THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

DEFENCE LEGISLATION AMENDMENT (SECURITY OF DEFENCE PREMISES) BILL 2010

REPLACEMENT EXPLANATORY MEMORANDUM

(Circulated by the authority of Minister for Defence the Hon Stephen Smith MP)

THIS MEMORANDUM REPLACES THE EXPLANATORY MEMORANDUM PRESENTED TO THE HOUSE OF REPRESENTATIVES ON 29 SEPTEMBER 2010
DEFENCE LEGISLATION AMENDMENT (SECURITY OF DEFENCE PREMISES) BILL 2010

GENERAL OUTLINE

This Bill will insert a new Part VIA into the *Defence Act 1903* and make associated amendments to the *Australian Federal Police Act 1979*.

The Bill gives effect to Australian Government initiatives to enhance the security of Defence bases, facilities, assets, and personnel within Australia in response to the changing nature of security threats.

In broad terms, the amendments:

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

- establish a statutory regime of search and seizure powers that will operate at defence premises to reduce the risk of dangerous items entering defence facilities, or material and classified information being unlawfully removed;

- update and relocate the trespass offence and related arrest power in section 82 of the *Defence Act 1903*;

- support the enforcement of the trespass offence by authorising Defence to use overt optical surveillance devices to monitor the security of defence premises and to disclose the information captured by these devices to law enforcement agencies and Commonwealth, State and Territory public prosecution authorities;

- clarify that this Part does not limit the exercise of powers of a defence security official, a member of the Defence Force or any other person, under this Act or any other law.

Financial Impact statement

The costs associated with the amendments in the Bill will be met from internal Defence resources that have been allocated to the Base Security Improvement Program. Funding of $686.8m has been allocated over the ten year period for this program, with expenditure of $328.2m proposed during the forward estimates period.
NOTES ON CLAUSES

Clause 1:  Short title
Clause 1 is a formal provision specifying the short title of the Bill as the *Defence Legislation Amendment (Security of Defence Premises) Act 2010*.

Clause 2:  Commencement
Clause 2 provides for the commencement of the Bill. Commencement will occur on proclamation or six months after receiving Royal Assent if it has not been proclaimed to commence by that time.

Clause 3:  Schedule(s)
Clause 3 is a formal provision specifying that amendments or repeals are made to the provisions set out in the Section s in the schedule.

Schedule 1 – Amendments relating to the security of defence premises

Part 1—Main amendments

*Defence Act 1903*

Schedule 1 inserts a new Part VIA in the *Defence Act 1903* to provide for provisions of common application across Defence to effectively deal with the security of defence bases, facilities, assets and personnel within Australia.

PART VIA – Security of defence premises

Division 1-Preliminary

Section 71 Simplified outline
This section provides an overview of the Divisions contained in the new Part VIA as follows:

- Division 1 provides this simplified outline and definitions for the expressions used in this Part.
- Division 2 provides for matters relating to defence security officials.
- Division 3 sets out the powers exercisable by defence security officials with consent at defence access control points and on defence premises. Subdivision B contains special provisions relating to declared explosive ordnance depots.
- Division 4 sets out the powers exercisable by special defence security officials without consent at defence access control points and on defence premises. It also provides offences for non-compliance or hindering.
- Division 5 relates to seizure of sections, vehicles, vessels and aircraft.

- Division 6 sets out provisions that apply generally to the exercise of powers under this Part.

- Division 7 provides for other matters including an offence of trespass on defence premises or defence accommodation, and the provision of information obtained from certain surveillance devices to law enforcement and other agencies.

**Section 71A Definitions**

This section provides definitions for the terms and expressions used in the new Part VIA relating to the security of defence premises.

*contracted defence security guard* has the meaning given by section 71B. Contracted defence security guards will only be authorised under the Act to request evidence of a person’s identification, conduct consensual searches and, in defined circumstances, restrain and detain a person for the purposes of placing them in the custody of a law enforcement officer.

*criminal offence* means an offence against a law of the Commonwealth, a State or a Territory.

*declared explosive ordnance depot* has the meaning given by section 71L.

*defence access control point* means a point of entry to or exit from defence premises, or a part thereof, where entry or exit is controlled or limited by any means.

The concept of defence access control points is introduced to create identified points on defence premises where defence security officials are expressly authorised to exercise the identification, search and related enforcement powers proposed in the new Part.

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

The concept of defence accommodation has been introduced to cover facilities, within Australia, that are used to accommodate a number of Defence Force members or members of their household, regardless of whether these facilities are located on or off defence bases. The definition captures accommodation blocks, such as apartment buildings or townhouse complexes, which provide residential accommodation for numerous Defence Force members and/or their families. It includes areas connected with the accommodation buildings such as private car parks, gardens and recreational facilities which form part of the accommodation buildings.

The definition does not cover single, stand-alone residences, which are located off base, and are either privately owned or rented by Defence Force members.

Noting that accommodation buildings which are used by numerous Defence Force members represent a potentially attractive terrorist target, the policy intent is to ensure that defence accommodation has explicit coverage for the purposes of the trespass offence and related arrest power in the new Part. It is not intended, however, that the proposed search and related enforcement powers provided in the new Part will be exercised on defence accommodation.

