

## CALLING OUT THE TROOPS – DISTURBING TRENDS AND UNANSWERED QUESTIONS

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### I INTRODUCTION

Five years have elapsed since the military call-out legislation was passed by the Commonwealth Parliament in September 2000.<sup>1</sup> The anniversary provides a timely opportunity to re-examine the laws, their rationale and their underlying effect. Although the amended call-out powers, contained in Part IIIAAA of the *Defence Act 1903* (Cth) ('the Act'), have not yet been invoked, definite preparations have been made for their application. These include the staging of nine simulation exercises by the end of 2003<sup>2</sup> and the writing of a classified manual to guide Australian Defence Force ('ADF') personnel in conducting operations under Part IIIAAA.<sup>3</sup>

At the same time, this period has seen substantially increased use of the ADF in civilian settings. This has occurred most notably in repelling refugee boats, in the so-called 'war on terrorism' and in deployments in Afghanistan, Iraq and the Solomon Islands. Some of these deployments have been authorised under other specific legislation, such as the Migration, Customs, Border Protection and Fisheries Management Acts; others by executive direction. Thus, despite the non-use of Part IIIAAA of the Act, a considerable expansion has occurred in the military's role.

An examination of these developments, which could be termed a creeping militarisation of the state apparatus, is all the more necessary because an official review of Part IIIAAA, carried out in late 2003 in accordance with s 51XA of the Act, criticised the new provisions as overly restricting the calling out of the ADF, particularly in the context of the 'war on terror'.<sup>4</sup> As will be examined toward the

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1 Michael Head, 'The Military Call-Out Legislation – Some Legal and Constitutional Questions' (2001) 29 *Federal Law Review* 273.

2 Department of Defence, *Statutory Review of Part IIIAAA of the Defence Act 1903 (Aid to Civilian Authorities)*, Australian Government, Canberra (2004) 2.

3 Letter from Senator Robert Hill, Minister for Defence, to Michael Head, 4 August 2005 (copy on file with author).

4 Department of Defence, above n 2.

end of this article, the review recommended that the scope of Part IIIAAA be widened, and that limitations on the powers of the called out ADF be reduced. Furthermore, the review suggested lessening the legal constraints on ADF members exercising certain extraordinary powers, such as to detain people, enter and search premises and use lethal force.

In 2000, the call-out legislation was quickly brought forward, with little media or other public discussion. Both the Howard Government and the Labor Party Opposition declared that it was necessary to have the legislation in place before the Sydney Olympic Games. In the brief debates, references were made, by both sides of the House, to the need to counter possible terrorism at the Olympics, where some 4000 military personnel were placed on stand by.<sup>5</sup> After expedited examinations by two Senate committees, whose recommendations for minor amendments were partially adopted,<sup>6</sup> the legislation was ultimately passed on the last day of sitting before the opening of the Games. Despite this haste, the Act was not utilised during the Olympics, although Special Air Services ('SAS') soldiers were deployed at the Games.<sup>7</sup>

This author has argued that the underlying purposes of the legislation went far beyond the Sydney Olympics.<sup>8</sup> In fact, the amendments effected a permanent shift in the military's role. As Shadow Attorney-General, Robert McClelland, told Parliament: '[t]hese measures should not be seen as simply a short-term measure that can be sunsetted after the Olympics. They are in themselves important measures that are certainly required'.<sup>9</sup> The Government and the Opposition combined to reject amendments to insert a sunset clause that would revoke the legislation after the Games. Instead, s 51XA, requiring the Defence Minister to appoint a review panel within three years of the passage of Part IIIAAA, was inserted as a supposed alternative to sunseting.

Under the amended Act, the federal government has the power to call-out the armed forces on domestic soil against perceived threats to 'Commonwealth interests', with or without the agreement of a State government. The legislation authorises the Prime Minister, the Defence Minister and the Attorney-General, or 'for reasons of urgency', one of these 'authorising ministers', to advise the Governor-General (the Commander-in-Chief of the Armed Forces under the

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5 Michael Head, 'Olympic Security: Police and Military Plans for the Sydney Olympics – A Cause for Concern' (2000) 25 *Alternative Law Journal* 131.

6 Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000 (2000), <[http://www.aph.gov.au/senate/committee/fadt\\_ctte/completed\\_inquiries/1999-02/aidciv/report/report.pdf](http://www.aph.gov.au/senate/committee/fadt_ctte/completed_inquiries/1999-02/aidciv/report/report.pdf)> at 8 September 2005; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest No 10 of 2000* (2000), <<http://www.aph.gov.au/senate/committee/scrutiny/alerts/2000/d10.doc>>.at 8 September 2005.

7 Special Air Services ('SAS') personnel were deployed undercover in plain clothes, assisting the New South Wales Police to monitor crowds during the Olympics, without approval by the Defence Minister or Federal Cabinet. Cabinet's National Security Committee subsequently approved the deployment, without any reference to the *Defence Act 1903* (Cth): see David Lague, 'Demand for Answers on Crack Army Games Spies', *The Sydney Morning Herald* (Sydney), 9 February 2001, 6.

8 Head, above n 1.

9 Commonwealth, *Parliamentary Debates*, House of Representatives, 28 June 2000, 18420 (Robert McClelland).

*Constitution*) to call-out military personnel to deal with ‘domestic violence’.<sup>10</sup> ‘Domestic violence’ is a vague expression, which is undefined legislatively or judicially. It is found in s 119 of the *Constitution*, which provides that ‘the Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State protect such State against domestic violence’. The term was borrowed from article IV of the *United States Constitution*, § 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 the *Civil Disturbance Statutes* 10 USC § 331 (1964) uses the more specific term ‘insurrection’, suggesting that an extremely serious level of rebellion must be involved – one that threatens the very existence of a State government.<sup>11</sup>

Once they are deployed, under the Act, military officers can order troops to open fire on civilians, as long as they determine that it is reasonably necessary to prevent death or serious injury. Soldiers have greater powers than the police in some circumstances, including the right to shoot in order to kill someone escaping detention,<sup>12</sup> capture and search premises without warrants,<sup>13</sup> detain people without formally arresting them,<sup>14</sup> search people and vehicles,<sup>15</sup> seal off areas<sup>16</sup> and issue general orders to civilians.<sup>17</sup> Ministerial authorisation is all that is required to exercise these powers; however, even that is not necessary if a member of the ADF ‘believes on reasonable grounds that there is insufficient time to obtain the authorisation because a sudden and extraordinary emergency exists’.<sup>18</sup> The manuals and rules of engagement for exercising the call-out powers are secret. The Defence Minister has advised this author that

there is a manual to provide guidance to ADF members for the conduct of ADF operations under Part IIIAAA of the *Defence Act 1903*, but this manual is not available for release to the public. If the ADF was called out under Part IIIAAA of the *Defence Act 1903*, the Chief of the Defence Force would issue situation-specific rules of engagement ... to regulate the use of force ... Rules of engagement are, by necessity, highly classified.<sup>19</sup>

The legislation’s essential content is to authorise the use of the military to deal with civilian disturbances, including political and industrial unrest. The fact that such legislation has been introduced suggests a bipartisan expectation in official political circles that, in the coming period, troops will be required to deal with domestic disturbances of such intensity and scale that the police forces cannot contain them. Section 51B contains a minor limitation, retaining a previous provision preventing the mobilisation of the Emergency Forces or the Reserve

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10 *Defence Act 1903* (Cth) s 51A.

11 M Cherif Bassiouni, *The Law of Dissent and Riots* (1971).

12 *Defence Act 1903* (Cth) s 51T.

13 *Defence Act 1903* (Cth) s 51I.

14 *Defence Act 1903* (Cth) s 51I.

15 *Defence Act 1903* (Cth) ss 51O, 51P.

16 *Defence Act 1903* (Cth) s 51R.

17 *Defence Act 1903* (Cth) s 51R.

18 *Defence Act 1903* (Cth) s 51I(3).

19 Above n 3.

Forces in connection with an industrial dispute. This prohibition appears to bar the deployment of the SAS against striking workers, but does not extend to the ADF as a whole. Both Liberal and Labor governments have used the ADF against strikers in the not-too-distant past, notably in 1949 (against coal miners), 1953 (against wharf labourers), 1981 (against Qantas) and 1989 (against pilots).<sup>20</sup>

After the legislation was enacted, the Howard Government followed the lead of the Bush Administration in the United States and the Blair Government in Britain, by declaring that the 11 September 2001 ('September 11') terrorist attacks in the United States required an indefinite 'war' against terrorism abroad, accompanied by curtailment of legal rights at home.<sup>21</sup> The fact that the military call-out legislation pre-dated September 11 points to deeper trends beyond this response to the events in New York and Washington. Indeed, there is reason to be concerned that these atrocities have been seized upon to justify far-reaching alterations to the legal and constitutional framework, including plans for substantial military involvement in combatting domestic unrest. This article will explore how the post-September 11 atmosphere has been utilised to help condition public opinion in relation to the use of the military against civilians.

