This book — one in the four-volume set, Global Governance and the Quest for Justice — focuses on human rights in the context of ‘globalisation’ together with the principle of ‘respect for human rights and human dignity’ viewed as one of the foundational commitments of a legitimate scheme of global governance. The first part of the book deals with the ways in which ‘globalisation’ impacts on established commitments to respect human rights. When human rights are set against, or alongside, potentially competing priorities such as ‘security’ or ‘economy’, how well do they fare? Does it make any difference whether human rights commitments are expressed in dedicated free-standing instruments or incorporated as side-constraints (or ‘collaterally’) in larger multi-functional instruments? In this light, does it make sense to view a trade-centred community such as the EU as a prospective regional model for human rights? The second part of the book debates the coherence of a global order committed to respect for human rights and human dignity as one of its founding principles.

If ‘globalisation’ aspires to export and spread respect for human rights, the thrust of the papers in this volume is that it could do better, that legitimate global governance demands that it does a great deal better, and that lawyers face a considerable challenge in developing a coherent jurisprudence of fundamental values as the basis for a just global order.
Global Governance and the Quest for Justice

Volume 1: International and Regional Organisations
Edited by Douglas Lewis

Volume 2: Corporate Governance
Edited by Sorcha Macleod and John Parkinson

Volume 3: Civil Society
Edited by Peter O’Dell and Chris Willett

Volume 4: Human Rights
Edited by Roger Brownsword
Global Governance
and the Quest for Justice

Volume IV: Human Rights

Edited by

ROGER BROWNSWORD
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2004
Law, as Lon Fuller famously remarked, orders social life by ‘subjecting human conduct to the governance of rules’;\(^1\) but, as he also remarked, law is not just about order, it is about the establishment of a just order.\(^2\) Law, formal as well as informal, hard or soft, high or low, purports to set (just) standards and to provide the framework for the (fair) resolution of disputes. Legal rules, of course, are not the only mechanisms for channelling behaviour — market prices, for example, may be as prohibitive as the rules of the criminal code — but it is a truism that it is society’s need for effective and legitimate governance that offers the raison d’être for law.

Fifty years ago, the legal imagination centred on governance within and by the nation state. The municipal legal system was the paradigm; its architecture (especially its division of the public from the private) clean-lined; its organisation hierarchical; its modus operandi (even if Austin had over-stated the coercive character of law) largely one of command and control; and its authority unquestioned.\(^3\) Beyond the boundaries of local legal systems, the first seeds of regional and global governance had been sown but it was to be some time before they would begin to flower. If anyone ruled the world, it was the governments of nation states.

Fifty years on, the landscape of legal governance looks very different. To be sure, the municipal legal system remains an important landmark. However, governance within the nation state no longer respects a simple division of the public and the private; in many cases, hierarchical organisation has given way to more complex regulatory networks; each particular regulatory space is characterised by its own distinctive regime of governance and stakeholding; command and control is no longer viewed as the principal regulatory response; and, confronted with various crises of legitimacy, nation states have sought to retain public confidence by aspiring to more responsive forms of governance.\(^4\)

At the same time that local governance has grown more complex and difficult to map, the world beyond the nation state has moved on. Not

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\(^1\) LL Fuller, *The Morality of Law* (New Haven, Yale University Press, 1969) at 96.


only has regional governance developed rapidly (in Europe, to the point at which a Constitution for the enlarged Union is under debate), but manifold international agencies whose brief is global governance are now operating to regulate fields that are, in some cases, narrow and specialised but, in other cases, broad and general. If mapping municipal law has become more challenging, this applies a fortiori to governance at the regional or global level where the regulatory players and processes may be considerably less transparent. Moreover, these zones of governance — the local, the regional, and the global — do not operate independently of one another. Accordingly, any account of governance in the Twenty-First Century must be in some sense an account of global governance because the activities of global regulators impinge on the activities of those who purport to govern in both local and regional zones.

To a considerable extent, global governance has grown alongside the activities of organisations whose predominant concerns have been international security and the promotion of respect for human rights. However, it has been the push towards a globalised economy that has perhaps exerted the greater influence — that is to say, ‘globalisation’ has served to accelerate both the actuality, and our perception, of global governance. With the lowering of barriers to trade and the making of new markets (traditional as well as electronic), the processes of integration and harmonisation have been set in motion and the governance activities of bodies such as the IMF, the World Bank and the WTO have assumed a much higher profile. If nation states still rule the world, their grip on the reins of governance seems much less secure.