**Defence premises** means any area of land or any other place, a building or other structure, a vehicle, vessel or aircraft, or a prohibited area within the meaning of the *Defence (Special Undertakings) Act 1952*, which is located in Australia and is owned or occupied by the Commonwealth for use by the Defence Force or the Department.

Land or buildings that may have a defence purpose, but which are not currently used by the Defence Force or the Department of Defence do not meet the definition of defence premises included in the Bill. So, for example, the provisions in the Bill do not apply to an immigration facility that is located on a former Defence base that is not currently used by the Defence Force or the Department. Similarly, if a portion of an operational base is set aside for a use that is unrelated to the Defence Force or the Department, the provisions of the Bill do not apply to that portion of the base.

The concept of defence premises is introduced to circumscribe the locations at which the proposed measures in the new Part will operate.

The concept of defence premises and its use in this Part is confined to locations within Australia and does not have extra-territorial application.

**Defence security official** means a contracted defence security guard, a security authorised member of the Defence Force or a defence security screening employee. Detailed definitions of these officials are found at section 71B, 71C and 71D. Defence security official is a generic term encompassing all three classes of persons empowered under this Part and was introduced to assist drafting.
Defence security screening employee has the meaning given at section 71D. A defence security screening employee may only exercise the non-consensual identification, search and seizure powers if it is not reasonably practicable, in all the circumstances, for a security authorised member of the Defence Force to do so. In addition, defence security screening employees will not be authorised under this Part to take action to make a seized item safe or prevent its use, or use force that is likely to cause death or grievous bodily harm to a person.

intelligence or security agency means the Australian Secret Intelligence Service, the Australian Security Intelligence Organisation or the Office of National Assessments.

limited search of a person means:

- a search of things in the possession of a person that may include requesting the person to remove his or her overcoat, coat or jacket and any gloves, shoes and hat and an examination of any of those items that the person consents to remove; or

- a search of a person conducted by quickly running the hands over the person’s outer garments and an examination of anything worn or carried by the person that is conveniently and voluntarily removed by the person.

It does not include requesting the person to remove all of his or her garments.

For the purposes of the consensual search regime contained in Division 3 of this new Part, the concept of a limited search of a person has been introduced to allow both the search of things in a person’s possession and a ‘pat down’ of the person over their outer garments. Contracted defence security guards will only be empowered to request a consensual, limited search of a person.

optical surveillance device means any device capable of being used to record visually or observe an activity, but does not include spectacles, contact lenses or similar devices used by a person to overcome impaired sight.

personal information has the same meaning as in the Privacy Act 1988.

person assisting a defence security official has the meaning given by section 72M.

protective service officer has the same meaning as in the Australian Federal Police Act 1979.

search of a person, for the purposes of the non-consensual search regime contained in Division 4 of the new Part, has the same meaning as in section 51 of the Defence Act 1903, which deals with Defence Force assistance to the civil authority under Part IIIA. That definition is based on the definitions of frisk search and ordinary search that are contained in Part 1AA of the Crimes Act (in particular, section 3C).

Search of a vehicle, vessel or aircraft, for the purposes of both the consensual and non-consensual search regimes contained in Divisions 3 and 4 of the new Part, includes a search of a thing in the vehicle, vessel or aircraft.
security authorised member of the Defence Force has the meaning given by section 71C. This class of persons will be authorised to use the full range of powers proposed under this Part.

special Defence security official is a security authorised member of the Defence Force or a defence security screening employee. It is a generic term that references these two classes of person and was introduced to assist drafting.

evessel has the same meaning as in section 51SD of the Defence Act 1903, which provides that a vessel includes:

- a ship, boat, raft, pontoon or submersible craft; or
- any other thing capable of carrying persons or goods through or on water; and
- includes a hovercraft (or other non-displacement craft) and a floating structure or installation.

To avoid doubt, a thing includes a substance, a vehicle, vessel or aircraft and a thing in electronic or magnetic form.

Division 2 – Defence security officials

Three classes of persons will be empowered to exercise some or all of the powers in this new Part.

Section 71B Contracted defence security guards

This section defines a contracted defence security guard as a contractor, subcontractor or their employees, who provide security services at defence premises under a contract with the Commonwealth, and have been authorised by the Minister, by written instrument, to be contracted defence security guards. The Minister will only authorise as contracted defence security guards, persons who have met a standard of security training and qualification requirements as determined by the Minister by legislative instrument.

Defence has determined that it is appropriate that the training and qualification requirements for Defence security officials under this Bill, including training requirements for the restrain and detain powers, be specified in a legislative instrument. A legislative instrument is subject to tabling and potential disallowance in both Houses of Parliament, therefore the use of this mechanism affords significant protection. It ensures that the Parliament, at all times, has control over the nature and level of training and qualification requirements that will be imposed on people who will be authorised to exercise powers under this Bill. A legislative instrument provides a far greater level of protection and flexibility than having training and qualification requirements set out in departmental administrative guidance.