## II SIGNIFICANCE AND HISTORICAL IMPLICATIONS OF THE LEGAL SHIFT

As well as a lack of discussion, the passage of the call-out legislation was accompanied by political deception. In a joint news release, the Attorney-General, Daryl Williams, and the Defence Minister, John Moore, asserted that the Bill did not change the conditions in which the armed forces could be called out: 'State, Territory and Commonwealth Governments have always had the power to request call-out of the Defence Force in Australia in rare situations where police need help to deal with an extreme emergency'.<sup>22</sup> Labor's spokesmen made similar statements, even asserting that the legislation placed new restrictions on the use of the military.

These statements are disproved by the legislation itself. It provides that the utilisation and powers of the armed forces under its provisions shall be additional to any other lawful use of the military. This is evident in section 51Y which states that 'this Part does not affect any utilisation of the Defence Force that

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20 Elizabeth Ward, 'Call out the Troops: An Examination of the Legal Basis for Australian Defence Force Involvement in "Non-Defence" Matters' (Australian Parliamentary Research Paper No 8, Parliament of Australia, 1997) 19.

21 Michael Head, 'Counter-Terrorism Laws: A Threat to Political Freedom, Civil Liberties and Constitutional Rights' (2002) 26 *Melbourne University Law Review* 666.

22 John Moore and Daryl Williams, 'Further Safeguards for Defence Bill' (Press Release, 23 August 2000), <<http://www.minister.defence.gov.au//2000/22900.htm>> at 8 September 2005.

would be permitted or required, or any powers that the Defence Forces would have, if this Part were disregarded'.<sup>23</sup>

Furthermore, s 51A goes beyond the previous s 51, which essentially mirrored s 119 of the *Constitution*. In the first place, the new section allows a military call-out where the three ministers are satisfied that domestic violence is occurring, 'or is likely to occur'. The latter phrase is an addition to s 119 and is, therefore, arguably unconstitutional. Second, the new section extends the call-out power to the protection of 'Commonwealth interests', regardless of whether there is a request by any State or Territory government. The new s 51A(3) provides that 'the Governor-General may make the order whether or not the Government of the State or the self-governing Territory request the making of the order'. This provision, in so far as it purports to permit a military intervention without the consent of a State, also arguably contravenes s 119, which requires State assent to the use of troops on State soil.

Beyond the constitutional limitations, the legislation was an attempt to overcome a variety of serious legal problems. Under previous legislative provisions and the common law, if military personnel killed or maimed individuals, damaged private property or interfered with people's liberty, they could be charged with criminal offences, including murder or manslaughter, or face civil action.<sup>24</sup> In addition, military personnel lacked legislative powers to carry out searches, seizures and arrests.

As discussed in one of my earlier articles,<sup>25</sup> throughout the 20<sup>th</sup> century, the deployment of troops within the country was both politically contentious and clouded by legal uncertainties. In the words of one Royal Commissioner, commenting on the fatal shooting of an entirely innocent Aboriginal man, David Gundy, by the New South Wales Police Paramilitary Unit, the Special Weapons Operation Squad: 'in Australia there is a very well established tradition that military responsibility is confined to dealing with external enemies under the commend of civil authority in wartime'.<sup>26</sup> During the 19<sup>th</sup> century, martial law was declared several times to deal with riots and rebellions, but the last clear exception to the military–civil division of power occurred in 1891 when the Queensland Government used troops to help the police suppress a sheep shearers' strike.<sup>27</sup>

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23 The Explanatory Memorandum states that s 51Y 'makes it clear that the new process for calling out members of the Defence Force does not in any way detract from the use of the Defence Force that would be permitted or required under any powers that the Defence Force would have if the new Part were not in place': Explanatory Memorandum, Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2003 (Cth) [59].

24 Peter Brett and Louis Waller, *Brett and Waller's Criminal Law: Text and Cases* (5th ed, 1983) 654.

25 Head, above n 1.

26 John Haldon Wootten, 'Report of the Inquiry into the Death of David John Gundy', in Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) 282–3.

27 Christopher Doogan, 'Defence Powers Under the Constitution: Use of Troops in Aid of State Police Forces – Suppression of Terrorist Activities' (1981) 31 *Defence Force Journal* 31.

This division of power was enshrined in the *Constitution* at Federation in 1901. The military power was handed to the Commonwealth under s 51(xxxi), the colonial defence forces were transferred to the Commonwealth by s 69, and under s 114 the States were forbidden to raise military or naval forces without the consent of the Commonwealth Parliament. Residual authority over domestic law and order remained in the hands of the States and their police forces. Section 119 allowed for a military call-out, but only if a State requested it, and it was never applied during the 20<sup>th</sup> century. In the early years of that century, States unsuccessfully requested military intervention six times. Only one request, by Queensland in 1912, invoked s 119.<sup>28</sup>

The underlying constitutional demarcation has become embedded in public consciousness. Domestic use of the armed forces has become widely regarded as conduct to be expected of a military or autocratic regime, not a democratic government. Only once since Federation has a federal government called out the military in a non-industrial urban situation – following a bomb blast outside a regional Commonwealth Heads of Government meeting at the Sydney Hilton Hotel in 1978. The sight of armed soldiers patrolling highways and the streets of the New South Wales town of Bowral caused public consternation.<sup>29</sup> Partly for that reason, former London Metropolitan Police Commissioner, Sir Robert Mark, who was appointed to examine policing resources, protective security and counter-terrorism, recommended that the Australian Federal Police (‘AFP’) establish an anti-terrorist squad to take frontline responsibility for action, such as the ‘killing of terrorists’, that might disturb the public.<sup>30</sup>

### III INCREASING USE OF THE MILITARY IN CIVILIAN SETTINGS

Let us now examine the expanded use of the military in the three civilian settings identified above: against asylum seekers; in the domestic ‘war on terrorism’; and in post-September 11 deployments overseas. These interventions have been conducted in a number of critical areas where the government and the media created an atmosphere of emergency, such that the use of the ADF became possible. This article cannot review these political circumstances, but each has involved concerted efforts to convince the public that the safety of the nation is threatened, whether by an influx of ‘boat people’,<sup>31</sup> ‘terrorist cells’,<sup>32</sup> ‘weapons of mass destruction’<sup>33</sup> or ‘failed states’ in the South Pacific.<sup>34</sup> These precedents

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28 Hung Phun Lee, *Emergency Powers* (1984) 201.

29 Jenny Hocking, *Beyond Terrorism: The Development of the Australian Security State* (1993).

30 Sir Robert Mark, *Report to the Minister for Administrative Services on the Organisation of Police Resources in the Commonwealth Area and Related Matters* (1978) 16.

31 Michael Head, ‘Whither the Refugee Convention? A New Perspective for the 21st Century’ (2002) 21 (May 2004) *Mots Pluriels* <<http://www.arts.uwa.edu.au/MotsPluriels/MP2102mh.html>> at 8 September 2005; Michael Head, ‘The High Court and the Tampa Refugees’ (2002) 11 *Griffith Law Review* 23.

32 Michael Head, ‘Another Threat to Democratic Rights: ASIO Detentions Cloaked in Secrecy’ (2004) 29 *Alternative Law Journal* 127.

33 Phillippe Sands, *Lawless World: America and the Making and Breaking of Global Rules* (2005).

for military deployment may, in turn, be seen as shaping public opinion in ways that could make it more feasible for a government to invoke the call-out powers in the future.

### A *Tampa and Operation Relex*

A number of disturbing legal and political precedents were set by the military operation to turn back the *MV Tampa* ('*Tampa*') and its rescued passengers in August–September 2001, and the subsequent *Operation Relex* to dispatch naval vessels and air force planes to repel refugee boats. When Howard Government ministers sent 45 SAS soldiers to board the Norwegian freighter and detain the rescuees, they were aware that they lacked any legislative power to do so. The Government tried to rush retrospective legislation – the Border Protection Bill 2001 – through Parliament to authorise its actions, but was defeated in the Senate.

Indeed, the Cabinet sought to evade the operation of the *Migration Act 1958* (Cth), which required Commonwealth officers to detain all 'unlawful' arrivals. Under that Act, military officers who boarded refugee vessels – even on the high seas – were obliged to bring the people on-board ashore, to be placed in detention.<sup>35</sup> On the Federal Cabinet's instructions, various steps were taken to ensure that the people on-board the *Tampa* could not contact lawyers to challenge the legality of the Government's conduct, or seek their release from the ship. Government leaders were determined to prevent the asylum seekers from applying for protection visas. According to the agreed facts in *Victorian Civil Liberties Council Incorporated v Minister for Immigration and Multicultural Affairs* ('*Tampa Case*');

The ship has been forbidden by Australian authorities from proceeding any closer to Christmas Island and from entering the port ... The effect of the continuing presence of the SAS officers is that the captain and crew are unlikely to attempt to move the ship into the port. This is a consequence desired by the Australian government ...

