the Act) contained in the Bill will, among other things, enable the Australian Defence Force (ADF) to conduct offshore maritime counter-terrorism activities in Australia's offshore area. Current operations in this area are authorised under the Government's executive power. As a consequence, ADF personnel do not receive the same powers and protections currently afforded when conducting land-based hostage recovery operations. As the ADF is likely to be the principal agency equipped to conduct maritime counter-terrorism (and related) operations there is a requirement to ensure a consistent legislative approach for both land-based and offshore activities. It should be noted that, with respect to counter-terrorism operations members of the ADF perform many of the roles in the offshore area that the State or Territory Police would perform within Australia.

Items 1 - 11 – Subsection 51(1) Definitions

5. The proposed amendments will allow the ADF to be utilised in Australia's offshore areas. The amendments outline the relevant jurisdictions and clearly indicate the areas in which authority may be exercised and who may exercise that authority.

Item 12 – 51AA

6. The proposed 51AA sets out the conditions under which an order may be made utilising the ADF in the offshore areas (and within internal waters of a State or Territory in certain circumstances). In relation to the use of the ADF to protect the Commonwealth interest in areas over which the Commonwealth has jurisdiction, this provision can be distinguished from the other provisions of Part IIIAAA in that the trigger for a call out is not linked to domestic violence within a State or Territory, but rather, to a threat to Commonwealth interests. Given the evolving threat

environment, the power to deal with these threats and concurrently provide protections to ADF members who are operating under the Act to protect Commonwealth interests, is appropriate.

7. In relation to offshore areas, proposed 51AA(1) provides that authorising Ministers must be satisfied as to two matters. Firstly, that there is a threat in an offshore area (whether already inside that area or elsewhere) to Commonwealth interests. What constitutes a threat giving rise to satisfying this condition will depend on the nature of the threat and its implications. The test is different from other sections within the part as it relates to Commonwealth interests only.

8. The second matter is that the Chief of the Defence Force should be directed to utilise the ADF to deal with the threat, and that Divisions 2A or 3A and Division 4 should apply.

9. At the proposed 51AA(2), once authorising Ministers are satisfied that the ADF should be called out, the Governor General, may by written order call out the ADF and direct the CDF to use the ADF to protect the Commonwealth interest against the threat.

10. At the proposed 51AA(3) the existing restriction in 51(G) of Part IIIAAA preventing Reserves from being called out or utilised in connection with an industrial dispute applies to call outs in the Offshore Division.

11. In respect of conditions for utilising the ADF in the internal waters of a State or Territory at 51AA(4), the operative provisions reflect those that exist in the current sections, 51A, B and C, which relate to the utilisation of the ADF to protect Commonwealth, State or Territory interests in the context of domestic violence).

12. The proposed 51AA(5) provides that the Governor General has the power to direct CDF to utilise the ADF in the internal waters of a State or Territory to protect Commonwealth interests against domestic violence. This provision allows there to be a seamless transition (in that the same powers and provisions will apply) with respect to a threat in the offshore area that is likely to cross into (or originate from) internal waters of a State or Territory.

13. The proposed 51AA(6)(a) provides that the Governor General may direct CDF to utilise the ADF in the internal waters of a State or Territory to protect Commonwealth interests without there being a request from the affected State or Territory.

14. The proposed 51AA(6)(b) provides that where the affected State or Territory in 51AA(6)(a) does not make a request, the authorising Minister must consult with the affected State or Territory.

15. The proposed 51AA(7) provides an exception to consultation where, for reasons of urgency, consultation would be impracticable. The presumption remains that consultation would take place where possible.

16. The proposed 51AA(8) sets out the content of an order made under 51AA. Included in the order is a statement as to the nature of the threat and the Commonwealth interests affected. Where 51AA(5) is applicable, the State or Territory and the nature of the domestic violence must be included. The order must also set out the powers that have been authorised and the duration of the order (not to be more than 20 days), including the commencement and the date on which the order ceases to be in force.

17. The proposed 51AA(9) provides that an order is in force when issued in accordance with 51AA(8)(d).

18. The proposed 51AA(10) provides that if authorising Ministers cease to be satisfied as to the conditions set out in 51AA(1), the Governor General must revoke the order calling out the ADF.

19. The proposed 51AA(11) provides that, in revoking the order, the Governor General is to act in accordance with advice from the Executive Council or, where there are reasons of urgency, the authorising Minister only. In this section only making or revocation of the order is contemplated. Where an order is sought to be varied, it becomes another order and must be dealt with in accordance with 51AA(1).

20. The proposed 51AA(12) provides that where an order is revoked or ceases to be in force, CDF must cease using the ADF under that revoked or ceased order.

21. The proposed 51AA(13) provides that where an order is made to use the ADF in the internal waters of a State or Territory, the State or Territory must be notified of the making or revocation of the order. Not notifying the relevant State or Territory does not affect the validity of the making or revocation of the order.

22. The proposed 51AA(14) provides that where an order has been made in relation to one matter, other orders may be made in relation to the same matter. This ensures that rather than varying orders, authorising Ministers will need to satisfy themselves as to the requirements of 51AA(1) before making further orders to deal with matters.

23. In advising the Governor-General in relation to call-out, authorising Ministers should have regard to Australia's international legal obligations.

Item 13 – Subsection 51(F)

24. Provides for the addition of a subsection 3 dealing with an order under 51AA.

Item 14 – At the end of section 51F

25. Proposed subsection (3) provides that insofar as 51AA applies to offshore areas, there is no legal requirement for the Defence Force to cooperate with a State or Territory Police force (although the ADF would always seek to cooperate with State or Territory police where appropriate). Where 51AA relates to the internal waters of a State or Territory however, there is a requirement to cooperate consistent with 51F.

**Item 15 – After Division 3 of Part IIIAAA
Division 3A - Powers in the Australian offshore area etc.**

26. The proposed insertion of a new Division 3A is to provide for the powers of the ADF when operating in accordance with 51AA and will apply in the Australian offshore area.

27. The proposed 51SA provides that before this Division and Division 4 can apply, the application of Division 3A must be made in an order consistent with 51AA(8)(c).