Against this background, Global Governance and the Quest for Justice is a four-volume set addressing the legal and ethical deficits associated with the current round of ‘globalisation’ and discussing the building blocks for modes of global governance that respect the demands of legality and justice. To put this another way, this set explores the tension between the order that is being instated by the governance that comes with globalisation (the reality, as it were, of globalised governance) and the aspiration of a just world order represented by the ideal of global governance.

Each volume focuses on one of four key concerns arising from globalised governance, namely: whether the leading international and regional organisations are sufficiently constitutionalised, whether transnational
corporations are sufficiently accountable, whether the distinctive interests of civil society are sufficiently represented and respected and whether human rights are given due weight and protection. If the pathology of globalised governance involves a lack of institutional transparency and accountability, the ability of the more powerful players to act outside the rules and to immunise themselves against responsibility, a yawning democratic deficit, and a neglect of human rights, environmental integrity and cultural identity, then this might be a new world order but it falls a long way short of the ideal of global governance.

In the opening years of the twenty-first century, the prospects for legitimate and effective governance — that is to say, for lawful governance — are not overwhelmingly good. Local governance, even in the best-run regimes, has its own problems with regard to the effectiveness and legitimacy of its regulatory measures; regionalisation does not always ease these difficulties; and globalised governance accentuates the contrast between the power of those who are unaccountable and the relative powerlessness of those who are accountable. Yet, in every sense, global governance surely is the project for the coming generation of lawyers.

If the papers in these volumes set in train a sustained, focused and forward-looking debate about the co-ordination of governance in pursuit of our best conception of an ordered and just global community, then they will have served their purpose — and, if law plays its part in setting the framework for the elaboration and application of such global governance, then its purpose, too, will have been fulfilled.

Roger Brownsword and Douglas Lewis
Sheffield, February 2004
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Introduction: Global Governance and Human Rights

ROGER BROWNSWORD

Each year, thousands of statutory instruments pass into law. In the year 2001, SI No 3644 was one such. This, however, was no routine statutory instrument. For, this was the Human Rights Act 1998 (Designated Derogation) Order in which the Home Secretary announced that provisions in what would become the Anti-Terrorism, Crime and Security Act 2001 would require there to be a derogation from Article 5 of the European Convention on Human Rights (ECHR). In plain English, the Government was to change the law so that persons could be lawfully detained in circumstances that, it openly accepted, might not be fully consistent with respect for the right to liberty and security of the person as enshrined in Article 5 of the ECHR. Or, in even plainer English, the Government proposed to sacrifice the liberty and security of one group of persons (thus far, the 14 or so foreign nationals resident in the United Kingdom so detained) 1 for the sake of the liberty and security of another group of persons (those many millions of persons in the United Kingdom not so detained).

Why should the Government enact such an extraordinary measure? Quite simply, these were no ordinary times. In the wake of the tragic events of September 11, 2001 — the most violent backlash yet against American global influence — the United States and her allies needed to take measures for their own protection. This was an emergency with a capital E; all systems needed to be put on the highest alert. Anyone

1 Under the 2001 Act, 16 suspects have been detained; two of them were freed to go to countries (France and Morocco) that were prepared to accept them; and 13 have appealed to the Special Immigration Appeals Commission (SIAC), but only one (a Libyan man known simply as M) has been successful. In M’s case, SIAC, presided over by Mr Justice Collins, ruled that the evidence did not justify M’s detention. On appeal by the Home Secretary, the Court of Appeal, upheld SIAC’s ruling; see A Gillan, ‘Defeat for Blunkett as Judges Free Detainee’ The Guardian, March 19, 2004, p 2. And, see note 8 below.
doubting that terrorism was a clear and present danger (a threat both without and within) need only contemplate the rubble that once was the Twin Towers; and, whilst bringing rights home in a more civilised time was all very well, in the troubled world of post 9/11 the exigencies of survival and security took priority.

This particular episode in the local governance of the United Kingdom (like the dramatic detention of large numbers of persons by the United States in Camp Delta at Guantánamo Bay) points to an important issue about the level of commitment to human rights. Whether, at one end of the scale, governments derogate from human rights after the most careful consideration of the arguments (and within a legal framework that expressly permits derogation in exceptional circumstances), or at the other end of the scale, human rights are simply ignored or set aside whenever it is convenient or expedient to do so, the fact is that human rights are displaced — they are not treated as the first priority. In a context of emerging global governance (as the general editors sketch in their Preface) one suspects that, while the pressure to sign up to human rights will increase, the reasons for displacing human rights will become more varied and pressing. Paradoxically, then, the more that governance seems to be committed to human rights, the less it actually is.