The evidence justifies an inference that the many of the rescuees would, if entitled, wish to apply for protection visas, and would wish to leave the ship and enter Australia. The rescuees have no access to communications with persons off the ship and persons off the ship are unable to communicate with them.<sup>36</sup>

In the Federal Court, North J granted a habeas corpus order, ruling that the refugees had been illegally detained. He found that the Government had flouted its own migration legislation and had determined 'at the highest level' to 'use an unlawful process to detain and expel the rescuees'. He ordered the Government to bring the *Tampa* refugees, crammed aboard a military troop carrier at that time, the *HMAS Manoora*, to the Australian mainland, where they would have

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34 Tarcisius Tara Kabutaulaka, '*Failed State*' and the War on Terror: *Intervention in Solomon Islands*, Asia Pacific Issues: Analysis from the East-West Centre No 72 (2004), <<http://www.eastwestcenter.org/stored/pdfs/api072.pdf>> at 8 September 2005.

35 *Migration Act 1958* (Cth) ss 189, 245.

36 *Ibid* [35].

the right to apply for asylum under the *Migration Act 1958* (Cth) and the *Convention Relating to the Status of Refugees*.<sup>37</sup>

Even after Justice North's initial ruling, the Government continued on its course, having obtained an agreement from the lawyers challenging its actions – Melbourne solicitor Eric Vadarlis and the Victorian Civil Liberties Council – that it would return the rescuees to Australia if it lost an appeal to the full Federal Court. The refugees were shipped thousands of kilometres away to the remote Pacific island of Nauru. En route, the government crammed 237 more unwanted refugees, seized off Ashmore Reef, onto the *Manoora*. Upon arrival at Nauru, a desolate former Australian, New Zealand and British protectorate, military personnel forced the *Manoora's* unwilling passengers into a detention camp of makeshift shelters and tents in the middle of the island's former phosphate mine.

By two-to-one, the full Federal Court declared that the government has vague executive or prerogative power under the *Constitution* to detain and remove 'aliens' and take any other action it considers necessary to protect 'national sovereignty'.<sup>38</sup>

In November 2001, the High Court brought the *Tampa* case to an abrupt halt. A panel of three justices refused to consider an appeal from the full Federal Court.<sup>39</sup> The decision effectively sanctioned the Federal Government's continued use of military force to remove asylum seekers from territorial waters and transport them to detention camps on remote Pacific islands. If it were to have lost the appeal, the Government would have been in breach of an undertaking to bring the refugees back to Australia. However, it presented the High Court with a *fait accompli* – Australia was no longer detaining the refugees, because they had been removed to Nauru. The High Court judges accepted that the refugees were no longer held under Australian authority and were no longer under its jurisdiction.<sup>40</sup>

In doing so, the judges declined to rule on the dubious constitutional validity of the post-*Tampa* laws, which include provisions purporting to retrospectively authorise the *Tampa* operation and prevent any legal challenge to the forced removal of refugees and their boats from Australian waters. Section 5 of the *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth) purports to legalise and protect any action taken against the *Tampa* rescuees during the 'validation period', which was backdated to 27 August 2001. Section 6 provides that, '[a]ll action to which this Part applies is taken for all purposes to have been lawful when it occurred', and s 7 states that, '[p]roceedings, whether civil or criminal, may not be instituted or continued in any court, in respect of action to which this Part applies'.

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37 Ibid.

38 *Ruddock v Vadarlis* (2001) 110 FCR 491.

39 Transcript of proceedings, *Vadarlis v Minister for Immigration and Multicultural Affairs* (High Court of Australia, Gaudron, Gummow and Hayne JJ, 27 November 2001), <<http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/hca/transcripts/2001/M93/3.html?query=title+%28+22vadarlis%22+%29>> at 8 September 2005.

40 Head, above n 31, 25.



Section 198A of the amended *Migration Act* authorises officers, including military personnel, to remove ‘offshore entry’ people from vessels, restrain them, place them on other vessels and take them to other countries, using ‘such force as is necessary and reasonable’. The latter phrase is not defined. Section 494AA of the *Migration Act* bars legal proceedings relating to the exercise of powers under s 198A, or to the detention or status of an offshore entry person, while not seeking to ‘affect the jurisdiction of the High Court under s 75 of the *Constitution*’.

These provisions could allow refugees to be fired upon in order to prevent them landing on Australian soil. For example, shots were fired in the direction of at least one over-crowded and sinking boat, codenamed *SIEV 4*, whose occupants were ultimately rescued by sailors when the vessel sank. Government ministers then falsely accused the refugees of throwing children overboard in effort to compel the navy to rescue them.<sup>41</sup> Members of the crew of *HMAS Adelaide* blew the whistle on the Government in the media and later made statements, tabled in the Senate Inquiry over the incident, ‘A Certain Maritime Incident’, denying the allegations made against the asylum seekers.<sup>42</sup>

Apart from revealing how far a government may go to deceive the public about military operations against civilians, and to shield such operations from legal scrutiny, perhaps the ‘children overboard’ affair points to the difficulties that governments may experience in ordering reluctant military personnel to execute highly political tasks.

## B The ‘War on Terrorism’

The ‘war on terrorism’, conducted since 2001, has seen a substantial increase in the domestic role of the armed forces. This has taken three known forms:

- (1) close involvement by the ADF in counter-terrorism planning and preparation;
- (2) the expansion of existing ‘rapid response’ units and the establishment of new ones designed for use against domestic civilian targets; and
- (3) the participation of ADF units in frequent counter-terrorist exercises in various parts of Australia.

These developments also involve para-military squads that were created in federal, State and territory police forces during the 1970s, further smudging the line between police and military operations. As one study has concluded:

the establishment of specialist counter-terrorism units within state police forces in the mid-1970s has led to increasingly militarised forms of policing. The units – such as Victoria’s Special Operations Group – are paramilitary: they train with the military, include former members of the military, use a wide range of military

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41 Senate Select Committee on A Certain Maritime Incident, Parliament of Australia, *A Certain Maritime Incident* (2002), <[http://www.aph.gov.au/Senate/committee/maritime\\_incident\\_ctte/report/contents.htm](http://www.aph.gov.au/Senate/committee/maritime_incident_ctte/report/contents.htm)> at 24 June 2005, 33.

42 Ibid 62. See also Michael Head, *Australian Election: The Howard Government’s Big Lie Unravels* (2001) World Socialist Web Site <<http://www.wsws.org/articles/2001/nov2001/refu-n10.shtml>> at 24 June 2005.

weapons and equipment; they train with and use extremely high levels of force. In short, the units straddle the line between the police and military and blur the traditional distinctions between the two organisations.<sup>43</sup>

Taken together, these measures have created the political, public relations and legal atmosphere for more ready internal use of the military.

## 1 *Planning*

Over the past four years, the ADF and the police para-military units have been more closely integrated into the civilian counter-terrorism framework. For example, in its 2004 Report, *Watching Brief on the War on Terrorism*, the Parliamentary Joint Standing Committee on Foreign Affairs Defence and Trade noted that if a terrorist attack were to occur in Australia, 'the Australian Defence Force would liaise with State police to determine what, if any, support is required', as part of the crisis management arrangements to be activated in these circumstances. ADF representatives would be included, together with senior ministers, public service chiefs, State and federal police forces and intelligence services, in the 'crisis centre' established to take charge of the incident.<sup>44</sup> These arrangements provide for the invocation of the call-out powers. Clause 44 of the *National Counter-Terrorism Plan*, adopted by the National Counter-Terrorism Committee in June 2003, states:

Where civilian authorities determine that their resources and capabilities are insufficient to manage the threat or incident and the use of force is envisaged, the Governor-General can authorise the use of ADF resources, including the Tactical Assault Groups ... under the provisions of Defence Force Aid to Civilian Authorities ... (Part IIIAAA of the *Defence Act 1903*). Where force is not required, the Defence Force can assist under the provisions of Defence Assistance to the Civil Community<sup>45</sup>

Under the Plan, however, it seems that ADF resources can be mobilised without a formal call-out order, and that the Commonwealth can do so with or without the consent of the States and territories. Clause 53 of the *Plan* permits use of ADF siege negotiators under the Defence Force Aid to Civilian Authorities ('DFACA') provisions, but other clauses allow for ADF involvement without mentioning the DFACA provisions. For example, clause 48 states that the Incident Response Regiment ('IRR') may be deployed to assess and respond to chemical, biological and radiological incidents, clause 66 speaks of the ADF providing intelligence support to a Joint Intelligence Group, with the Australian Security Intelligence Organisation ('ASIO') and the AFP, and clause 67 refers to ADF operational support.

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43 Jude McCulloch, *Blue Army: Paramilitary Policing in Australia* (2001) 1.

44 Ibid 8.

45 National Counter-Terrorism Committee, *National Counter-Terrorism Plan*, National Security Australia (2003), <<http://www.nationalsecurity.gov.au/agd/www/NationalSecurityHome.nsf/Page/RWPCD8501294925DA06CA256D42001C1A4C?OpenDocument#legal>> at 28 June 2005.

Clause 74 specifies that the Commonwealth may declare a terrorist situation to be a 'national terrorist situation'. The States and Territories need to be consulted and their agreement sought, but, their acceptance is not required. Nevertheless, they '[can]not ... withhold unreasonably such agreement'. Under clause 76 'overall responsibility for policy and broad strategy in relation to the situation transfers to the Commonwealth, in close consultation with relevant States or Territories'. As with the call-out legislation itself, by allowing for State objections to ADF deployment to be overridden, these measures could exceed s 119 of the *Constitution*.