28. The proposed 51SB provides that the powers in Division 3A will apply in those areas set out in 51AA, that is, both offshore and in internal waters.

29. The proposed 51SC provides that, in exercising powers under Division 3A, authorising Ministers, must have regard to Australia's international legal obligations.

30. The proposed 51SD provides for definitions of 'facility' and 'vessel'. "Vessel" includes submersibles and those things that move through or on the water and are capable of carrying goods or persons.

31. The proposed 51SE provides that where a member of the ADF is being used in accordance with 51D and under the command of CDF, there are a number of actions that the member may be authorised to take. The list of powers of the ADF member may exercise is not exclusive. This means that when the ADF is called out under 51D and in accordance with 51AA, members may also do those things that are incidental to deal with the threat to Commonwealth interests or where relevant in internal waters, State or Territory interests. This reflects existing provisions in other Divisions and the changing nature of security threats against the Commonwealth and States and Territories. The powers include the power to destroy an aircraft or vessel. This might be required where the vessel or aircraft was heading for a facility offshore or a city of facility onshore.

32. Australia's international legal obligations may be relevant to any exercise of power under Division 3A.

33. Proposed 51SE(1) specifically authorises two levels of involvement by an ADF member with respect to the taking of measures against a vessel or aircraft.

34. With respect to the first level, proposed 51SE(1)(a)(i) provides that an ADF member being utilised in accordance with section 51D may, under the command of CDF, take of measures, including the use of force. This applies to the ADF member who actually engages the vessel or aircraft.

35. With respect to the second level, paragraph 51SE(1)(b)(ii) provides that the ADF member, also being utilised in accordance with section 51D may, under the command of CDF give an order for the taking of such measures. This applies, for instance, to

the ADF member who orders another member to release weapons against the vessel or aircraft.

36. The authority to take measures against a vessel or aircraft found in 51SE(1) is granted subject to the conditions found in 51SE(2), dealing with the ADF member who take measures against a vessel or aircraft, and 51SE(3) dealing with the ADF member who orders the taking of such measures.

37. The arrangements found within subsections 51SE(1),(2) and (3) place significant emphasis upon maintaining strict control over the engagement of any vessel or aircraft through the process of members being given and responding to orders. Moreover, the specific limits imposed by 51SE(2) and 51SE(3) upon the existence of authority to take measures against a vessel or aircraft or to order such measures, in large measure, draw upon the principles that would apply to acting under lawful authority.

38. Proposed 51SE(2)(c) and (d) and 51SE(3)(c) and (d), import the requirements that the member must not believe the order to which they are responding is unlawful, nor must the order be manifestly unlawful.

39. Proposed 51SE(2)(d) and (e) and 51SE(3)(d) and (e), remove the authority of an ADF member to take or order measures against a vessel or aircraft, 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.

40. Proposed 51SE(2)(f) requires that the measures taken against a vessel or aircraft be reasonable and necessary to give effect to the order received by the ADF member. Likewise, the 51SE(3)(f) requires that the giving of the order to take measures was reasonable and necessary to give effect to the relevant superior order.

41. For the purposes of 51SE, the orders given to ADF members can be expected to take on at least two forms. The first form involves specific orders to take direct action, such as to engage a specific vessel or aircraft. The second form involves orders that authorise the engagement of aircraft should certain parameters be satisfied (most likely that a threat aircraft is behaving in a particular manner).

42. Under the proposed arrangements provided for in 51SE, the primary responsibility for ensuring the legality of the chain of orders will rest with those Ministers who advise the Governor General on the content of the relevant call out order and CDF who then issues the orders to the ADF for the purposes of utilising the ADF under section 51D.

43. In essence, the terms of proposed 51SE are intended to ensure that where ADF members in good faith comply with their orders to take measures against vessels or aircraft, or to order other members of the ADF to take such measures, then there is significant statutory protection for those measures. Such statutory protection will only be withdrawn, in accordance with 51SE(2) and (3), where there are clear reasons that were or should have been known to the ADF member why measures should not be

taken. For instance, should an ADF member who is specifically positioned to deal with a potential air or offshore threat, receive an order to engage a vessel or aircraft through the expected channels, that is consistent with the ROE under which he or she is operating, and there are no clear reasons for the order to be questioned in the circumstances, then that ADF member will be able to comply with that order with confidence that they are acting with lawful authority. Likewise, should an ADF member who is positioned to give orders to other members to take measures against a vessel or aircraft, apply the facts known to them to a set of objective criteria defining an offshore or aerial threat and conclude on reasonable grounds that the criteria have been met, then that member will have confidence that they are acting within their lawful authority by giving an order to engage the vessel or aircraft.

44. The remaining powers under the proposed 51SE provides that where a member of the ADF is being used in accordance with 51D and under the command of CDF, there are a number of actions that the member is authorised to take. The powers of the ADF member are indicative and not exclusive powers. It means that when the ADF is called out under 51D and in accordance with 51AA, members may also do those things that are incidental to deal with the threat to Commonwealth interests or, where relevant in internal waters, State or Territory interests. This reflects the need to be able to take action while protecting ADF members and the changing nature of security threats against the Commonwealth and States and Territories. The powers include the power to board and recapture vessels, facilities or aircraft, and prevent or put an end to violence.

45. The proposed 51SE(4) reflects the existing Part IIIAAA requirement for authorisation at 51I(2), where there is a requirement to exercise the new powers, such exercise would only take place on the authorisation of a relevant Minister.

46. The proposed 51SE(5) is the exception to 51SE(4) and provides that where an ADF member believes on reasonable grounds that there is insufficient time to obtain the authorisation because a sudden and extraordinary emergency exists, 51SE(4) does not apply.

47. Subdivision C, Powers that may be exercised anywhere in an offshore area provides for a declaration of an offshore general security area, reflecting the same process as the existing Division 3 of Part IIIAAA. It provides for the declaration of a general security area (for instance around a particular vessel or facility) and notification requirements generally and specifically to Parliament.