These reflections lead directly to the first of two general questions that underlie the contributions to this volume. Indeed, the first question (which is addressed by the papers in the first half of the collection) focuses precisely on the level of respect that is given to human rights when they are in competition with other priorities for governance. This is not simply a matter of whether human rights have any chance when they are in competition with considerations of exceptional emergency (threats to national security and the like) but also of how well they fare when they are woven routinely into the groundrules for global trade. In a world of globalised governance, are human rights destined to take second place?

Taking up this question, Michael Head and Sabine Michalowski critically review the brute displacement of human rights by, respectively, the Australian and the Argentinian governments in the face of recent ‘emergencies’. Whereas, broadly speaking, the Australian emergency provisions reflect concerns about security, the measures taken in Argentina were in response to an economic crisis and in compliance

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2 In June 2004, by a 6–3 majority, the US Supreme Court ruled that US domestic courts have jurisdiction to hear challenges to the legality of detention at Guantánamo Bay. See, Julian Borger and Vikram Dodd, ‘Supreme Court Blow for Bush on Guantánamo’, The Guardian, June 29, 2004, p 13.

3 As would seem to be the case if the provisions of the Anti-Terrorism Crime and Security Act 2001 were to be copied across to cover security threats presented by British citizens. See G Peirce, ‘This Covert Experiment in Injustice’ The Guardian, February 4, 2004, p 22.
with the conditions dictated by the IMF. There is a double message to the legal community in these papers: first, that a hard look should be taken at so-called emergencies to ensure that they are not being cited as a pretext by governments minded to increase police power at the expense of civil liberties; and, secondly, that judicial deference to the executive branch should not involve the suspension of legal judgment as to the necessity, proportionality, and unavoidability of whatever exceptional measures are taken.

Sheldon Leader, too, addresses the displacement of human rights. However, he detects and characterises a more subtle displacement in the work of the burgeoning international agencies (particularly those agencies whose function is to promote trade or commerce). ‘Collateralism’, as Leader terms it, captures a culture that tends towards specialised institutional interests being given a disproportionate weight where decisions calling for a balancing of considerations fall to be made. This is not to say that human rights are not taken seriously by such institutions — far from it, some rights might even be treated as having fundamental importance. However, the effect of policy informed by the collateralist mind-set is that adjustments and balances tend to favour those rights that run with the grain of the institutional goals. What makes this process so insidious is that, from the agency’s perspective, it is perfectly natural to be guided by precisely those considerations that give the body its specialised governance function and its distinctive identity.

The focus of the papers by Andrew Williams and Elspeth Deards moves to the European Union. From its modest beginnings as a relatively small trade association, the community has grown into a major articulation of regional governance, cultivating a single market and now seeking to integrate respect for human rights into its (essentially economic) constitutive objects. Will this work? The discussions by Williams and Deards prompt doubts on at least two scores. First, even if the Union is granted an explicit human rights competence as a matter of law, in practice can it succeed in synthesising European commercial imperatives (its traditional mission) with a European culture of human rights? Secondly, so long as the Union treats its larger international function as the representation of regional interests, can it do justice to the universality of human rights? In both cases, the Union would need to transform its understanding of its distinctive governance role otherwise human rights, if not marginalized, would be vulnerable to collateralism.

These papers are complemented by Laura Westra’s powerful caution that we ‘collateralise’ environmental considerations at our peril. According to Westra, because the integrity of the environment is presupposed by the enjoyment of any kind of human right (including the right to life) and the pursuit of any kind of human activity (including commercial and economic activities), we should treat the right to a sustainable environment...
as fundamental — if there is to be a war on terror, it should encompass a war on those who would despoil the environment.

The papers by Duncan French and Chris Gallavin offer a bridge into the second half of the collection. They reflect on the distance between international aspiration and international realpolitik, between the idealistic rhetoric of the many declarations on matters of social welfare adopted by the international community and the actual agenda of signatories, and between the retributive victim-orientated purity of the framework set out in the Rome Statute founding the International Criminal Court and the realities of international politics. For French, the lesson is that, in act and deed, international governance must start to match its fine words — the real must start to live up to the ideal; while, for Gallavin, the lesson is that, in an imperfect world, some degree of flexibility is required if things are to move forward — the ideal must at least be situated within the real.