## 2 *Domestic Military Units*

The military's capacity to intervene domestically has been significantly enhanced. In the 2002–03 Budget, the Howard Government committed A\$219.4 million over four years to raise a second Tactical Assault Group ('TAG') force to match the existing SAS regiment, based in Perth, to be 'available to assist the civil authorities to deal with a terrorist incident'.<sup>46</sup> These elite units are trained to conduct heavily-armed operations in civilian areas, including 'recapturing structures, freeing hostages and supporting high-risk search teams'.<sup>47</sup> The 310-strong TAG East Force is, in addition to the IRR, stationed at Holsworthy Barracks in Sydney, a commando regiment that has personnel support from the navy. The 2002–03 Budget allocated A\$121 million over four years to make the IRR a permanent ADF capability.<sup>48</sup>

Thus, the government has given itself the capacity to simultaneously mobilise the military on Australia's east coast, where the largest populations are concentrated, and on the west coast. In answer to a Parliamentary Committee question about the possibly unnecessary and costly duplication of existing resources, Major-General Ken Gillespie commented that the second TAG has 'created an ability to respond quickly across jurisdictions with two capabilities'.<sup>49</sup> The Government has also established the Ready Reserve Force ('RRF'), providing 'a short readiness capability in ADF reserve brigades in each state'.<sup>50</sup>

## 3 *Internal exercises*

A national program of counter-terrorism exercises has been instituted, giving the military experience in action alongside Federal and State police forces in a range of civilian settings, including urban and suburban, as well as remote. One such exercise, codenamed *Mercury 04*, 'tested the full range of preventative, response and consequence management arrangements across four jurisdictions – the Northern Territory, South Australia, Victoria and Tasmania'.<sup>51</sup> At least one RRF unit was involved.<sup>52</sup> In April 2005, Attorney-General Philip Ruddock

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46 National Counter-Terrorism Committee, above n 45, 14.

47 Ibid 14.

48 Ibid 14.

49 Ibid 15.

50 Ibid 98.

51 Ibid 95.

52 Ibid 98.

announced that five exercises were planned for 2005, beginning with the Tactical Response Exercise *High Line*, to be held over five days in central and suburban Melbourne. According to his media release, '[d]eveloped by a joint exercise management team, *High Line* has a specific focus on testing and evaluating the tactical-level response of Victoria Police and its interoperability with the Australian Defence Force and interstate police tactical groups'.<sup>53</sup>

Such events have generally been publicised in the mass media, accompanied, for example, by images of officers descending from military helicopters to storm buildings.<sup>54</sup> These images are designed to accustom the public to the domestic use of military force. However, the operations have caused some shock and distress. After operation *High Line*, the Victorian Police had to apologise to residents of Collingwood, an inner Melbourne suburb, who were traumatised when police and soldiers swooped on their neighbourhood in the early hours of the morning firing guns. The ABC Radio Program, 'The World Today' recorded the following comments from resident Aiden Halloran:

It was pretty scary. It was probably worse for my partner who has suffered panic attacks in the past and it definitely made her very, very nervous. The impact of the explosions – and I think there was more than one – was actually shaking the foundations of the house, so the whole house was literally shaking. That was followed by the helicopter swooping and gunfire or grenades of some sort ... this went on for maybe 20 minutes or so. There were commandos running through the streets.<sup>55</sup>

### C Deployments in Afghanistan, Iraq and the Solomon Islands

It is beyond the scope of this article to consider the merits or legality of the post-2001 United States-led invasions of Afghanistan and Iraq, and the Australian-led intervention in the Solomon Islands. It suffices to say that there are many reasons to conclude that the invasions of Afghanistan and Iraq violated international law and were based on lies.<sup>56</sup> There is ample evidence that the terrorist outrages in New York and Washington provided the pretext for the implementation of plans prepared much earlier (that is, during the 1990s) for the conquest of Afghanistan and Iraq, and constitute a drive for American hegemony over the Middle East and Central Asia.<sup>57</sup> It can also be argued that Canberra's post-Iraq decision to send troops to the Solomon Islands was similarly motivated by strategic and economic considerations.<sup>58</sup> Regardless of those issues, however,

53 Philip Ruddock, 'Counter-Terrorism Exercise Begins in Melbourne' (Press Release, 4 April 2005).

54 For example, 'Terror Training Exercise in Sydney CBD', *Sydney Morning Herald* (Sydney), 17 June 2004, <<http://www.smh.com.au/articles/2004/06/16/1087244980098.html?from=storylhs>> at 17 June 2005.

55 ABC Radio National, 'Police Anti-Terrorism Exercise in Melbourne Suburb Frightens Residents', *The World Today*, 13 April 2005, <<http://www.abc.net.au/worldtoday/content/2005/s1344346.htm>> at 17 June 2005.

56 Sands, above n 33.

57 Andrew Bacevich, *American Empire: The Realities and Consequences of US Diplomacy* (2002); Nick Beams, *The Political Economy of American Militarism* (2003) World Socialist Web Site <<http://www.wsws.org/articles/2003/jul2003/nb1-j10.shtml>> at 9 September 2005.

58 Kabutaulaka, above n 34. See also Socialist Equality Party, *Oppose Australia's Colonial-Style Intervention in the Solomons* (2003) <<http://www.wsws.org/articles/2003/jul2003/solo-j03.shtml>>

there is no doubt that the operations have seen the Australian military engaged in patrolling populated areas and acting against civilian targets.

## 1 *Afghanistan*

How such operations can involve ADF personnel in attacking innocent civilians was underscored when controversy concerning Australia's post-September 11 mission in Afghanistan, called *Operation Slipper*, arose in May 2005. *Time* magazine reported that an Australian SAS patrol killed 15 innocent tribesmen and wounded 16 others in 2002. It was not a new story, but *Time* located and interviewed relatives of the dead civilians, who left behind nearly 50 children reliant on hand-outs to survive. Responding to the report, General Peter Cosgrove, Chief of the ADF said he was satisfied with disciplinary action taken towards the SAS soldiers involved. Cosgrove told a Senate committee that the patrol's tactical actions had been reviewed and were found to be in accordance with the rules of engagement. He said:

For the protection for ourselves and their families, the ADF ... does not normally publicly discuss the details of internal investigations and any disciplinary actions taken. We treat these issues confidentially in order to allow the correct and appropriate application of military law.<sup>59</sup>

These comments highlight the barriers placed in the way of scrutinising ADF operations and holding to account those responsible for any fatalities. Secrecy surrounds the evidence, the investigation and the disciplinary actions, together with the applicable rules of engagement. The *Time* article published aspects of the rules of engagement for the SAS during *Operation Slipper*. The rules reportedly stated that 'incidental/collateral damage' was acceptable as long as it was not 'excessive in relation to direct military advantage anticipated to be gained'. Cosgrove denounced the disclosure of classified information and said it was in breach of the 'Official Secrets Act' (in fact, the relevant provisions are in Chapter 5 of the *Criminal Code Act 1995* (Cth)). Defence Minister Hill declined to comment, citing normal secrecy about the activities of the SAS.<sup>60</sup>

## 2 *Iraq*

Secrecy likewise surrounds the rules of engagement for the Australian mission in Iraq, codenamed *Operation Falconer*. The Department of Defence website indicates that the rules authorise the use of lethal force against alleged paramilitary forces and, under some circumstances, civilians. After referring to Australia's obligations under international law, the site states:

Under these obligations, Australian forces will be authorised to engage with necessary and proportionate lethal force all Iraqi military and paramilitary forces, as required to achieve their mission. Australian forces will not attack civilians or

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at 17 June 2005.

59 'SAS 'Killed Civilians' in Bungled Op' (2005) News.com.au <<http://www.news.com.au/story/print/0,10119,15469257,00.html>> at 29 June 2005. See also Peter Symonds, *New Evidence Confirms Killings of Afghan Villagers by Australian Soldiers* (2005) World Socialist Web Site <<http://www.wsws.org/articles/2005/jun2005/sas-j03.shtml>> at 29 June 2005.

60 'SAS 'Killed Civilians' in Bungled Op', above n 59.

other persons protected by the Geneva Conventions, such as those who are incapacitated by sickness or wounding, and are unable to defend themselves, or who have surrendered. Australian forces will not attack civilians, other persons protected by the Geneva Conventions, or civilian objects such as civilian buildings, provided they are not being used for a military purpose.<sup>61</sup>

Various controversies have arisen over the use of ADF personnel against civilian targets in Iraq, including the shooting of a woman at a checkpoint,<sup>62</sup> the storming of a cleric's home over the Douglas Wood kidnapping<sup>63</sup> and interrogation of prisoners held by the United States-led coalition.<sup>64</sup>

### 3 *Solomon Islands*

Under the Australian rules of engagement in the Solomon Islands, according to the BBC, troops can 'shoot to kill' if militias threaten their security.<sup>65</sup> The Department of Defence website for *Operation Anode* gives no information about the rules of engagement, except to state:

The Solomon Islands Parliament has passed legislation which allows members of the visiting forces to use such force as is necessary to protect themselves, protect other persons or property, and to achieve the purposes of the mission, such as stopping violence.<sup>66</sup>

Section 7 of the *Facilitation of International Assistance Act 2003* (Solomon Islands) provides that armed forces and police members of the visiting contingents may exercise any powers that may be exercised by police officers. In addition, they 'may use such force as is reasonably necessary to achieve a public purpose'. Moreover, s 17 of the Act gives contingent members immunity from legal proceedings in relation to actions taken in the course of, or incidental to, official duties. 'Legal proceedings' are defined to include criminal, civil, disciplinary and administrative proceedings, and proceedings seeking to enforce customary law.