The use of a legislative instrument also enables training and qualification requirements to be updated rapidly, for example in response to the availability of new technologies and equipment, without incurring the delays that would arise if these requirements were stipulated within the Bill itself.
An authorisation of a person as a contracted defence security guard is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Contracted defence security guards will only be authorised under this Part to request evidence of a person’s identification, conduct consensual searches and, in defined circumstances, restrain and detain a person for the purposes of placing them in the custody of a law enforcement officer.

**Section 71C Security authorised members of the Defence Force**

This section defines a security authorised member of the Defence Force as being a member of the Defence Force, who is authorised by the Minister, by written instrument to be a security authorised member of the Defence Force. The Minister will only authorise ADF members to be security authorised members of the Defence Force where they have met a standard of security training and qualification requirements as determined by the Minister in a legislative instrument.

An authorisation of a person as a security authorised member of the Defence Force is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

This class of persons will be authorised to use the full range of powers proposed under this Part.

Further information on the determination of a legislative instrument for training and qualifications aspects of the Bill can be found under Section 71B.

**Section 71D Defence security screening employees**

This section defines a defence security screening employee as an APS employee of the Department of Defence who has been authorised by the Minister, by written instrument, to be a defence security screening employee. The Minister will only authorise as defence security screening employees, APS employees who have met a standard of security training and qualification requirements determined by the Minister in a legislative instrument.

An authorisation of a person as a defence security screening employee is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Defence security screening employees must have volunteered to undertake the additional responsibilities or risks associated with this role, or have applied for a Department of Defence position where these additional responsibilities were included in the duty statement.

A defence security screening employee may only exercise the non-consensual identification, search and seizure powers if it is not reasonably practicable, in all the circumstances, for a security authorised member of the Defence Force to do so. In addition, defence security screening employees will not be authorised under this Part.
to take action to make a seized item safe or prevent its use, or use force likely to cause
death or grievous bodily harm.

Further information on the determination of a legislative instrument for training and
qualifications aspects of the Bill can be found under Section 71B.

**Section 71E Identity cards**

This section requires the Secretary to issue an identity card to each defence security
official. The identity card must be in a form approved by the Secretary and contain a
recent photograph of the official. A defence security official is required to carry the
identity card at all times when performing functions or exercising powers as a defence
security official.

Given the serious consequences that could arise if an identity card is misused to gain
access to a defence facility or to exercise powers under this new Part, a person
commits a strict liability offence, carrying a maximum penalty of 5 penalty units, if he
or she fails to return the identity card to the Secretary within 7 days of ceasing to be a
defence security official. However, the offence does not apply if the identity card was
lost or destroyed. In line with Commonwealth criminal law policy this is a strict
liability provision given the low level of penalty but need to ensure that the officials
are aware of the significance of the identity cards.

A requirement for any member of the ADF who ceases to be a security authorised
member of the Defence Force to return an identity card within 7 days will also be
imposed by way of a “general order” as defined in the *Defence Force Discipline Act*
1982. This will enable Defence to take disciplinary action against any member who
fails to return an identity card as required.

**Section 71F Delegations relating to training and qualification requirements**

Section 71F(1) provides that the Minister may, by writing, delegate the power to
determine the security training and qualification requirements for contracted defence
security guards and defence security screening employees to the Secretary, or an APS
employee who holds or performs the duties of an SES Band 3 position or an equivalent
or higher position.

Section 71F(2) provides that the Minister may, by writing, delegate the power to
determine the security training and qualification requirements for security authorised
members of the Defence Force to an Army officer holding the rank of Brigadier or
higher, a Navy officer holding the rank of Commodore or higher, or an Air Force
Officer holding the rank of Air Commodore or higher. This will allow developments
in training associated with the use of force, to be more readily incorporated into the
training requirements for security authorised members of the Defence Force.

**Section 71G Delegations relating to identity cards**

Section 71G(1) provides that the Secretary may, by writing, delegate the power to
issue identity cards to defence security officials to an APS employee who holds or
performs the duties of an Executive Level 2 position or higher, or a military officer holding the Army rank of Colonel (or the Navy and Air Force equivalents) or higher.

Section 71G(2) provides that the Secretary may, by writing, delegate the function to receive returned identity cards from defence security officials to an APS employee who holds or performs the duties of an APS 5 position or higher, or an Army officer of the rank of Captain (or the Navy and Air Force equivalents) or higher.

These delegation arrangements acknowledge the need to implement practical arrangements for the issue and recovery of identity cards that recognise the constraints posed by the geographically dispersed nature of the Defence estate.

**Division 3—Powers exercisable with consent at Defence access control points and on Defence premises**

This Division provides measures to prevent or reduce the risk of unauthorised entry to defence premises (or parts thereof), to detect and deal with trespassers, and to prevent or reduce the risk of dangerous items entering defence premises or material being unlawfully removed.

**Subdivision A – General Provisions**

**Section 71H Consensual identification and limited search - person about to pass a defence access control point**

This section provides that a defence security official may request a person, who is about to pass a defence access control point, to provide evidence of their identity and authority to pass the access control point, or to undergo a limited search.