In contrast with a setting of globalised governance, where human rights are in competition with a range of rival governance imperatives and where the commitment of governments to human rights is less than complete, imagine a more congenial setting. Imagine that global governance enjoyed the luxury of a one-dimensional concern with respect for human rights and the justice of the global order. Imagine, in other words, that governance was guided exclusively by moral reason. Under such improved conditions, how straightforward would it be to advance the project of just global governance? This is the second of the two general questions that inform the contributions to this volume.

Clearly, other things being equal, the prospects of just governance are better where it is accepted that the guiding principle is that the ‘moral’ thing should be done. However, in a global context of competing moral viewpoints, the essays in the second part of the collection highlight that competing moral views can be almost as problematic as competition between moral and non-moral priorities.

Sometimes, we seem to start in much the same place, but we understand our commitments in rather different ways. Thus, as Bev Clucas and Scott Davidson demonstrate, the problem can be that particular human rights, even rights (such as the right to life) that are agreed to be fundamental or axiomatic, are interpreted by different judges in different contexts in different ways; similarly, the various ways in which judicial interpreters respond to clear gaps and omissions in human rights regimes reflect important differences of adjudicative ideology.

Sometimes, the problem runs deeper. For, as Chandra Sriram highlights in her paper, we do not always start in the same place. So, for instance, even if it is agreed that a human rights atrocity has occurred and that there needs to be a legal response, there may be very different views — generated by radically competing conceptions of international criminal justice — as to who should respond, as to where the response should be (whether the court
or commission should be internal or external), and as to the nature of the response (echoing Gallavin, is retributivism or regeneration, recrimination or reconciliation the appropriate objective?).

Still in the deep waters of moral pluralism, Deryck Beyleveld and Shaun Pattinson reflect on the fundamentally different viewpoints in Europe concerning the moral status (and dignity) of the human embryo, views that have generated a patchwork of local regulatory positions with regard to the use of human embryos for research and that have recently frustrated the articulation of an agreed regional position covering stem cell research. Famously, similar differences almost blocked the adoption of Directive 98/44/EC on the Legal Protection of Biotechnological Inventions (where the focal concern was the patentability of human gene sequences) — and, no doubt, if it were to be proposed that a common position should be agreed in Europe with regard to the regulation of abortion, the same value disagreements would be rehearsed; and regulators would find themselves in the same deep water. Nevertheless, as Beyleveld and Pattinson observe, the currents of globalisation tend to flow towards more permissive positions making it difficult for the more restrictive regimes to hold their lines or, at any rate, to sustain a practice that is fully consistent with declared principle.

Finally, in closing the volume, my own paper points to the development of new technology as another shifting feature of the global context that sets the frame for the aspiration to just governance. If we agree that the benefits of such technologies should be exploited provided that this is consistent with respect for human rights and human dignity, regulators face the kind of interpretive challenges indicated by fellow contributors in this second part of the book; human rights and, especially, human dignity cover a multitude of moral differences. Moreover, reverting to the themes of the first part of the book, if regulators find that they are unable to secure regimes of governance that are either just or effective, we might find a wholesale turn to technology as an instrument of regulation. In which case, in addition to renewed concerns for the prospects of human rights, the spread of technology-reliant governance will concentrate the mind on the meaning of human dignity.

If ‘globalisation’ aspires to export and spread respect for human rights, the thrust of the papers in this volume is that it could do better, that legitimate global governance demands that it does a great deal better, that lawyers face a considerable challenge in developing a coherent jurisprudence of fundamental values as the basis for a just global order and that, as ever, the tension between effective governance and legitimate governance — between mere order and just order — threatens to frustrate our best efforts.

Should we, then, look forward to the coming century of governance with confidence and in a spirit of optimism? Writing (pre 9/11) in the
Millennium year, Anne-Marie Slaughter aptly remarked that '[t]he compression of distance and the dissolution of borders that drives globalization has proved far more efficient at producing global markets than global justice.'\textsuperscript{4} Nevertheless, she saw encouraging signs in the willingness of national judges to learn from the human rights expertise available worldwide. Post 9/11 should we be so sanguine? Are things destined to improve? Will the inadequate world of globalised governance yield to more adequate regimes of legitimate global governance?