These provisions, and the secret rules of engagement in each of the three missions, raise serious questions which are not just about the potential for the killing of innocent local civilians, as happened in Afghanistan. They also point to the sorts of training, powers, attitudes and experience to which SAS and other military personnel can become accustomed, for possible application at home.

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61 Department of Defence, *Disarmament of Iraq – Operation Falconer: Frequent Questions*, <<http://www.defence.gov.au/opfalconer/faq.htm>> at 24 June 2005.

62 'Commander Backs Troops over Baghdad Shooting', *The Age* (Melbourne), 28 February 2005, <<http://www.theage.com.au/news/Iraq/Commander-backs-troops-over-Baghdad-shooting/2005/02/28/1109439483457.html>> at 29 June 2005.

63 Paul McGeogh, 'The Raid that Went Wrong', *The Age* (Melbourne), 18 June 2005, 1.

64 Margo Kingston, 'Was Australia Complicit in US War Crimes at Abu Ghraib?', *Sydney Morning Herald* (Sydney), 2 June 2004, <<http://www.smh.com.au/articles/2004/06/02/1086058911006.html>> at 29 June 2005.

65 'Peacekeepers Arrive in Solomons', *BBC News*, 24 July 2003, <<http://news.bbc.co.uk/1/hi/world/asia-pacific/3091649.stm>> at 24 June 2005.

66 Department of Defence, *Regional Assistance Mission to the Solomon Islands – Operation Anode: Frequent Questions* <<http://www.defence.gov.au/opanode/faq.htm>> at 9 September 2005.

#### IV UNANSWERED CONSTITUTIONAL AND LEGAL QUESTIONS

Despite the passage of five years, important constitutional and legal questions, which were raised at the time the call-out legislation was introduced, remain unanswered.

- A. What is the constitutional basis claimed for the provisions and their potential application? As noted above in the Introduction, the powers set out in Part IIIAAA exceed those contained in s 119 of the *Constitution* in several respects.
- B. What degrees of violence and violation of basic legal and democratic rights are permissible under the legislation? In particular, what is the scope of the ‘reasonable and necessary force’ protected by s 51T of the Act?
- C. What manuals, rules of engagement or guidelines have been issued to govern the conduct of military personnel under Part IIIAAA of the Act? Why are they kept secret?
- D. In the event of the unlawful killing or injuring of civilians, can members of the armed forces argue a defence of acting in obedience to superior orders?
- E. Is it possible to legally challenge decisions made under Part IIIAAA of the Act, including those made by the ‘authorising ministers’ (or the Governor-General) to issue a call-out order, specify a ‘general security area’ or declare a ‘designated area’?

After briefly canvassing the constitutional issues, which were examined by this author previously, this article will probe, in more detail, the legal problems posed in the author’s earlier article, particularly those raised by Section 51T of the Act.

##### A Constitutional Doubts

Doubts remain about the constitutional validity of the call-out provisions, given that they have not been used and the Federal Government has taken no steps to clarify the heads of power it is relying upon. As noted in my previous article, the relevant sections of the *Constitution* are ss 51(vi) (defence), 51(xxix) (external affairs), 51(xxxix) (incidental), 61 (executive), 68 (command of the military forces) and 119 (protection of states). Possibly combined with prerogative powers, some or all of these powers may give rise to an inherent power of self-protection or a ‘nationhood’ power. But there is still the fundamental issue of whether the federal government can act to protect a State without a State application, that is, outside or in breach of the express precondition provided by s 119.<sup>67</sup> This article will not revisit these unresolved questions.

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<sup>67</sup> Head, above n 1, 286–93.

In addition, any military deployment against political dissidents or organisations might infringe the implied freedoms of political communication and association.<sup>68</sup> Military powers of detention could trespass on the judicial power.<sup>69</sup> It might be argued that the Commonwealth's power has been enhanced by the States' referral of powers to enact anti-terrorist legislation, but this argument has yet to be tested in the counter-terrorism arena, let alone the wider context of suppressing 'domestic violence'.<sup>70</sup> In any case, referrals of power may be ineffective in overriding the implied constitutional freedoms.

### B 'Reasonable and Necessary Force'

Section 51T of the Act provides:

- (1) A member of the Defence Force may, in exercising any power under Division 2 or 3 or this Division, use such force against persons and things as is reasonable and necessary in the circumstances.
- (2) However, a member of the Defence Force must not, in using force against a person:
  - (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 protect the life of, or to prevent serious injury to, another person (including the member); or
  - (b) subject the person to greater indignity than is reasonable and necessary in the circumstances.
- (3) In addition, if a person is attempting to escape being detained by fleeing, a member of the Defence Force must not do anything that is likely to cause the death of, or grievous bodily harm to, the person unless the person has, if practicable, been called on to surrender and the member believes on reasonable grounds that the person cannot be apprehended in any other manner.

While, on the face it, sub-ss (2) and (3) limit the breadth of sub-s (1), the scope that remains for the use of grievous or deadly force is substantial. Moreover, sub-ss (2) and (3) may have the effect of specifically authorising, or at least legitimising, such force in certain circumstances. Soldiers are permitted to cause death or grievous bodily harm where they believe 'on reasonable grounds' that such action is necessary to protect the life of, or prevent serious injury to, another person, including the soldiers involved. This opens up the possibility of military personnel justifying the infliction of fatal or serious injuries on the basis that soldiers felt threatened by the actions of their victims, or others associated with them. The cases reviewed below highlight the difficulties of challenging such

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68 For an exploration of these issues in the context of the anti-terrorism legislation introduced in 2003–04, see Joo-Cheong Tham, 'Possible Constitutional Objections to the Powers to Ban "Terrorist" Organisations' (2004) 27 *University of New South Wales Law Journal* 482; Greg Carne, 'Detaining Questions or Compromising Constitutionality? The *ASIO Legislation Amendment (Terrorism) Act 2003 (Cth)*' (2004) 27 *University of New South Wales Law Journal* 524.

69 Carne, above n 68.

70 See also Nicholas O'Neill, Simon Rice and Roger Douglas, *Retreat from Injustice, Human Rights Law in Australia* (2nd ed, 2004) 252–4.



claims, particularly where courts are loathe to second guess judgments made in the heat of conflict or in the context of ‘national security’.

Moreover, a person ‘attempting to escape being detained by fleeing’ may be killed or caused grievous bodily harm if they have been called on to surrender and a soldier believes on reasonable grounds that the person cannot be apprehended in any other way. This establishes the danger of killings or woundings being justified by equally difficult-to-assess allegations that the victims attempted to escape.

In two crucial respects, the authority to use force under s 51T exceeds that given to AFP officers. Section 14B of the *Australian Federal Police Act 1979* (Cth) (*AFPA*) states:

- (1) A protective service officer must not, in arresting or attempting to arrest a person for an offence or in preventing a person who has been arrested for an offence from escaping, use more force, or subject the person to greater indignity, than is reasonable and necessary in order to make the arrest or prevent the escape of the person.
- (2) Without limiting the generality of subsection (1), a protective service officer must not, in arresting or attempting to arrest a person for an offence or in preventing a person who has been arrested for an offence from escaping, do an act likely to cause death or grievous bodily harm to the person unless the officer believes on reasonable grounds that the doing of the act is necessary to protect life or prevent serious injury to the officer or any other person.

In the first place, the AFP authority to use force is constrained by reference to arrests made for offences, whereas the ADF powers are more sweeping once general security and designated areas have been declared. With the exception of the power to detain people, none of the far-reaching powers, such as to capture premises, issue directions, evacuate people and search and seize, are limited to any belief by the officer that an offence has been committed. Second, sub-s (3) of s 51T, although expressed as a further restriction ‘in addition’ to sub-ss (1) and (2), provides a specific scenario for the use of force – ‘where the person cannot be apprehended in any other manner’, which is not contemplated by s 14B of the *AFPA*. Moreover, the risk of AFP members using lethal force in the exercise of policing functions is considerably greater, given that they are armed only with high-powered weaponry, designed to kill, and that soldiers are trained to kill, or be killed.<sup>71</sup>

These issues can be illustrated by two British House of Lords decisions arising out of fatal shootings by soldiers of unarmed men during the course of British military operations in Northern Ireland. (These two cases are part of a wider bitter experience that demonstrates the inherent dangers in the domestic use of armed forces.<sup>72</sup> Two decades of military deployment against alleged ‘terrorist’ opponents of British rule in Northern Ireland produced numerous instances in which civilians were killed by troops, including the infamous ‘Bloody Sunday’

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71 McCulloch, above n 43, 17–31.