48. Proposed 51SF reflects the existing provisions of Division 3 of Part IIIAAA. At section 51SG an authorisation may be granted by CDF or an officer, or class of officers (such as the Commanding Officers of a warship) with a delegation from CDF to make such an authorisation, to search a facility in the offshore general security area for dangerous and other things. Such an authorisation may only be made where CDF or the officer with the appropriate delegation, believes on reasonable grounds that a thing, including a dangerous thing, is necessary to be seized.

49. Proposed 51SG(2) provides that the authorisation must clearly set out a number of matters including descriptions, authorisations to seize and search related to the search of facilities in an offshore general security area.

50. Proposed 51SG(2)(g) also provides that the authorisation must not remain for more than 24 hours.

51. Proposed 51SG(3) provides that the authorisation has effect according to the terms of the authorisation.

52. Proposed 51SG(4) provides that more than one authorisation may be issued in relation to the same facility.

53. Proposed 51SH and 51SI reflect the current provisions of 51M and 51N and provides that a copy of the offshore authorisation is to be given to the occupier of the facility and that person is entitled to be present during the search of the facility.

54. Proposed 51SJ reflects the current provisions relating to searches of means of transport in 51O, in that vessels (or aircraft, for instance a helicopter on a vessel, or facility), may be searched, and that barriers may be erected to stop the vessel (or aircraft). It is noted that these provisions would apply principally to vessels, but might be applied to aircraft on the ground, or on a facility or vessel. In the case of searches of vessels or aircraft, the master or captain (respectively) is entitled to be present during the search.

55. Proposed 51SK reflects the current provisions in 51O relating to search of persons in the security area, including for instance divers in the water or other persons in the offshore general security area.

56. The proposed Subdivision D, powers that may be exercised only in relation to an offshore designated area in the offshore general security area, also reflects the provisions of the existing subdivision C of Part IIIAAA. The new subdivision provides that in a maritime environment an offshore designated area may be declared, being a whole or part of an offshore general security area. An offshore designated area cannot be declared without an offshore general security area also being declared.

57. The proposed 51SL(1) refers to the declaration of an offshore designated area. This reflects existing provisions regarding the establishment of a designated security area on land under Subdivision C, section 51Q.

58. The proposed 51SL(2)(a) reflects that in the maritime context, the declaration may be made by referring to an area surrounding one or more vessels or aircraft, the area or boundaries of which will change as the vessel or aircraft moves across (or through) the sea or through the air. There is also provision for publication of the declaration of the offshore designated area in terms similar to that of the offshore security area.

59. The proposed 51SL(2)(b) also provides that the area may also be in the internal waters of a State or Territory if the order under 51AA includes the internal waters of a State or Territory.

60. The proposed 51SL(3) provides that where an area is declared that no longer falls within an offshore general security area, the whole or part ceases to be an offshore designated area and the powers that may be exercised within it.

61. The proposed 51SL(4) provides that notifications for an offshore designated security area are to be made.

62. The proposed 51SL(5) is an exception to notification in circumstances where notification would compromise the operations of the ADF under 51D. This exception is only operative where Ministers declare in writing that the operation of 51SL(4) would compromise the operation. An example may include a situation where the ADF was conducting clandestine operations (such as assault or hostage recovery) and where notification may alert hostile elements to the ADF presence.

63. The proposed 51SM provides for control of movement in relation to an offshore designated area. The provision outlines the powers of a member of the ADF when dealing with a person who is in charge of a vessel or aircraft. Powers include the ability to direct such a person not to bring the vessel or aircraft into the offshore designated area, or to direct such a person to take a vessel or aircraft from the offshore designated area or compel a person to comply with any such direction. This provision also enables barriers to be erected, for instance a floating barrier might be erected around a facility.

64. The proposed 51SM(3) also deals with the situation within an offshore designated area, in which an ADF member has to deal with a vessel or aircraft where there is no person in control and provides that the ADF member may do things necessary and reasonable to move the vessel.

65. The proposed 51SM(4), (5) and (6) deal more generally with powers of the ADF powers in relation to persons, whether or not they are in charge of a vessel or an aircraft. This is necessary to ensure, for example, that a member of the ADF can direct a diver in the water not to enter an area, and to search persons within areas or to direct persons to leave an area unless they agree to be searched.

66. Proposed 51SN provides, consistent with 51S of the existing Part IIIAAA, that ADF members are required to wear identification, displaying either their name, or a number. Given the importance attached to the identification of ADF members under this Part, there are 30 penalty units where the ADF member fails to comply.

67. Proposed 51SO is a power to require persons to answer questions or produce documents, but only where it is necessary for the purposes of preserving life, the safety of others or to protect the Commonwealth interest. An example might be where an ADF member directs a crew member to answer a question regarding the location of a person or thing associated with a particular threat.

68. Proposed 51SO(4) deals with the issue of self incrimination and reflects existing Commonwealth law on the issue.

69. Proposed 51SP deals with the power of an ADF member to require a person to operate a vessel or machinery or equipment on a vessel or aircraft. The provision reflects the need for the ADF to do that which is necessary to protect life or Commonwealth interests against the threat concerned. An example might be where a person is ordered to shut down the propulsion on a vessel to prevent it from colliding with another vessel or facility. An offence is committed if a person fails to comply with this requirement.

70. The proposed 51SQ notes that Section 15.4 of the *Criminal Code* (extended geographical jurisdiction – category D) applies to an offence against section 51SO or 51SP.

Item 16 – After subsection 51T(1)

71. Item 16 amends 51T to the effect that reasonable and necessary force cannot be used to compel individuals to produce documents, answers questions or operate machinery.

Item 17 – Subdivision B of Division 4 of Part IIIAAA (heading)

72. Item 17 removes the reference to ‘dangerous things’ being seized within the heading of Subdivision B of Division 4. This reflects the amendment to Section 51V noting that some things that may be required to be seized may not be inherently dangerous.

Item 18 – Section 51V

73. Item 18 notes that some things may be seized that may not be considered ‘dangerous’, yet may require action to be taken against them. This may include the seizing of radio equipment or other devices associated with a threat.

Item 19 – Subparagraph 51X(1)(c)(ii)

74. Item 19 updates the publication requirements of section 51X to include offshore general security areas and offshore designated areas.

Item 20 – Subparagraph 51X(2)(a)(ii)

75. Item 20 similarly updates section 51X to include offshore general security areas and offshore designated security areas.