A defence security official may refuse to allow the person to pass a defence access control point and, if on defence premises restrain and detain the person, if the person:

- refuses an identification or search request; or
- as a result of complying, the defence security official reasonably believes that the person is not authorised to pass the defence access control point, constitutes a threat to the safety of persons on the premises, or has or may commit a criminal offence in relation to the defence premises.

**Section 71J Consensual search - vehicle, vessel or aircraft about to pass a defence access control point**

This section provides that a defence security official may request a person, who is apparently in control of a vehicle, vessel or aircraft that is about to pass a defence access control point, to permit a search of the vehicle, vessel or aircraft.

A defence security official may refuse to allow the vehicle, vessel or aircraft to pass a defence access control point and, if on defence premises, restrain and detain any person in the vehicle, vessel or aircraft, if the person:
• refuses to permit the requested search; or
• as a result of complying, the defence security official reasonably believes that the vehicle, vessel or aircraft (or a thing in it) is not authorised to pass the defence access control point, constitutes a threat to the safety of persons on the premises, or relates to a criminal offence that has or may be committed on the defence premises.

Section 71K Consensual identification – person on defence premises

As a further measure to detect and deal with trespassers while undertaking patrols, this section provides that if a defence security official reasonably believes that a person is on defence premises without authority, they may request that the person provide evidence of their identity and their authority to be on the premises.

A defence security official may restrain and detain a person if the person:
• refuses the identification request; or
• as a result of complying, the defence security official reasonably believes that the person is not authorised to be on the defence premises, constitutes a threat to the safety of persons on the premises, or has or may commit a criminal offence in relation to the defence premises.

Subdivision B—Special provisions for declared explosive ordnance depots

Given the inherent risk to public safety posed by the unlawful removal of weapons, munitions and explosive ordnance from defence premises, this subdivision introduces special provisions for declared explosive ordnance depots. The provisions provide additional consensual search powers for defence contracted security guards at a small number of depots, where security authorised members of the Defence Force are not usually present to exercise the non-consensual search powers provided under this Part. Although small in number, these facilities contain the majority of Defence’s explosive ordnance.

Section 71L Declared explosive ordnance depots

This section provides that the Minister may specify, by legislative instrument, an area of land, place, building or structure, which is a defence premise used wholly or in part for the storage of explosive ordnance and where members of the Defence Force are not normally present, to be a declared explosive ordnance depot. Signs stating that it is a condition of entry that persons consent to searches as provided by this subdivision are to be prominently displayed at the entrance to the declared explosive ordnance depot and at regular intervals around the perimeter.

Each depot specified in the legislative instrument must be identified either by reference to its geographical location or a unique code or number that is held in the Department’s records and is applicable to that explosive ordnance depot. The intent of permitting the use of a unique code or number is to avoid potential security concerns arising from publishing the location of these explosive ordnance depots.
Section 71M Consensual search – person on a declared explosive ordnance depot

This section provides that a contracted security guard may request a person who is on a declared explosive ordnance depot to undergo a limited search, including a search of things in the possession of the person.

A contracted defence security guard may restrain and detain a person if the person:

- refuses the search request; or
- as a result of complying, the contracted defence security guard reasonably believes that the person is not authorised to be on the declared explosive ordnance depot, constitutes a threat to the safety of persons on the depot, or has or may commit a criminal offence on, or in relation to the depot.

Section 71N Consensual search – vehicle, vessel or aircraft on a declared explosive ordnance depot

This section provides that a contracted security guard may request a person who is apparently in control of a vehicle, vessel or aircraft that is on a declared explosive ordnance depot to permit a search of the vehicle, vessel or aircraft (including things in the vehicle, vessel or aircraft).

A contracted defence security guard may restrain and detain any person in the vehicle, vessel or aircraft, if the person:

- refuses to permit the requested search; or
- as a result of complying, the contracted defence security guard reasonably believes that vehicle, vessel or aircraft (or a thing in it) is not authorised to be on the declared explosive ordnance depot, constitutes a threat to the safety of persons on the depot, or may relate to a criminal offence that has or may be committed on the depot.

Section 71P Powers additional to other powers

This section identifies that this Subdivision does not limit any other power of a contracted defence security guard under this Part.

Subdivision C—Offences

Section 71Q Offences – search powers exercised without consent

Section 71Q(1) provides that a defence security official commits a strict liability offence, carrying a maximum penalty of 50 penalty units, if the official conducts a limited search of a person purportedly under Division 3 (powers exercisable with consent) without the person’s consent.

Section 71Q(2) provides that a defence security official commits a strict liability offence, carrying a maximum penalty of 30 penalty units, if the official conducts a search of a vehicle, vessel or aircraft, purportedly under Division 3 (powers
Division 4—Powers exercisable without consent at defence access control points and on defence premises

The lack of explicit non-consensual search powers poses a significant obstacle for Defence in undertaking protective security functions at all defence premises, particularly during heightened threat levels. This is also a particular problem for sensitive facilities (e.g. storing weaponry, munitions and explosive ordnance or highly classified material) even at a time of no heightened security threat, given the inherent risk to public safety and national security arising from security breaches at these premises.