72 Ibid 9.

events of 30 January 1972. During a disturbance in Londonderry following a civil rights march, the British Army fired shots. Thirteen people were killed and another 13 were wounded, one of whom subsequently died.<sup>73</sup>)

In *Attorney-General for Northern Ireland's Reference (No 1 of 1975)*,<sup>74</sup> a soldier on patrol in Northern Ireland shot and killed an unarmed man, who ran away when challenged. The trial judge found that the prosecution had failed to prove that the soldier intended to kill or cause serious bodily harm, and further found that the homicide was justifiable under s 3 of the *Criminal Law Act (Northern Ireland) 1967* (UK) c 18. That section provided:

A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.

The House of Lords decided that the judge's ruling was purely one of fact and, therefore, declined to answer the question of law referred to it, which was in relation to whether the soldier had committed a crime. However, Lord Diplock made the following remarks, which point to the uncertainties and high risks associated with military mobilisations in civilian areas:

There is little authority in English law concerning the rights and duties of a member of the armed forces of the Crown when acting in aid of the civil power; and what little authority there is relates almost entirely to the duties of soldiers when troops are called upon to assist in controlling a riotous assembly. Where used for such temporary purposes it may not be inaccurate to describe the rights and duties of a soldier as being no more than those of an ordinary citizen in uniform. But such a description is in my view misleading in the circumstances in which the army is currently employed in aid of the civil power in Northern Ireland ... In theory it may be the duty of every citizen when an arrestable offence is about to be committed in his presence to take whatever reasonable measures are available to him to prevent the commission of the crime; but the duty is one of imperfect obligation and it does not place him under any obligation to do anything by which he would expose himself to risk of personal injury, nor is he under any duty to search for criminals or seek out crime. In contrast to this a soldier who is employed in aid of the civil power in Northern Ireland is under a duty, enforceable under military law, to search for criminals if so ordered by his superior officer and to risk his own life should this be necessary in preventing terrorist acts. For the performance of this duty he is armed with a firearm, a self-loading rifle, from which a bullet, if it hits the human body, is almost certain to cause serious injury if not death.<sup>75</sup>

Lord Lloyd of Berwick cited these comments in the second pertinent case, *R v Clegg*,<sup>76</sup> where he emphasised the last sentence in the quotation and added:

In the case of a soldier in Northern Ireland, in the circumstances in which Private Clegg found himself, there is no scope for graduated force. The only choice lay between firing a high-velocity rifle which, if aimed accurately, was almost certain to kill or injure, and doing nothing at all.<sup>77</sup>

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73 The United Kingdom Government's Bloody Sunday Inquiry documents and findings can be read at its web site: <<http://www.bloody-sunday-inquiry.org.uk/>> at 17 June 2005. The Inquiry's report was due in mid-2005.

74 [1977] AC 105.

75 Ibid 136-7.

76 [1995] 1 AC 482.

77 Ibid 497-8 (emphasis omitted).

The implication, it seems, is that when a government deploys highly-armed soldiers, equipped and trained to kill, in a civilian area, it is precisely because of that circumstance that the law must give the armed forces greater leeway to kill or maim than would be permitted for any other person (including, presumably, a less lethally-equipped police officer).

Private Clegg was convicted by a trial judge of murder. While on a patrol to catch ‘joyriders’, Clegg fired three shots at the windscreen of a car as it approached at speed. He fired a fourth shot, killing a passenger, after the car had passed him and was already more than 50 feet along the road. The judge accepted that the initial three shots were fired in self-defence, or in defence of a colleague, but that the fourth shot could not have been fired in self-defence because the danger to the soldiers no longer existed. The House of Lords upheld the conviction, ruling that where a person used a greater degree of force than necessary for self-defence, the charge could not be reduced to manslaughter, even if the accused was a soldier or police officer acting in the course of his duty.<sup>78</sup> Yet, the Court expressed regret that, under existing law, the judge had no choice but to convict Clegg of murder, and urged the Parliament to change the law relating to murder and manslaughter.

In an interesting insight into the lengths that military personnel may go in conspiring together to obscure their criminal liability, Clegg argued that he had fired the fourth shot to stop the driver of the car in the belief that it had struck another member of the patrol. The judge found that bruising on the other soldier’s leg had not been caused by the car but by another soldier stamping on it to give the misleading appearance that he had been struck by the car. The House of Lords observed that an army ‘yellow card’ entitled ‘[i]nstructions for opening fire in Northern Ireland’ could, on a literal reading, justify firing on a car where a person had been injured by it, irrespective of the seriousness of the injury. But, in any case, the Court said the card had no legal force.<sup>79</sup> (This issue may be relevant to considering the legal effect of any military manual or rules of engagement, as discussed below).

### C Rules of Engagement?

During the passage of the call-out legislation, the Government and the Labor Party combined to defeat an amendment that would have required the tabling in Parliament of the manuals and protocols that would apply to military interventions. This proposal was raised after Greens Senator Bob Brown read out extracts from the Australian Army *Manual of Land Warfare*.

This secret manual, produced in 1983, had been leaked to the media in 1993.<sup>80</sup> The leaked document asserted an extremely wide and highly-political role for the ADF, with an Introduction that stated: ‘[c]ivil disobedience, mass violence and

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78 The same position that the Australian High Court reverted to in *Zecevic v Director of Public Prosecutions (Victoria)* (1987) 162 CLR 645, overturning *R v Howe* (1958) 100 CLR 448 and *Viro v The Queen* (1978) 141 CLR 88.

79 [1995] 1 AC 482, 491.

80 McCulloch, above n 43, 177.

terrorism have become common methods of dissent throughout the world in recent years'.<sup>81</sup> It indicated that the ADF may be involved in countering the threat posed by the activities of dissidents, including riots, mass demonstrations, and industrial, political and social disturbances.<sup>82</sup> It referred to establishing detention centres<sup>83</sup> and to opening fire on 'unlawful assemblies'. The latter section stated:

As a last resort troops may be required to open fire on the crowd to disperse it. The principles of minimum force must be kept in mind by the commanders. Therefore, initially, only selected individuals should be nominated to fire upon selected agitators in the crowd.<sup>84</sup>

Senator Brown quoted s 543 of the *Manual*, which instructed military personnel in how to then cover up the killing or wounding of 'dissidents'. The section stated:

Dead and wounded dissidents, if identifiable, must be removed immediately by the police ... When being reported, dissident and own casualties are categorised merely as dead or wounded. To inhibit propaganda exploitation by the dissidents the cause of the casualties (for example, 'shot') is not reported. A follow-up operation should be carried out to maintain the momentum of the dispersing crowd.<sup>85</sup>

Responding to Senator Brown, Special Minister of State Chris Ellison said the *Manual* was 'under revision' and would be replaced with a new version once Part IIIAAA of the Act was passed. He refused, however, to give any assurance that a similar clause would not appear in the rewritten document. Defence Minister Hill's aforementioned letter to this author confirms that the revised *Manual* will not be released to the public, but provides no reasons for that secrecy.<sup>86</sup> Concerns remain therefore that the *Manual* may still contain instructions permitting ADF personnel to open fire on demonstrators.

According to Senator Hill's letter, it would be left to force commanders to translate the rules of engagement issued by the Chief of the Defence Force into 'situation-specific orders for the use of force'. The letter argues that rules of engagement cannot be released into the public domain for reasons of operational security. It states that '[p]recise knowledge by an adversary of the limitations that have been placed on the use of force by ADF members could endanger their lives'. This contention applies battlefield considerations directly to civilian contexts, depicting members of the public as potential 'adversaries'.

## D Superior Orders?

Military personnel ordered to use force against civilians may face a dilemma. Under military law, if they disobey orders, they could face dire consequences, including imprisonment. However, under civilian law, if they execute orders that are subsequently ruled unlawful, they may have no defence of obeying superior orders.

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81 Ibid 178.

82 Ibid.

83 Ibid 182.

84 Ibid 183.

85 Commonwealth, *Parliamentary Debates*, Senate, 6 September 2000, 17398 (Bob Brown).

86 Above n 3.

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.<sup>87</sup> Nonetheless, these instruments are heavily tilted toward obedience. Thus, 'a person given an order requiring the performance of a military duty may infer it to be lawful and disobeys it at peril'.<sup>88</sup> Disobedience of a lawful command is punishable by up to two years imprisonment.<sup>89</sup> 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'.<sup>90</sup> For officers, their officer's commission reinforces the duty of obedience:

I (name of Governor-General) ... Charge and Command you faithfully to discharge your duty as an officer and observe and execute all such orders as you may receive from your superior officers ...<sup>91</sup>

On the other hand, since *Re Tracey; Ex parte Ryan*,<sup>92</sup> it has been reasonably clear that the defence power cannot be used to exempt military personnel from the general criminal and civil law for conduct for which they have already been tried under military law by means of a 'service offence'. Five members of the High Court in that case held that provisions of the *DFDA*, which sought to achieve the opposite of this, were invalid, insisting that, after reviewing the history, a soldier remains a citizen and liable to the ordinary criminal law.