Schedule 2 – Incidents Involving Designated Critical Infrastructure

Defence Act 1903

76. Proposed schedule 2 deals with the situation in which there is 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. Terrorist attacks have shown that these types of infrastructure are high priority targets for terrorists. The ADF may be required to protect infrastructure that the Government designates as critical (noting that police assets would also be employed in times of increased threat). To protect this infrastructure the ADF may be required to use reasonable and necessary force in specific authorised circumstances to protect designated infrastructure or Commonwealth interests.

77. A primary concern is the authority to use force to protect uninhabited infrastructure, where the loss of that infrastructure is likely to have cascade effects directly resulting in serious injury or the loss of life. Within the current Commonwealth, State and Territory criminal law frameworks, force can only be used if an attack against infrastructure is likely to cause immediate death or serious injury to persons (such as the inhabitants of infrastructure targeted for attack).

78. No provisions currently exist that allow the use lethal force where this is necessary to protect uninhabited infrastructure from attack, even if the consequences of that attack would have secondary effects resulting in the death or serious injury to others. 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.

79. It is proposed that the Attorney-General, the Minister for Defence and the Prime Minister will be the authorising Ministers for the purposes of 51CB. The authorising Ministers must be satisfied that an attack on infrastructure will result in the loss of life or serious injury before directing the CDF to utilise the ADF to protect infrastructure. Once Ministers have directed CDF to utilise the ADF, the ADF will have specific powers to act to protect infrastructure.

Item 1 – Subsection 51(1)

80. The proposed provision provides for a definition of designated critical infrastructure.

Item 2 – Subsection 51(1)

81. The proposed provision provides for a definition of infrastructure.

Item 3 – Before section 51D

82. Item 3 describes the process for the authorising Ministers to declare that particular infrastructure is designated critical infrastructure for the purposes of applying either Division 2A or 3B, or both, and Division 4. The proposed section

notes that such a declaration would only be made if the authorising Ministers believe on reasonable grounds that there is a threat of damage or disruption to the infrastructure, and where that damage or disruption would or directly or indirectly endanger the life of, or cause serious injury to, other persons.

Item 4 – After Division 2 of Part IIIAAA

83. Item 4 locates the new Division, Powers to Protect Designated Critical Infrastructure within the existing Part.

84. Proposed 51IA deals with the application of the new Division and that of Division 4. It provides that the order is to be made in accordance with relevant provisions and that this Division and Division 4 can apply under 51AA in an Australian offshore area and in the internal waters of a State or Territory.

85. Proposed 51IB deals with the declaration of designated critical infrastructure and provides that authorising Ministers may declare in writing that particular infrastructure is designated critical infrastructure to which the Part applies. They may only do so on the specified cumulative grounds in 51CB(2). What constitutes a threat is a matter for Ministers on the basis of information supplied to them. As to the indirect endangerment of life of, or cause of serious injury to other persons, examples include and are not limited to, damage or destruction to pipelines that supply gas and power to hospitals, or damage or destruction to power plants that could reasonably be said to indirectly endanger life or cause serious injury.

86. Proposed 51IB outlines the powers of the ADF in protecting designated critical infrastructure. Powers include preventing damage, protecting persons, controlling the movement of persons and anything incidental to the powers set out.

Item 5 - After subsection 51T(2)

87. Proposed 51T(2A) inserts in the “use of force” provision in Division 4 of the Part analogous provisions to those that exist in the current 51T(2)(a) and are limits on the use of the powers by the ADF when acting under an authorisation to protect infrastructure.

Schedule 3 – Aviation incidents

Defence Act 1903

88. Threats from aircraft in the hands of terrorists or other criminals have the capacity to cause mass casualties, the catastrophic destruction of property and severe disturbance of the community. In the event of an aviation security incident, only the ADF is in a position to resolve such a threat.

89. A central element of planning a structured approach to countering such aerial threats is the provision of an appropriate legislative framework for action by the ADF. A legislative framework is required that provides clear authority for the ADF to take measures against aircraft in appropriate circumstances, as well as facilitating a timely ADF response. Those authorities and associated mechanisms must take into

account the nature of aerial threats, and most particularly the consequences of taking measures against any aircraft in flight. That is, any use of force against an aircraft must be presumed to be capable of causing the aircraft to crash and/or be destroyed with loss of life both of the persons on board the aircraft and potentially on the ground and at the crash site. These serious consequences must be balanced against the consequences of permitting the threat aircraft to continue unimpeded, and to reach or attempt to reach the destination intended by those in control of the aircraft.

90. Currently there are no provisions within Part IIIAAA to enable the ADF to conduct operations against air threats. In the past, preparatory operations to counter aerial threats have been authorised under the Government's Executive Power (for instance, for the Commonwealth Heads of Government Meeting in 2002), rather than under specific provisions of Part IIIAAA. As such, ADF personnel involved in dealing with aerial threats have not been covered by the specific statutory authorities and protections currently afforded to ADF members conducting land-based hostage recovery operations found within Part IIIAAA. On this basis alone it is appropriate for a consistent legislative approach for both land-based and air-based activities through the enactment of specific aviation provisions within Part IIIAAA. That is, the Aviation Division will provide clear statutory authority for members of the ADF, acting within the parameters set first by an order under Part IIIAAA and then by implementing internal ADF orders, to engage threat aircraft

91. The authority to take action in response to aerial threats is not, however, sufficient without mechanisms to allow the ADF to be used in a timely manner to respond to the threat. An ADF response to a particular air threat could be activated under pre-existing arrangements (such as under section 51A). However, aerial threats have the capacity to emerge at a speed that could be expected to render ineffective these pre-existing call out provisions or even expedited provisions provided in Schedule 4 of the proposed amendments. It is appropriate that preparatory arrangements be brought within Part IIIAAA through the addition of a new preparatory call out mechanism that will permit ADF elements to respond rapidly (including the use of force if necessary) within carefully pre-defined parameters.