In the short run, we can surely expect no dramatic transformation. The global context in which local governance now self-consciously operates makes it too easy for the pursuit of sectional interest to be wrapped up in the rhetoric of the public interest — the pressures of ‘globalisation’ are too easily a pretext or an excuse for weak governance.\textsuperscript{5} Moreover, the cause of global governance is not assisted if those who most loudly proclaim the virtues of human rights and the Rule of Law feel able to opt out when they perceive the circumstances as so demanding. As Helena Kennedy has recently written:

> The nature of a government’s response to terrorism within its borders will depend on the type of violence, its history and roots, its seriousness, the extent to which it has community support and the effect on the international community’s respect for human rights. Sensitive political judgements have to be made. The way in which mature legal systems deal with subversion or attack has global implications: toleration of infringements of civil liberties gives poor signals to those nations which are struggling to establish democracies. It also gives succour to tyrants who have little interest in the rule of law or the pursuit of justice.\textsuperscript{6}

In this light, and specifically with reference to the detention policies adopted on both sides of the Atlantic post 9/11, those who allege that ‘the example being set by the US and the UK is being used to legitimise repression internationally on an ever-increasing scale’\textsuperscript{7} would seem to have a point.

In the medium term, the attempt to harmonise commercial and cultural values in an enlarged European zone of regional governance, like the attempts to invest trade agencies with missions that incorporate human rights, will tell us whether it is possible for human rights to be seamlessly integrated in this way. It may be that we come to understand that respect

\textsuperscript{5} See, eg, Jim Wurst, ‘Counterterrorism to Blame for Erosion of Rights, Expert Says’ UN Wire \url{<http://www.ishr.ch>} (January 11, 2004).
\textsuperscript{6} H Kennedy, Just Law (London, Chatto and Windus, 2004) at 61.
for human rights will never be effectively achieved by ‘bolt-ons’ or ‘balances’ or by way of ‘side-constraints’ or similar mechanisms. To counteract collateralism, perhaps we must follow the example of Article 1 of the Basic Law in Germany and make human rights and human dignity the most fundamental values, our first and paramount legal priorities, in any constitution of governance.

In the longer run, the sustainability of the environment will be a cause for continuing concern; and, whilst technology will serve to lower the barriers to communication, it will also offer opportunities for the powerful to enhance their positions and increase the gap between the ‘haves’ and the ‘have-nots’ in the global village. If there is to be any prospect of legitimate global governance, lawyers have a special responsibility to place themselves in the vanguard of the quest for justice. It is not enough to argue against lawlessness, nor even to encourage dialogue that builds on a shared sense of justice while seeking to address fundamental differences of value; and neither is it enough to accept paper commitments to human rights. Just order, to be sure, is a tall order. However, if (legitimate) global governance is to have any chance in the twenty-first century, the commitment to human rights must be real, the vision of a just order clear, and the resolution of the legal community unshakeable.\footnote{As we go to press, challenges both to the legality of SI 2001/3644 and to a number of certificates issued under the 2001 Act have been raised and largely rejected. In \textit{A & Others v Secretary of State for the Home Department} [2004] QB 355, the Court of Appeal held that deroga-
tion was lawful; but the decision is under appeal to the House of Lords. And, in \textit{A & Others v Secretary of State for the Home Department} [2004] EWCA Civ 1123, the Court (by a majority) ruled that, where the Secretary of State certifies that he reasonably believes that a person’s presence in the UK is a risk to national security and that he reasonably suspects that the said person is a terrorist (or, similarly, where SIAC so holds), then such an assessment is not invalidated by dint of reliance on evidence that has been obtained by torture — at any rate, provided that UK agents are not responsible for such acts or complicit in their commission. Neuberger LJ’s dissent (leaning heavily on the fair trial requirement in Article 6 of the ECHR) takes a stronger stand against abuse of process and in support of the Rule of Law; however, the reality is captured better by Laws LJ’s concluding remarks to the effect that, while the reconciliation of competing constitutional fundamentals may not have been perfect, there is no reason to think that the government ‘has at all lost sight of those constitutional principles which it is the court’s special duty to protect: the rule of law and the avoid-
ance of arbitrary power’ (at para 282).}
Part I: Competing Priorities — Are Human Rights Destined to be Second-Best?
The Global ‘War on Terrorism’: Democratic Rights Under Attack

MICHAEL HEAD*

INTRODUCTION

ONE OF THE most striking challenges for global governance in the 21st century is the protection of democratic rights. In the opening years of the new century, numbers of governments have used the threat of terrorism as a pretext to erode such vital principles as free speech, freedom of political association, prevention of arbitrary detention, and the right to seek asylum.