This division provides for non-consensual identification and search powers which will be exercised, as a matter of Defence policy, by special defence security officials during higher threat levels on any defence premises and at all times on sensitive sites. Threat levels are determined on the basis of intelligence.

Section 71R Non-consensual identification and search - person about to pass a defence access control point

This section provides that a special defence security official may require a person who is about to pass through a defence access control point, to provide evidence of their identity and authority to pass the access control point and, if on defence premises, may search the person.

A special defence security official may refuse to allow a person to pass a defence access control point if the person:

- refuses to comply with the identification requirement;
- hinders or obstructs a search on defence premises; or
- as a result of complying with the identification requirement or search, the special defence security official reasonably believes that the person is not authorised to pass the access control point, constitutes a threat to the safety of persons on the premises, or has or may commit a criminal offence on, or in relation to the defence premises.

If a special defence security official refuses to allow a person to pass a defence access control point and the person is on defence premises, the special defence security official may:

- restrain and detain the person; or
- request the person to leave the premises and, if he or she refuses, remove the person from the premises.
Section 71S Non-consensual search - vehicle, vessel or aircraft about to pass a
defence access control point

This section provides that a special defence security official may search a vehicle,
vessel or aircraft (or a thing within it) that is about to pass a defence access control
point and is on defence premises.

A special defence security official may refuse to allow a vehicle, vessel or aircraft to
pass a defence access control point if the person:

- hinders or obstructs a search of a vehicle, vessel or aircraft that is on defence
  premises; or
- as a result of complying with the search, the special defence security official
  reasonably believes that the vehicle, vessel of aircraft (or a thing in it) is not
  authorised to pass the access control point, constitutes a threat to the safety of
  persons on the premises, or relates to a criminal offence that has or may be
  committed on the defence premises.

If a special defence security official refuses to allow a vehicle, vessel or aircraft to pass
a defence access control point and the vehicle, vessel or aircraft is on defence
premises, the special defence security official may restrain and detain any person in the
vehicle, vessel or aircraft.

Section 71T Non-consensual identification and search – person on defence
premises

This section provides that if a special defence security official reasonably believes that
a person on defence premises is not authorised to be on the premises, constitutes a
threat to safety or persons on the premises, or has or may commit a criminal offence on
the premises, the official may require the person to provide evidence of their identity
and authority to be on the premises, or search the person.

The special defence security official may restrain and detain the person or remove the
person from the premises.

Section 71U Non-consensual search – vehicle, vessel or aircraft on defence
premises

This section provides that if a special defence security official reasonably believes that
a vehicle, vessel or aircraft that is on defence premises is not authorised to be there,
constitutes a threat to safety or persons on the premises, or relates to a criminal offence
that has or may be committed on the premises, the official may search the vehicle,
vessel or aircraft (or a thing in it). Further, the special defence security official may
restrain and detain any person in the vehicle, vessel or aircraft.

Section 71V Offence – refusing to provide evidence etc. required under this
Division

To assist with the enforcement of the non-consensual identification requirements under
Division 4 of this Part, this section establishes an offence, carrying a maximum penalty
of 20 penalty units, if a person who is on defence premises refuses or fails to provide evidence of their identity or authority to be on the premises, or provides information that is false in a material particular.

However, the offence will not apply if the special defence security official did not comply with the requirement to produce their identity card and explain the effect of refusing to comply with the requirement, as stipulated at section 72B, before exercising a power under this Part.

**Section 71W Offence – hindering or obstructing a search under this Division**

To assist with the enforcement of the non-consensual search regime under Division 4 of this Part, this section establishes an offence, carrying a maximum penalty of 50 penalty units, if a person hinders or obstructs a search by a special defence security official where that official has complied with relevant identity and other requirements as stipulated in section 72B.

**Section 71X Security authorised members of the Defence Force may respond to an attack**

This section provides that if an attack on defence premise is occurring or imminent and is intended to, or could result in the death or serious injury of persons on the premises, then a security authorised member of the Defence Force may take action to protect persons on the premises. For this purpose, attack covers an armed attack, attack by detonation of an explosive device or any other conduct, whether or not involving firearms or explosives, that is designed to, or could result in the death or serious injury of persons on defence premises.

The section provides explicit authority for security authorised members of the Defence Force to use force in responding to an attack on defence premises that could result in the death or serious injury of persons on the premises. The note makes it clear that this section is to be read in conjunction with sections 72G and 72H which set out the rules on the use of force by security authorised members of the Defence Force.

**Section 71Y Power to stop and detain**

This section provides that a special defence security official, when exercising his or her powers under Division 4 (powers exercisable without consent), may stop and detain a person, vehicle, vessel or aircraft for the purposes of conducting a search, or to require the person to produce evidence of their identification or authority to pass a defence access control point or be on defence premises.

**Section 71Z Powers are in addition to powers under this Part**

This section identifies that powers conferred on a special defence security official under Division 4 (powers exercisable without consent) are in addition to those powers conferred on the official under any other Division in this Part.
Division 5 – Seizure

Section 72 Power to seize things on defence premises

This section provides that a special defence security official may seize an item (including a vehicle, vessel, aircraft or unattended thing) that is on defence premises, or found as a result of a search, if the official reasonably believes that the item constitutes a threat to safety of persons on the premises, or relates to a criminal offence that has or may be committed on the premises.