92. In essence, this preparatory call-out mechanism will permit the Governor-General, acting on the advice of appropriate authorising Ministers, to specify circumstances (which if they actually arose would otherwise justify a call out of the ADF) where CDF is already authorised to utilise the ADF to deal with the threat. Such threats may occur either within Australia or in the Australian offshore area. It is appropriate that the authorisation can be framed to allow the ADF to take measures against an aerial threat without further authorisation by Ministers. Such an authorisation would reduce the risk that the ADF while operationally capable of addressing a particular aerial threat, would be otherwise unable to react against that threat for want of further contact with, and authorisation from an appropriate Minister.

93. The amendments are not intended to circumvent existing processes or the other amendments providing for expedited call out. However, these amendments will provide necessary flexibility to ensure that in those specific circumstances involving aerial threats, where authorising Ministers have already identified circumstances as

triggering an immediate ADF response, the ADF already has the necessary authority to react.

94. An example of use of these preparatory call out provisions would include for the provision of aerial security for special events (such as was the case with CHOGM in 2003).

95. Under the proposed provisions, use of force against an aircraft would be directly linked to dealing with domestic violence (within Australia) or threats to Commonwealth interests in the Australian offshore area). That is, the authorisation to use force has not been expanded beyond circumstances where the Government would be expected to act to protect the nation and its interests from aerial threats. What is different is that rather than always waiting for the domestic violence to occur (or become likely to occur), or for a threat to manifest itself, prior to initiating action under Part IIIAAA, that part will now contain the mechanism for prudent pre-planning and authorisation to deal with foreseeable circumstances involving aerial threats.

Item 1 – Before section 51B

96. The proposed Item 1 deals with the incorporation of the new Aviation provisions into Part IIIAAA.

97. The proposed addition of section 51AB provides an additional mode of call out order by the Governor General, specifically under subsection 51AB(2). The Governor General's authority to make an order under this subsection is dependant upon the authorising Ministers being satisfied of certain matters set out in subsection 51AB(1).

98. Proposed 51AB(1) provides five criteria for consideration by the authorising Ministers before making of an order under 51AB.

99. First, for an order to be made by the Governor General under this section, the authorising Ministers must be satisfied prospectively that if 'specified circumstances' were to arise then domestic violence or a threat in the Australian offshore area would occur or be likely to occur (paragraph 51AB(1)(a) refers). What constitutes "specified circumstances" are matters for the authorising Ministers based on advice relating to particular threats.

100. Second, the authorising Ministers must also be satisfied that if the 'specified circumstances' arose, then for reasons of urgency, it would be impractical for the Governor-General to make an order under section 51A (paragraph 51AB(1)(a) also refers).

101. Third, authorising Ministers must be satisfied, in the case of domestic violence, that where relevant the State or Territory would not be or unlikely to be able to protect the Commonwealth interests against the domestic violence (paragraph 51AB(1)(b) refers).

102. Fourth, the authorising Ministers must be satisfied that CDF should be directed to utilise the ADF to protect the Commonwealth interests against domestic violence, or a threat in the Australian offshore area, if the ‘specified circumstances’ arise (paragraph 51AB(1)(c) refers).

103. Fifth, the authorising Ministers must also be satisfied that the new Aviation Division, that is, Division 3B, as well as Division 4 should apply in relation to the order.

104. Furthermore, it is proposed that where the authorising Ministers have satisfied themselves of the matters in 51AB(1), the Governor General may order the CDF to utilise the ADF to protect the Commonwealth interests against domestic violence, or a threat in the Australian offshore area, if ‘specified circumstances’ arise. In making the order the Governor-General is obliged to act with the advice of the Executive Council (51AB(7) refers). The Governor General may make further orders in relation to the same matter (51AB(10) refers)

105. The proposed 51AB(4) set out the content of the order. Among other things, the order must specify the circumstances to which the order relates; where relevant the State or Territory in which the domestic violence would occur or would be likely to occur; the Commonwealth interests; and the domestic violence, or the actual or potential threat in the Australian offshore area as the case requires. The order must state that the Aviation Division (Division 3B) and Division 4 apply to the order.

106. The order must state that the order comes into force when it is made and that unless it is revoked earlier, it ceases to be in force at the end of the period specified in the order (51AB(4)(d) refers). The Governor General must revoke the order if the authorising Ministers cease to be satisfied with respect to the criteria in subsection 51AB(1) (51AB(6) refers). In revoking the order the Governor General is to act with the advice of the Executive Council (51AB(7) refers).

107. If the order is revoked or ceases to be in force, then CDF must cease utilising the ADF in accordance with the order (paragraph 51AB(8) refers).

108. The amendments include a number of provisions concerning the relationship with the Governments of the States and Territories (51AB(3) and (9) refer). Where the domestic violence concerned would occur or is likely to occur in a State or Territory, the Governor-General is not obliged to wait for a request for the order from a State or Territory. However, if no such request from a State or Territory is made, then an authorising Minister must consult that Government about the making of the order prior to the order being made. Moreover, where an order is made which specifies a State or Territory in which the domestic violence would occur or would be likely to occur, then an authorising Minister must arrange for the Government of that State or Territory to be notified of the making or the revocation of the order as soon as is reasonably practicable (although failure to do so will not affect the validity of the order).

109. In essence, these statutory arrangements provide a mechanism whereby the Government may identify an aerial threat scenario where other call-out arrangements

under Part IIIAAA would be ineffective because of the speed of response required, and then pre-authorise CDF to utilise the ADF to counter such aerial threats if they actually arise. The arrangement preserves existing relationships between the Commonwealth Government and the States and Territories through both consultation and notification, and do not detract from existing arrangements for the States and Territories to request assistance from the Commonwealth Government. Moreover the proposed amendments reflect the current practice of calling out the ADF under section 61 of the Australian Constitution.

Item 2 – Before Division 4 of Part IIIAAA

110. Item 2 provides for the addition of Division 3B *Powers relating to aircraft* and relates to the application of the new provisions and the special powers of members of the Defence Force.

111. Section 51SR provides that Division 3B and 4 applies if the relevant call out orders (made under paragraphs 51A(4)(c), 51AB(4)(c), 51B(3)(c) or 51C(3)(c)) states that Division 3B and 4 applies.