In *R v Clegg*, it was said that English law knew no general defence of superior orders. Lord Lloyd of Berwick cited ancient authority<sup>93</sup> as well as the Australian High Court in *A v Hayden (No 2)*,<sup>94</sup> followed by the Privy Council in *Yip Chiu-Cheung v The Queen*.<sup>95</sup> In *A v Hayden*, Murphy J stated:

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87 *Defence Force Discipline Act 1982* (Cth) s 27; *Australian Defence Force Discipline Act 1982 Manual* 4–33.

88 *Australian Defence Force Discipline Act 1982 Manual* 4–33.

89 *Defence Force Discipline Act 1982* (Cth) s 27; *Australian Defence Force Discipline Act 1982 Manual* 4–33.

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

91 Rhonda M Wheate and Nial J Wheate, 'Lawful Dissent and the Modern Australian Defence Force' (2003) 160 *Australian Defence Force Journal* 20, 21. This study, based on a small survey of officer cadets being trained at the Australian Defence Force Academy, found that a 'perhaps surprising percentage of respondents' reported that they could not presume orders were lawful: *ibid*.

92 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518.

93 *R v Thomas*, Judges' Note Books, Crown Cases Reserved 1757–1845; M & S 448.

94 (1984) 156 CLR 532.

95 [1995] 1 AC 111.

In Australia it is no defence to the commission of a criminal act or omission that it was done in obedience to the orders of a superior or the government. Military and civilians have a duty to obey lawful orders, and a duty to disobey unlawful orders.<sup>96</sup>

It must be noted, however, that the effect of this rule, in *A v Hayden*, was to permit the superior officers and other higher authorities (including the relevant minister) to disown the individual officers who had violated the criminal law. In addition, a closer examination of the case reveals that, in the end, the officers involved also escaped prosecution.

*A v Hayden* arose out of a 1983 Australian Secret Intelligence Service ('ASIS') training operation at Melbourne's Sheraton Hotel, in which the masked and heavily-armed participants smashed open a door, engaged in a fight in an elevator and terrified guests and staff as they ran through a lobby to a waiting car. The incident attracted media headlines and an inquiry, conducted by Justice Hope, concluded that the participants had possibly committed 21 serious criminal offences. However, the Minister responsible for ASIS, Foreign Minister Bill Hayden, was absolved of responsibility for the agent's misconduct. Justice Hope concluded that Hayden had no duty to inquire into the specific details of ASIS training programs, and the Acting Director-General had no duty to inform him.<sup>97</sup>

Alleged participants in the incident sought an injunction prohibiting the Commonwealth from disclosing their identities to the Victorian Chief Police Commissioner for the purpose of investigating whether they had committed criminal offences. The plaintiffs argued that, as they worked with ASIS, their identification would endanger national security and breach confidentiality agreements in their contracts of employment with the Commonwealth.

Members of the Court made apparently strong statements to the effect that ASIS and other security agencies must operate within the law. Justice Mason, for example, declared that '[f]or the future, the point needs to be made loudly and clearly that if counter-espionage activities involve breaches of the law they are liable to attract the consequences that ordinarily follow from breaches of the law'.<sup>98</sup> Other justices described the incapacity of the executive to dispense its servants from obedience to legislation as 'the cornerstone of parliamentary democracy'<sup>99</sup> and essential to the 'rule of law'.<sup>100</sup>

Yet, the case was unusual because the Federal Government opposed the plaintiffs, denying that national security would be threatened. (An agreement had been reached with the Victorian Government and specific State legislation introduced to prevent public disclosure of the plaintiffs' identities and provide for *in camera* trials of any criminal charges). Thus, the Court did not have to decide

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96 *A v Hayden* (1984) 156 CLR 532, [5]. Justices Mason, Deane and Brennan made similarly emphatic statements.

97 Commonwealth, Royal Commission on Australia's Security and Intelligence Agencies, *Report on the Sheraton Hotel Incident* (1984), 18.

98 *A v Hayden* (1984) 156 CLR 532, [2].

99 *Ibid* [6] (Brennan J).

100 *Ibid* [3] (Murphy J).

whether a government claim of national security would have protected the ASIS officers.<sup>101</sup>

In addition, the judges accepted that the Commonwealth itself was immune from criminal prosecution, even though senior officials had initiated the training exercise.<sup>102</sup> In other words, individual intelligence operatives might be criminally liable, but not their superior officers or members of the government. Finally, Brennan J opined that, at least during wartime, legislation could be passed exempting ASIS officers from other laws. He stated that '[t]he Commonwealth Parliament has made no law granting to ASIS officers exemption from any law; it is unnecessary to consider whether its constitutional powers could support such a law in times of peace'.<sup>103</sup> This suggestion could take on new meaning in the light of the 'war on terrorism'.

Finally, it must be noted that no prosecutions resulted. Public and private requests by the Commonwealth Government not to proceed prevailed. Officially, the Victorian Commissioner of Police, on the advice of the State Director of Public Prosecutions, announced that matters would not proceed. It was maintained that as the suspects had worn masks, it was not possible to determine who had done precisely what, and that lack of evidence precluded the laying of specific charges. Instead, the hotel management received A\$259 000 in exemplary damages from the government, while employees received undisclosed payments.<sup>104</sup>

### **E How to Challenge the Legality of any Call-Out?**

The decision in *A v Hayden* also relates to another question: to what extent is it possible to legally challenge decisions made under Part IIIAAA of the Act, including those made by the 'authorising ministers' (or the Governor-General) to issue a call-out order, specify a 'general security area' or declare a 'designated area'?

There is no provision for legal review in Part IIIAAA. Instead, s 51X provides for limited scrutiny, after the event, by Parliament. Within seven days of a call-out order ending, the Defence Minister must present both Houses with a copy of the order and a report on the utilisation of the ADF under the order.

Section 51W provides that:

If, before, during or after exercising power under Division 2 or 3 or this Division, a member of the Defence Force fails to comply with any obligation imposed under any of those Divisions that relates to the exercise of the power, the member is not, or is taken not to have been, entitled to exercise the power.

The effect of this section is not clear. It relates only to the legality of actions taken by individual ADF members under a call-out order, not to the lawfulness of the government's proclamations.

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101 Ibid [18] (Gibbs CJ).

102 Ibid [1] (Mason J).

103 Ibid [8] (Brennan J).

104 Peter Grabosky, *Wayward Governance: Illegality and its Control in the Public Sector* (1989) ch 8.

The majority of the Court in *A v Hayden* refused to rule out the possibility that, under certain circumstances, the interests of ‘national security’ could override those of ‘the administration of justice’. Justices Wilson and Dawson stated that ‘[t]he administration of justice, important though it is, may on occasions have to give way to an even more compelling public interest. In a proper case, national security may well satisfy that description’.<sup>105</sup> They indicated that the government’s view of national security would always ‘carry great weight’. ‘The consequence of a decision of a court on a matter of national security which is contrary to the considered view of the government could be very serious indeed.’<sup>106</sup>

This stance was in line with the outcome of *Church of Scientology v Woodward*,<sup>107</sup> where the Church of Scientology challenged an assessment by ASIO that the Church was a security risk. The High Court dismissed the notion that ASIO could act lawfully beyond the limits set by the *Australian Security Intelligence Organisation Act 1979* (Cth) (‘*ASIO Act*’), in purported exercise of the Commonwealth’s executive power. But, in practice, the judges threw doubt on any judicial review of ASIO’s security assessment decisions.

Justice Mason, who concurred with Gibbs CJ in ruling in favour of ASIO, forming a statutory majority, said s 17(1) of the *ASIO Act* contained an exclusive and comprehensive list of the activities ASIO was authorised, and unauthorised, to engage in.<sup>108</sup> Yet, in so far as those functions were required to be relevant to ‘security’, it would be difficult for a plaintiff to challenge ASIO’s decision-making. Justice Mason described security as a ‘fluctuating concept, relying on circumstances as they exist from time to time – not unlike the issue of defence’.<sup>109</sup> The onus was on the plaintiff to establish that there was ‘no reasonable basis to conclude that the actions in question have a real connection with security’.<sup>110</sup> While not, in theory, ruling out judicial review of ASIO operations, Mason J described the satisfaction of the test as a ‘formidable task’. This was, in part, due to the severe challenges facing an applicant in satisfying a court that ASIO erred in its decisions as to national security. One such obstacle was the exclusion of material relied upon by the plaintiff by virtue of Crown privilege.<sup>111</sup>

Justices Murphy and Brennan, who dissented, also maintained that, in theory, no exercise of Commonwealth power could be excluded from judicial review, at least not without clear and express words. But in practice, they too considered that applicants would face almost insuperable difficulties in introducing evidence and convincing a court that ASIO’s judgments on national security were erroneous. Justice Brennan, for example, asked: ‘[h]ow can the gravity of a

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105 *A v Hayden* (1984) 156 CLR 532 [16].

106 *Ibid* [19].

107 (1982) 154 CLR 25.