Where the seizure relates to a possible security threat, a security authorised member of the Defence Force will be able to take any action that is reasonable and necessary to make the item safe or prevent it being used. In respect of a suspicious item that is left unattended on defence premises, such action could include a search of the item to establish whether it constitutes a threat to the safety of persons on the premises.

If the official reasonably believes that the seized thing was used (or may be used) in the commission of a crime, the official must give the thing to a member of a police force as soon as possible, unless action is necessary to make the item safe or prevent its use and this, in turn, prevents the item from being provided to the police.

Further, where an item (including a vehicle, vessel or aircraft) is seized from a person, the amendments will require a special defence security official to give the person a receipt for the item, if it is practicable to do so.

In the event that the seized item has not been used or otherwise involved in the commission of a criminal offence and, as a result, there is no requirement to provide the item to the civil police, the special defence security official must return the item to the person if practicable to do so or, if not, provide it to the civil police at the earliest practicable time.

Division 6—Matters relating to exercise of powers under Part

This Division specifies limitations and safeguards on the exercise of the powers by defence security officials conferred by this Part.

Section 72A Certain powers to be exercised only by security authorised members of the Defence Force unless not reasonably practicable

This section provides that the non-consensual identification, search and seizure powers conferred on a special defence security official under Divisions 4 and 5 may only be exercised by a defence security screening employee if it is not reasonably practicable for a security authorised member of the Defence Force to do so. This reflects the intention to limit the proposed use of defence security screening employees to those few defence sites where security authorised members of the Defence Force are not available to exercise the non-consensual identification, search and seizure powers.
Section 72B **Defence security officials must produce identity cards, etc.**

This section provides that before making a request or requirement of a person under this Part or undertaking a search, a defence security official must produce his or her identity card for inspection by the person and inform the person of the consequences of refusing to comply with the request, requirement or search.

However, the section creates a limited exception to this broad obligation in respect of non-consensual searches, if the official reasonably believes that a person constitutes a threat to their safety or other persons on the premises, such that complying with a requirement to produce their identity card before exercising a power under this Part could place the safety of the official and others at risk.

Section 72C **Persons to be informed of offence**

This section provides that if a special defence security official exercises powers under this Part on the basis of a reasonable belief that a person has or may commit a criminal offence, then the official must inform the person of the substance of the offence. In doing so, it is not necessary for the official to use language that is precise or technical in nature. This requirement does not apply, however, if the person should, in the circumstances, know the substance of the offence or, through their actions, makes it impracticable for the official to inform the person of the offence.

Section 72D **Conduct of searches and limited searches**

This section makes it clear that any search or limited search of a person must, if practicable, be conducted by a person of the same sex as the person being searched. Searches will also need to be conducted in a manner that is culturally sensitive.

Section 72E **Use of equipment to examine things etc.**

To detect and deter security threats posed by dangerous items (including weapons, explosives or detonation devices) being brought onto or unlawfully removed from defence premises, Defence intends to use search technologies. This may include metal detectors, x-ray detection equipment, arthroscope camera devices (to examine spaces that are confined or difficult to access such as areas of a vehicle’s engine bay), explosive residue equipment, chemical sniffers and other search devices.

This section provides for the use of electronic and other devices, together with technical assistance, for the purposes of conducting searches of a person or thing under this Part, or determining whether a thing may be seized. It provides that equipment may be used to search an item and data stored on items, for example data on laptops, mobile phones and thumb-drives. It also allows for an item to be moved to another part of the defence premises in order to access the equipment necessary to effect the examination or search.

Section 72F **Powers to move certain unattended things on defence premises**

This section provides that if a thing is left unattended on defence premises as a result of, or in connection with the exercise of powers under this Part, a defence security
official may move the thing to another place if the official believes this is necessary or desirable. This might be required if a vehicle has been left unattended and is impeding the normal operations of the defence base or poses a traffic hazard.

Section 72G Use of reasonable and necessary force etc. by defence security officials

Section 72G(1) provides that, in exercising powers under this Part, a defence security official may use such force against persons and things that is considered reasonable and necessary.

Section 72G(2) provides that a limit to the use of force by a contracted defence security guard or a defence security screening employee is that they must not, in using force against a person in exercising powers under this Part, do anything that is likely to cause the death of, or grievous bodily harm to, the person.

Section 72G(3) provides that a defence security official must not subject a person to greater indignity than is reasonable and necessary in the circumstances. That is the obligation to use only such force as is reasonable and necessary in the circumstances applies to all three classes of persons authorised to exercise powers under the security regime contained in this Part, namely contracted defence security guards, defence security screening employees and security authorised members of the Defence Force.

In conducting non-consensual searches under this Part, this item would permit a special defence security official to use reasonable and necessary force against a thing. This may include breaking the thing open (including a vehicle or vessel), in order to determine whether the thing should be seized.

The provision and its accompanying notes make it clear that contracted defence security guards and defence security screening employees cannot use lethal force, but would be able, where appropriate, to rely upon Commonwealth, State and Territory statutory defences and the common law on self defence. Further rules on the use of force by security authorized members of the Defence Force are set out at 72H.