112. Proposed 51SS provides that Divisions 3 and 4 (in its operation in relation to Division 3) extend to the Australian offshore area.

113. Proposed 51ST provides the special powers of the members of the ADF with respect to taking measures against aircraft. Those measures include the use of force against an aircraft, up to and including destroying the aircraft. In this respect the section is framed to take into account the practical reality the any use of force against an aircraft in flight must be presumed to be at least likely to cause the aircraft to crash or otherwise be destroyed.

114. Australia's international legal obligations will be relevant to any exercise of power under Division 3B.

115. Proposed 51ST(1) specifically authorises two levels of involvement by an ADF member with respect to the taking of measures against an aircraft.

116. With respect to the first level, proposed 51ST(1)(a) provides that an ADF member being utilised in accordance with section 51D may, under the command of CDF, take measures, including the use of force, against an aircraft, up to and including destroying the aircraft. This applies to the ADF member who actually engages the aircraft, for instance by releasing weapons against the aircraft.

117. With respect to the second level, paragraph 51ST(1)(b) provides that the ADF member, also being utilised in accordance with section 51D may, under the command of CDF give an order for the taking of such measures. This applies, for instance, to the ADF member who orders another member to release weapons against the aircraft.

118. Proposed 51ST(1) provides that the measures can be taken or ordered by the members (as the case may be, whether or not the aircraft is airborne or not. In addition the authority of the ADF member is not dependent upon the use of a

particular weapons platform. That is the ADF response to a threat could involve the use of ADF aircraft or ground-based or maritime-based air defence capabilities.

119. Under the proposed arrangements of 51ST, the authority to take measures against an aircraft is premised upon CDF, having received an order to utilise the ADF and is utilising the ADF in accordance with section 51D, subsequently issuing orders to subordinate members of the ADF to give effect to the content of the call out order.

120. The authority to take measures against aircraft found in 51ST(1) is granted subject to the conditions found in 51ST(2), dealing with the ADF member who take measures against an aircraft, and 51ST(3) dealing with the ADF member who orders the taking of such measures. These conditions must be met for the authority granted by 51ST(1) to apply.

121. The arrangements found within subsections 51ST(1),(2) and (3) place significant emphasis upon maintaining strict control over the engagement of any aircraft through the process of members being given and responding to orders. Moreover, the specific limits imposed by 51ST(2) and 51ST(3) upon the existence of authority to take measures against an aircraft or to order such measures, in large measure, draw upon the principles that would apply to acting under lawful authority.

122. Proposed 51ST(2)(a) and (b) ensure that the ADF member will only engage aerial threats pursuant to orders applicable to the member. Likewise by 51ST(3)(a) and (b), a member who is giving orders to take measures, is themselves acting in accordance with a superior order applicable to the member. In either case, through a chain of command, the authority for the superior orders given to an ADF member will ultimately derive from the orders of the CDF (who will be acting under the direction of the order from the Governor-General or, in the case of sudden and extraordinary emergency, the Prime Minister or two other Ministers).

123. Proposed 51ST(2)(c) and (d) and 51ST(3)(c) and (d), import the requirements that the member must not know the order to which they are responding is unlawful, nor must the order be manifestly unlawful.

124. Proposed 51ST(2)(d) and (e) and 51ST(3)(d) and (e), remove the authority of an ADF member to take or order measures against an aircraft, 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.

125. Proposed 51ST(2)(f) requires that the measures taken against an aircraft be reasonable and necessary to give effect to the order received by the ADF member. Likewise, the 51ST(3)(f) requires that the giving of the order to take measures was reasonable and necessary to give effect to the relevant superior order.

126. For the purposes of 51ST, the orders given to ADF members can be expected to take on at least two forms. The first form involves specific orders to take direct action, such as to engage a specific aircraft. The second form involves orders that

authorise the engagement of aircraft should certain parameters be satisfied (most likely that a threat aircraft is behaving in a particular manner).

127. In essence, the terms of proposed 51ST are intended to ensure that where ADF members in good faith comply with their orders to take measures against aircraft, or to order other members of the ADF to take such measures, then there is significant statutory protection for those measures. Such statutory protection will only be withdrawn, in accordance with 51ST(2) and (3), where there are clear reasons that were or should have been known to the ADF member why measures should not be taken against an aircraft. For instance, should an ADF member who is specifically positioned to deal with a potential air threat, receive an order to engage an aircraft through the expected channels, that is consistent with the rules of engagement under which he or she is operating, and there are no clear reasons for the order to be questioned in the circumstances, then that ADF member will be able to comply with that order with confidence that they are acting with lawful authority. Likewise, should an ADF member who is positioned to give orders to other members to take measures against an aircraft, apply the facts known to them to a set of objective criteria defining an aerial threat and conclude on reasonable grounds that the criteria have been met, then that member will have confidence that they are acting within their lawful authority by giving an order to engage the aircraft.

128. Proposed 51ST(4) requires written authorisation by an authorising Minister prior to the taking of measures against the aircraft or the giving orders for taking such measures. Specific exceptions to this requirement exist in two important circumstances. First, where the ADF member believes on reasonable grounds that there is insufficient time to obtain the authorisation because a sudden an extraordinary emergency exists. Second, where the Governor General has made an order under proposed 51AB(2), and an authorising Minister has already authorised in writing the taking of measures against an aircraft in specified circumstances.

129. Proposed 51ST(7) limits the circumstances for authorising the taking of measures against an aircraft. In the case of action pursuant to an order under 51AB (that is, involving ‘specified circumstances’), an authorising Minister must not authorise such action unless satisfied that taking action against the aircraft would be reasonable and necessary if the specified circumstances in question were to arise. In the case of any other authorisation to take action against an aircraft, then the authorising Minister must be satisfied that the taking of the action is reasonable and necessary.

130. Proposed 51ST(8) provides that, in exercising powers under 51ST, authorising Ministers are to have regard to Australia’s international legal obligations.