108 *Ibid* 57.

109 *Ibid* 60.

110 *Ibid* 61 (emphasis added).

111 *Ibid*.



security risk be evaluated by a court?' A plaintiff would not be able to force the disclosure of ASIO documents as evidence for a challenge. He concluded that

[d]iscovery would not be given against the Director-General save in a most exceptional case. The public interest in national security will seldom yield to the public interest in the administration of civil justice.<sup>112</sup> Brennan J concluded: 'There are thus large obstacles in the path of a plaintiff who seeks to restrain an alleged activity of the Organization on the ground that it does not lie within the functions assigned to it by s. 17.'<sup>113</sup>

Claims of public interest immunity may be invoked to prevent access to documents said to relate to defence or national security. In *Alister v R*,<sup>114</sup> by a three to two majority, the High Court held that, for the purpose of an appeal by Alister, a civilian, against a conviction for conspiracy to murder, it should inspect ASIO documents subpoenaed by the defence, despite a ministerial certificate claiming public interest immunity on national security grounds. The documents concerned the activities of an ASIO agent, Richard Seary, who was involved in the alleged conspiracy. The majority said a higher standard of 'public interest' was required where the information requested related to a criminal conviction. Strong statements of principle were made by the Court. Justice Brennan, for example, said:

It is of the essence of a free society that a balance is struck between the security that is desirable to protect society as a whole and the safeguards that are necessary to ensure individual liberty. But in the long run the safety of a democracy rests upon the common commitment of its citizens to the safeguarding of each man's liberty, and the balance must tilt that way.<sup>115</sup>

Upon inspection of the documents, however, a differently-constituted majority (with only Murphy J dissenting) held that, since none of the documents were relevant to the issues at the trial, the public interest in their non-production outweighed any contrary public interest. Given that the Court's examination of the documents was conducted in secret, it is difficult to assess this conclusion. It remains of concern, however, that the Attorney-General can readily claim public interest immunity and that the 'balance' to be struck with civil liberties remains substantially hidden from public scrutiny.

How these approaches might play out in the highly-charged context of a military call-out to put down 'domestic violence' can perhaps be gauged from the House of Lords decision in *Chandler v Director of Public Prosecutions*,<sup>116</sup> which involved a prosecution for breach of the *Officials Secrets Act 1911* (UK) c 6. Lord Reid stated that he did not 'subscribe to the view that the government or a minister must always or even as a general rule have the last word' about the safety or interests of the state. But, he agreed, together with the other Lords, that cross-examination was not permissible to challenge the evidence of a senior Air Force officer about the fact that a proposed obstruction of an airfield was contrary to the 'safety or interests of the State', which were the relevant words of

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112 Ibid 76.

113 Ibid.

114 (1984) 154 CLR 412.

115 Ibid 456.

116 [1964] AC 763.

the Statute. Lord Reid went on to refer to the proposition that decisions about military deployments are not justiciable:

The defence of the State from external enemies is a matter of real concern, in time of peace as in days of war. The disposition, armament and direction of the defence forces of the State are matters decided upon by the Crown and are within its jurisdiction as the executive power of the State. So are treaties and alliances with other states for mutual defence ...<sup>117</sup>

The law Lords invoked a famous passage in *The Zamora*, where the Privy Council declared:

Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public.<sup>118</sup>

This extraordinary statement, which amounts to placing the executive above the law when it comes to decisions made in the name of national security, cannot be dismissed as out-of-date. It was cited by approval by members of the House of Lords in *Council of Civil Service Unions v Minister for the Civil Service*<sup>119</sup> in ruling that the requirements of national security outweighed those of procedural fairness. This decision permitted the Thatcher Government to ban trade union membership in the Government Communications Headquarters without consulting the unions. Moreover, the decision in *Church of Scientology v Woodward* is in accord with *The Zamora*.

## V OFFICIAL REVIEW RECOMMENDS WIDER POWERS

These concerns and unanswered questions are underscored by the statutory review of Part IIIAA of the Act carried out in late 2003. The authors – Anthony Blunn, a former secretary of the Attorney-General's Department, John Baker, a retired Chief of the Defence Force, and John Johnson, a former Federal and Tasmanian Police Commissioner – presumably reflect the views of influential figures within government, public service, military and police circles. In preparing their report, they consulted with the Attorney-General, the Prime Minister's Office, ASIO, the Chief of the Defence Force, departmental heads and the States and Territories.<sup>120</sup>

The general tenor of the report is to call for widening the powers of the Commonwealth government to call out the ADF in domestic circumstances. To that end, it recommends measures to overcome the 'major flaws and limitations' of Part IIIAAA.<sup>121</sup> The Report also suggests an extremely broad interpretation of 'domestic violence'. After noting that the term is not defined, the report opines

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117 Ibid 796.

118 Ibid 107.

119 [1985] 1 AC 374.

120 Department of Defence, above n 2, attachment 5.

121 Ibid 12–13.

that ‘it would appear that the phrase would embrace all situations involving or likely to involve violence in Australia’.<sup>122</sup>

The authors contend that, as a result of the terrorist events since September 11, ‘contemporary concepts of threat and national mechanisms for dealing with incidents go well beyond those reflected in the formulation, approval and enactment of the Part’.<sup>123</sup> Among other things, the Report states that the Part proved too limiting to be used at the Commonwealth Heads of Government Meeting, convened in Coolumb, Queensland in 2002. Instead, ‘the call[-]out of the ADF was authorised directly under the executive authority of the Commonwealth’.<sup>124</sup>

The Report criticises as ‘problematic’ a number of procedures required under Part IIIAAA, including the need to obtain the written authority of the Defence Minister before recapturing premises unless a sudden and extraordinary emergency exists, and the onus placed on ADF personnel to form beliefs on ‘reasonable grounds’ before taking certain actions. It is of particular concern that the Report expresses dissatisfaction with Part IIIAAA’s injunction against ADF personnel using force likely to cause death or grievous bodily harm unless they reasonably believe it necessary to protect life or prevent serious injury.<sup>125</sup> The Report also suggests that the adoption of the Part may help create the public relations climate in which lethal force can be used:

Whilst these provisions do not provide much, if any, advance on the relevant Commonwealth and State law which would be applied to the use of force, they do recognise that the circumstances faced by members may require the use of force, including lethal force. In doing so they perhaps create a climate in which a court would have regard to the position in which the member exercising forces is placed, given that in calling out the defence force, civil authority has clearly decided military force was necessary and anticipated the use of force, including, in assault situations, lethal force.<sup>126</sup>

Among the legislation’s ‘major flaws and limitations’ identified by the report are:

- (a) ‘time consuming and complex’ processes;
- (b) no effective catering for ‘the wider range of terrorist scenarios now envisaged’;
- (c) no provision for ‘anticipatory operations by the ADF’; and
- (d) the ‘reasonableness’ requirements.<sup>127</sup>

Accordingly, the Report’s recommendations include reconsideration of the scope for the application of Part IIIAAA, a review of the call-out and authorisation procedures, and action to resolve Part IIIAAA’s ‘practical limitations’.<sup>128</sup> To date, there is no indication that the Howard Government intends to act on these recommendations, but their thrust may be a pointer to the

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122 Ibid 4.

123 Ibid 5.

124 Ibid 8.

125 Ibid 10.

126 Ibid 11.

127 Ibid 12.

128 Ibid 13.

types of measures under consideration in the upper echelons of the military, security agencies and government.

## VI CONCLUSION

Overall, there are many reasons for concern about the call-out laws and the increasing engagement of the ADF in dealing with civilian opposition, or resistance, to Australian government decisions and actions. Given the seriousness of the issues, remarkably little academic or media attention has been paid to them. The operations carried out against asylum seekers, in the 'war on terror' and overseas confirm this author's warning that the call-out legislation signalled an underlying political, legal and constitutional shift. These operations also increase the likelihood that the political conditions can be created to invoke the call-out powers in the event of serious social unrest, or other perceived threats of a political or industrial kind to the stability of the socio-economic order. Moreover, after the experience of such fabrications as the 'children overboard' affair and 'weapons of mass destruction' there is little cause to trust the Howard Government, or any future Commonwealth government, with the safe or democratic utilisation of these powers.

There is much is at stake here. As Commissioner Wootten observed in the Gundy case, cited earlier, the traditional view in legal and political circles is that empowering the armed forces to suppress internal conflicts is associated with dictatorships or military juntas and is accompanied by all the dangers they bring:

In numerous other countries, particularly newly established democracies without a strong tradition of parliamentary control, we have seen the difficulty of keeping military authority under civil control. Typically the military in such countries has a conviction of its own purity and righteousness, an impatience with values that fall outside its normal sphere of operation and a tendency to see the controversy and disputation which are the essence of democracy as a lack of national discipline.<sup>129</sup>

This is not to suggest that the people of Australia are threatened by the immediate prospect of military rule. But, in some respects, more insidious and troubling tendencies are at work. While the framework of parliamentary democracy and civil power remains, a legitimisation of military call-out is taking place, albeit under specific legislation or the executive authority of the government of the day.

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129 Wootten, above n 26, 282–3.