In Australia (and there are parallels elsewhere, notably in the United States and Britain), the dawn of the century saw three fundamental shifts in the state machinery — legislation in 2000 to permit the calling out of the military against civilian unrest; in 2001 to authorise the forcible turning away of refugee boats; and in 2002 to grant detention and proscription powers, as well as expanded surveillance powers, to the government and its security and intelligence agencies. These measures have profound implications for civil liberties, as well as for the future of international covenants, such as the Refugee Convention and the International Covenant on Civil and Political Rights (ICCPR). These global human rights instruments have proved largely irrelevant in curbing such powers.

The Howard government in Australia followed the lead of the Bush administration in the United States and the Blair government in Britain by declaring that the 11 September 2001 terrorist attacks in the United States required an indefinite ‘war’ against terrorism abroad, accompanied by curtailment of legal rights at home. Despite criticisms by civil liberties groups, both the British and American governments introduced severe

*This chapter was written while the author was Visiting Professor, Osgoode Hall Law School, York University, Toronto.
anti-terrorism measures, including detention without trial and proscription of organisations.\(^1\) Amnesty International condemned the Bush administration for breaching the ICCPR and other international protocols against arbitrary detention and inhuman treatment of prisoners.\(^2\)

Significantly, the first two sets of Australian legislation pre-dated September 11, indicating that the anti-democratic trend is more fundamental than a response to the events in New York and Washington. Rather, these atrocities, and later the Bali bombing of 12 October 2002, were seized upon retrospectively to justify, as well as to introduce new, far-reaching alterations to the legal and constitutional framework.

These political and legal shifts, as this chapter will review, are profoundly anti-democratic. They were not the result of any popular demand for such measures; on the contrary, each legislative package aroused considerable public opposition. The purpose of their introduction is to strengthen the repressive capacities of the state against the free movement of people and other perceived threats to the political establishment. This chapter will suggest that these legislative responses highlight essential contradictions of the increasing globalisation of economic and political life.

**THE MILITARY CALL-OUT LEGISLATION**

Amid considerable public controversy, the Australian Labor Party combined with the Government of Prime Minister John Howard to pass military call-out legislation through both houses of the Commonwealth Parliament in September 2000. Both the Government and the Opposition declared that it was necessary to have the legislation in place before the Sydney Olympic Games. In the brief parliamentary debate, references were made to the need to counter possible terrorism at the Olympics, where some 4000 military personnel were deployed.\(^3\) After expedited examinations by two Senate committees, whose recommendations for minor amendments were partially adopted,\(^4\) the legislation was ultimately


\(^2\) *Amnesty International’s concerns regarding post September 11 detentions in the USA*, Amnesty International March 2002.


passed on the last day of sitting before the opening of the Games. Despite this haste, the Act was not invoked during the Olympics. This suggests that Olympics merely provided a pretext for the legislation, which in fact has more underlying purposes.

Under the amended Defence Act 1903, 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. Once deployed, 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 will have greater powers than the police in some circumstances, including the right to shoot to kill someone escaping detention, search premises without warrants, detain people without formally arresting them, seal off areas and issue general orders to civilians.

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 Australian Constitution) to call out military personnel to deal with ‘domestic violence’. The term ‘domestic violence’ does not correspond to the modern sense of the phrase, which refers to violence within homes or families. It is a vague expression, undefined legislatively or judicially, found in section 119 of the Australian 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’. Unlike section 119, however, the new provisions do not require any invitation from a State government before troops are called out.

Both the Government and the Labor Party proposed limited amendments in an effort to meet certain objections from some State governments and to head off public concern about the impact on civil liberties, but the legislation’s essential content remained the same: to authorise the use of the military to deal with civilian disturbances, including political and industrial unrest. The fact that such legislation was passed suggests a bipartisan expectation in official political circles that, in the coming period, troops will be required to deal with disturbances that the police forces cannot contain.

5 It has since been revealed, however, that elite 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 Act. See The Sydney Morning Herald, 9 February 2001, 6.

6 Section 51.