Section 72H Use of force involving death or grievous bodily harm by security authorised members of the Defence Force

Section 72H deals with the use of force involving death or grievous bodily harm by security authorised members of the Defence Force and must be read in conjunction with section 72G. This section is also linked to the power, in section 71X, of security authorised members of the Defence Force to take action on defence premises to protect persons from an attack.

Section 72H(1) provides that a security authorised member of the Defence Force must not, in using force against a person in exercising powers under this Part, 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 prevent the death of, or serious injury to, another person (including the official), and the threat of death or injury is caused by an attack on defence premises, or on people on defence premises, that is occurring or is imminent. The effect of this section, when read
together with section 71X, is a security authorised member of the Defence Force may use up to lethal force, if the member believes that this is necessary to prevent death or serious injury to themselves or others in taking action to protect persons from an actual or imminent attack on defence premises. For this purpose, attack covers an armed attack, attack by the detonation of an explosive device or any other conduct, whether or not involving firearms or explosives, which is designed to kill or could result in the death or serious injury of persons on defence premises. No other defence security official is authorized to exercise force likely to cause death or grievous bodily harm under this Part.

Section 72H(2) provides that a security authorised member of the Defence Force may use up to lethal force on person who is attempting to escape being detained by fleeing, if the person has first been called on to surrender and the official believes on reasonable grounds the person cannot be apprehended in any other manner. This section must be read subject to section 72H(1). Consequently, the use of up to lethal force on a person who is attempting to escape being detained by fleeing is only authorised if this is necessary to prevent death or serious injury to persons on defence premises in the event of an attack that is imminent or occurring.

The provision is modelled on the existing Section 51T of the Defence Act 1903 which applies to the use of reasonable and necessary force by members of the Defence Force in assisting civilian authorities under Part IIIAAA. This consistency will ensure the same rules apply to the use of force under Part IIIAAA and this new Part. From operational perspective, this would provide certainty in situations where both regimes could potentially apply at different points in time.

Notwithstanding the inclusion of this provision, the common law right of all defence security officials to defend themselves continue to apply; as do the various Commonwealth, State and Territory legislative provisions that provide a defence of self-defence.

**Section 72J Limit on powers to restrain and detain**

This section provides that a defence security official can only restrain and detain a person for the purpose of placing them into the custody of a civil police officer, including a protective service officer of the Australian Federal Police, at the earliest practicable time.

The Part confers a power, rather than imposing a duty, to restrain and detain a person. Consequently, if a defence security official subsequently determines that there is no longer a basis for detaining a person, the defence security official can simply release the person.

**Section 72K Limit on power to arrest**

This section provides that, in exercising any power to arrest conferred by this new Part, a member of the Defence Force must bring the person before a member or special member of the Australian Federal Police, or a member of the State and Territory Police, as soon as practicable.
Section 72L Powers not to be used to stop protests, etc.

This section provides that a defence security official must not stop or restrict any protest, dissent, assembly or industrial action, except where there is a reasonable likelihood of the death of, or serious injury to, persons, or the commission of a criminal offence.

Section 72M Security authorised members of the Defence Force may use dogs

To provide an improved capability to detect explosives and other hazardous materials and to deter, detect and detain trespassers, this section provides that security authorised members of the Defence Force may use a dog to assist with the conduct of searches and other functions and powers under this Part. This includes the power to restrain and detain a person, remove a person from defence premises or arrest a person under 72P (which deals with trespass).

The use of dogs to assist with the conduct of searches or other functions or powers under this Bill is limited to security authorised Defence Force members who are also fully qualified dog handlers.

Defence maintains stringent policies and procedures around the training and use of military working dogs and the training of dog handlers. At all times, military working dog handlers are required to only use such force as is reasonable and necessary and direct their dogs in such a manner as to prevent unreasonable injury to persons or damage to property.

Section 72N Persons assisting defence security officials

This section provides that a defence security official may be assisted by others in certain circumstances, while exercising their powers, if it is reasonable and necessary to do so. These situations relate to conducting a search of a vehicle, vessel or aircraft either with or without consent, using equipment to conduct searches of persons or things, and moving things on defence premises.

For example, such assistance might be required to operate a forklift to unload a vehicle, vessel or aircraft, so that a thorough search may be properly conducted by defence security officials. Additionally, assistance might be required to use equipment to examine an item or data stored on the item, or to move an item that has been left unattended on defence premises.

The section provides that a person assisting may, subject to the direction of the defence security official, exercise the powers of the official. Further, powers that are exercised by a person assisting, under the direction of a defence security official, are taken to have been exercised by the official.

If a written direction is given by the defence security official to a person assisting, this direction is not a legislative instrument within the meaning of Section 5 of the *Legislative Instruments Act 2003*. 
Division 7—Other matters

Section 72P Unauthorised entry etc. on defence premises or defence accommodation

This section provides that a person commits an offence, carrying a maximum penalty of 50 penalty units, if they enter or are on defence premises or defence accommodation without authorisation. It also provides that a member of the Defence Force, a civil police officer or an Australian Federal Police protective service officer may, without warrant, arrest a person for unauthorised entry on defence premises or accommodation.