Item 3 – Before subsection 51T(3)

131. Item 3 amends 51T to provide the limits upon the use of force by an ADF member acting under Division 3B. In using force against a person or thing (which will include an aircraft), the ADF member is precluded from doing anything that is likely to cause the death of, or grievous bodily harm to, the person unless the member holds one of three beliefs on reasonable grounds. The first belief is that doing that thing is

necessary to protect the life of, or to prevent serious injury to, another person (including the member). The second belief is that doing that thing is necessary to protect, against a threat of damage or disruption to its operation, particular critical infrastructure (or a part of particular infrastructure) previously declared as such under proposed 51CB. The third belief is that doing that thing is necessary and reasonable to give effect to the order under which the member is acting.

Schedule 4 – Expedited call out

Defence Act 1903

132. It is likely that threats capable of overwhelming civil authorities will emerge with limited warning. The situation within the air and maritime environment may change quickly, from the relatively benign, to a potential terrorist threat. What could appear to be a fisheries or customs enforcement issue may quickly turn into a terrorist incident. A hijacked aircraft would pose a similar short-notice threat.

133. In the air and maritime environment only the ADF has the necessary resources to respond to the type of threats envisaged. This is in contrast to the situation onshore, within the jurisdiction of States and Territories, where the State and Territory police forces have primary responsibility for responding to violent incidents.

134. The amendments in Schedule 4 will enable ‘call-out’ or utilisation of the ADF to be activated in a timely and transparent fashion as any unnecessary delay could potentially impact adversely on the ADF’s ability to respond. For example, a response might be required at very short notice (such as an aircraft or a ship heading for a vessel, installation or facility with the intention of damaging it and/or killing those onboard).

135. When an immediate ADF response is required these expedited call-out arrangements will permit a timely and appropriate authorisation, whilst preserving the powers and protections of ADF personnel conferred by Part IIIAAA.

136. 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).

Item 1 – After section 51C

137. The proposed 51CA provides for an expedited call-out arrangement in the event that the extant arrangements under 51C preclude a timely and effective response to a rapidly developing threat.

138. The proposed 51CA(1) provides for expedited call-out arrangements that will enable the Prime Minister to make an order that the Governor-General is empowered to make under section 51A, 51AA, 51AB, 51B or 51C. The Prime Minister will be authorised to call-out the ADF in the event of a sudden and extraordinary emergency where it is not practicable for a normal call-out order to be made under those sections.

139. It is proposed by 51CA(2) that in the event the Prime Minister cannot be contacted, call-out can be authorised by the two other authorising Ministers.

140. It is proposed by 51CA(3) that the order must not direct the CDF to utilise the Defence Force in the internal waters of a State or Territory unless the Prime Minister is satisfied that domestic violence is occurring, or is likely to occur, in the internal waters of a State or self-governing Territory and the State or Territory is unable to protect the interests threatened. Similar provisions are proposed for circumstances where 2 Ministers make an order to call out the Defence Force.

141. The proposed 51CA(4) provides that in order to ensure an expedited call-out, orders need not be made in writing. This item sets out procedures for witnessing and authorising a verbal order for call-out in order to ensure transparency and accountability. Essentially, in the event such an order is not made in writing, both the Prime Minister (or the two other Ministers) must each make a written record of the order, sign the record and cause the signing of the record to be witnessed. This record must be given to the CDF and the Governor-General as soon as practicable. Similarly, the CDF must provide the record to be given the Prime Minister or the other two Ministers as soon as practicable. However a failure to comply with the exchange of records does not affect the validity of the order.

142. Under the proposed 51CA(5), an order made under this section has effect as if it were made by the Governor-General.

143. Proposed 51CA(6) notes that a reference to authorising Ministers ceasing to be satisfied is regarded as a reference to them not being satisfied.

144. Proposed 51CA(7) details the content of the order, noting that it must state that it was made under this section as if it were an order made by the Governor-General. Further, unless the order is revoked earlier, the order ceases to be in force after a specific period which must not be more than 5 days.

145. Proposed 51CA(8) details when the order comes into force, specifically, when the Prime Minister or the 2 Ministers and the CDF have complied with 51CA(4) and when the order ceases to be in force as detailed in 51CA(7)(b).

146. Proposed 51CA(9) notes that authorisations or declarations under a provision of 2, 2A, 3, 3A or 3B need not be in writing.

147. Proposed 51CA(10) details the procedures for providing, as soon as practicable, a written record of the authorisation or declaration. This is similar to the process described in 51CA(4).

148. Proposed 51CA(11) notes that if the authorisation or declaration is not in writing, it comes into force once paragraph 51CA(10)(c) has been complied with.

Schedule 5 – Amendments consequential on Schedules 1 to 4

Items 1 – 29

149. Items 1 to 29 are amendments consequential to the proposed changes to Part IIIAAA. These amendments are necessary to accurately reflect changes including titles and numberings in the *Air Force Act 1923*, *Defence Act 1903*, *Defence Reserve Service (Protection) Act 2001* and the *Naval Defence Act 1910*.

Schedule 6 – Other amendments

Defence Act 1903

Items 1-2 – Subsection 51(1)

150. These items provide a definition of ‘criminal act’ and ‘substantive criminal law’ for the purposes of Subsection 51(1). These changes complement the changes made by the insertion of Division 4A (see below).

Item 3 – After paragraph 51A(1)(a)

151. This item notes that call-out can be initiated under 51A to protect Commonwealth interests against domestic violence.

Item 4 Subsection 51A(3A)

152. This item replaces ‘Governor-General’ with ‘authorising Ministers’ to reflect that authorising Ministers may be required to make an order to protect Commonwealth interests.

Item 5 Subsection 51A(7)

153. This item omits the reference to the Governor-General being satisfied as mentioned in subsection (3A).

Item 6 – Section 51G

154. This item removes the restriction on the use of the Reserves for domestic security operations. As the ADF is an integrated force of both Permanent and Reserve elements, with specific Reserve capabilities established for domestic security tasks (such as Reserve Response Forces), this restriction is no longer required and inhibits the ADF’s operational effectiveness. This item preserves the current restrictions that ensure that the CDF, acting in accordance with 51D, will not stop or restrict any protest, dissent, assembly or industrial action, except where there is a reasonable likelihood of death of, or serious injury to, persons or serious damage to property.

Item 7 – Division 2 of Part IIAAA (heading)

155. The proposed change reflects the changes to Division 2 that enable the ADF to respond to a wider range of threats, including mobile incidents.

Item 8 – Subsection 51I(1) and (2)

156. The proposed changes detail the special powers of the ADF under this Division and remove the ‘land-centric’ nature of the current wording. Under this Division ADF members will have the power to:

- recapture a location or thing;
- prevent, or put an end to, acts of violence;
- protect persons from acts of violence
- free hostages;
- detain individuals for the purpose of placing them into custody of a member of the police force at the earliest practicable time;
- control the movement of persons or of means of transport;
- evacuate persons to a place of safety;
- search persons or locations for dangerous things or other things related to the threat concerned;
- seize any dangerous thing or other thing related to the threat concerned; and
- do anything incidental to the above.

Item 9 – At the end of section 51I

1. The proposed 51I(4) adds “location” and “thing” to the list of definitions. This provides the ADF with an expanded set of options in responding to a mobile terrorist threat.

Item 10 – After subsection 51K(2)

2. Proposed 51K(2)(2AA) provides an exemption from broadcasting the declaration of a general security area if such a broadcast would prejudice an operation conducted under Division 2. An example of where such an exemption may be required would include a clandestine hostage recovery operation.

Item 11 – At the end of section 51Q

3. This item provides an exemption from notifying the public of the declaration of a designated area if such notification would prejudice an operation under Division 2. An example of where such an exemption may be required would include a clandestine hostage recovery operation.

Item 12 – Paragraph 51S(1)(b)

4. This item clarifies language to ensure consistency with identification conventions within the ADF. In particular this amendment will note that an ADF member must be identified with either a name or a number attached to the front of their uniform.

Item 13 – After Division 4 of Part IIIAAA

5. The proposed Division 4A – Applicable criminal law complements the changes at Schedule 5 items 1 and 2, being changes to 51(1).

Division 4A – Applicable Criminal Law

6. The proposed subsection 51(1) relates to use of the ADF in a domestic security operation that has the potential to result in damage to property, serious injury or death. At present there are no provisions within Part IIIAAA for the context of a domestic security operation to be taken into account prior to deciding whether criminal charges should be laid against ADF personnel who are acting under legitimate orders. Furthermore, under current arrangements the relevant State or Territory Director of Public Prosecutions is the authority with jurisdiction to commence proceedings against ADF personnel following a domestic security operation.

7. A nationally consistent approach to consideration the prosecution of ADF members is more appropriate in circumstances where the ADF will be employed domestically by order of the Commonwealth government. It is also possible that domestic security operations will be cross-jurisdictional. This would emphasise the importance of a consistent approach to any consideration to prosecute ADF personnel following such an operation.

8. Part IIIAAA is proposed to be amended to provide that the Commonwealth assume exclusive responsibility with respect to criminal offences committed by ADF personnel when operating under Part IIIAAA. In accordance with normal prosecutorial discretion, the CDPP can be expected to consider the context of a domestic security operation and the military chain of command in deciding whether to prosecute.

9. The proposed changes ensure that where ADF members are called out under Part IIIAAA one set of criminal laws will be applied, irrespective of where the call-out powers are exercised, and that offences against these laws are prosecuted by the Commonwealth DPP. The laws of the Jervis Bay Territory will apply to ADF personnel in the event of a prosecution resulting from a domestic security operation.

51WA - Applicable Criminal Law

10. This item notes that the laws of the Jervis Bay Territory applies in relation to a criminal act of a member of the Defence Force that is done, or purported to be done, under Part IIIAAA.

11. The substantive criminal laws of the States or Territories will not apply in relation to a criminal act of a member of the Defence Force that is done, or purported to be done, under Part IIIAAA. However it would still be open to State or Territory police would investigate any criminal acts done, or purported to be done, by Defence Force members when operating under Part IIIAAA.

12. In order to avoid doubt, Chapter 2 of the Criminal Code does not apply to an act done, or purported to be done, under Part IIIAAA that is a criminal act except where it constitutes an offences against the laws of the Commonwealth.

13. Finally, the functions of the Director of Public Prosecutions under section 6 of the *Director of Public Prosecutions Act 1983* in relation to the law of the Jervis Bay Territory apply in relation to any prosecution of a Defence Force member arising as a result of a criminal act committed while operating under Part IIIAAA.

51WB – Defence of superior orders in certain circumstances

14. The proposed 51WB Defence of Superior Orders gives a member of the ADF, in certain circumstances, a defence to a criminal act. [The availability of a defence does not change the character of the act.] 51WB does not purport to provide immunity to actions of the ADF that would be criminal.

15. The proposed 51WB(2) describes the circumstances in which a defence of superior orders would be raised in a context where the act of the ADF member could be characterised as a criminal act. Proposed 51WB(2) does not limit the defences that might otherwise be available to the ADF member.

16. The nature and effectiveness of a military service and the operation of a Defence Force demands teamwork, mutual support and personal reliability underpinned by individual and collective discipline. On occasion this will require unhesitating compliance with orders. However, the requirement for unhesitating compliance with orders is not absolute. The circumstances in which the defence of superior orders to a criminal act may be raised include that the order was made by a superior, that the ADF member was under a legal obligation to obey the order and that the order was not manifestly unlawful.

17. A qualified defence of superior orders is proposed to clarify the position of ADF members called out under Part IIIAAA. The ADF is a disciplined force with a different command structure from a police force. ADF members are required to follow lawful orders and can be disciplined for failing to do so.

18. As matters currently stand, an ADF member prosecuted for a crime will have a defence if they can show they acted under lawful authority. The practical effect of the proposed new defence will be to make it clear how the concept of lawful authority applies when an ADF member acts under superior orders.

19. The proposed defence would not be absolute. Among other things, it would not apply if the relevant order was manifestly unlawful or if the actions of the member were not necessary and reasonable to give effect to the order.

20. The availability of this defence to an ADF member does not remove or dilute the fundamental requirement that in taking any action under Part IIIAAA the ADF member must in all circumstances act in a manner that is reasonable and necessary to give effect to an order.

Item 14 – After section 51XA

21. Item 14 inserts a proposed 51XB that an order, authorisation or declaration made under this Part is not a legislative instrument.