This section preserves the areas that were previously covered in the trespass offence in section 82 of the *Defence Act 1903*, including defence aircraft and buildings used for the accommodation of any part of the Defence Force. In addition, it clarifies that Defence has the power to deal with trespassers on naval vessels.

This section extends the associated arrest power to include State and Territory police and Australian Federal Police protective service officers. It also establishes an adequate maximum penalty for trespass, in line with current Commonwealth criminal law policy, to act as an effective deterrent and to provide a clear indication of the seriousness of the offence in the context of base security.

If this power is exercised, section 72K requires the member of the Defence Force to bring the person before a member or special member of the Australian Federal Police, or a member of the State and Territory Police, as soon as practicable.

Section 72Q Certain information may be collected and provided to law enforcement agencies etc.

To detect, deter and respond to potential security threats, Defence intends to increase the use of overt optical surveillance on defence premises, including vessels and aircraft, to provide perimeter breach and intruder detection capabilities. This may include optical surveillance, such as Closed Circuit Television (CCTV), CCTV smart recognition systems and Automatic Number Plate Recognition, and other comparable surveillance devices. The surveillance might be accompanied by appropriate signage.

In light of the foregoing, this section provides that the Department, the Defence Force, or a contracted security guard may, on defence premises, collect information including personal information by means of an optical surveillance device.

As the purpose of any surveillance activity undertaken by Defence would be to identify and deal with potential security threats, the Commonwealth needs to be able to rely on any images and information captured through surveillance to assist intelligence agencies, and as evidence to support any action by law enforcement agencies and the Commonwealth, State and Territory public prosecution authorities.

Consequently, this section also provides that the Department or the Defence Force may disclose information collected through the use of optical surveillance devices to intelligence or security agencies, Federal, State or Territory law enforcement agencies, and Commonwealth, State or Territory public prosecution authorities. Moreover, the
section provides that a disclosure of personal information is taken to be authorised by law for the purposes of Information Privacy Principle 11 in section 14 of the Privacy Act 1988.

Section 72R Compensation for acquisition of property

This section makes provision for reasonable compensation if the operation of this Part results in the acquisition of property other than on just terms. This is intended to cover circumstances such as where an item is damaged as a result of a search and no criminal proceedings are instituted in relation to the item, or it is found not to have been involved in the commission of a criminal offence.

Section 72S Other powers not affected

This section provides that this Part does not, by implication, limit the exercise of powers of a defence security official, a member of the Defence Force or any other person under this Act, any other law (including the common law), or otherwise in the performance of his or her duties.

The intent of this section is to make clear that the new Part does not expressly, or by implication, restrict the ability of Defence Force personnel to exercise powers under any other law including, but not limited to, the Customs Act 1901, Fisheries Management Act 1991, Crimes (Aviation) Act 1991 and the Crimes Act 1914, or the executive power. For example, it will ensure that:

- security authorised members of the Defence Force, who are also authorised Commonwealth officers under section 89 of the Crimes Act 1914, would be able to exercise any relevant powers considered appropriate in the circumstances; and
- Defence Force members, who are not security authorised members of the Defence Force but are empowered under the Crimes (Aviation) Act 1991, will be able to exercise powers under that Act if these are relevant to the circumstances.

Similarly, it is not intended that the powers conferred by this Part, should limit or otherwise restrict a landowner’s common law rights to refuse access to his or her property. The section also explicitly provides that the Part does not affect any right of a person to defend himself or herself or another person.

Subsection 82(3)

This section repeals subsection 82(3) which relates to the offence of trespass on a Defence installation, a building or land reserved or set apart for or used in connection with the administration, accommodation, or training of any part of the Defence Force, or an aircraft.
**Subsection 82(4)**

This section inserts the words ‘or Territory’ to include arrest powers for Territory police in relation to the offences committed against section 82 of the Act which relates to painting, sketching or photographing a defence installation. The new part would read, “Any member of the Defence Force, member or special member of the Australian Federal Police or member of the Police Force of a State or Territory, may, without warrant, arrest any person who he has reasonable ground to believe has committed an offence against this section, and take him before a Court of summary jurisdiction to be dealt with according to law”.

**Part 2—Associated amendment**

*Australian Federal Police Act 1979*

**Subsection 4(1)(after subparagraph (a)(iii) of the definition of protective service offence)**

This section amends the *Australian Federal Police Act 1979* to include the proposed offences of trespass, hindering and obstructing a search and refusing to provide evidence as protective service offences under that Act. This amendment will allow protective service officers to exercise their powers of arrest under Division 3, Part II of that Act in relation to those offences.

*Defence Act 1903*

**Subsection 51T(3)**

This section amends subsection 51T(3) of the *Defence Act 1903* to clarify that in the circumstances contemplated by Part IIIAAA, a member of the Defence Force is bound by the limitations on the use of force that is likely to cause death or grievous bodily harm, that are set out in paragraphs (2)(a), (2A)(a) and (2B)(a), (b) and (c) of section 51T, against a person who is attempting to escape being detained by fleeing.