

E 31H

*Report No. 12*

**First Report on Emergencies Use of the armed forces**

February 1990  
Wellington, New Zealand

The Law Commission was established by the Law Commission Act 1985 to promote the systematic review, reform and development of the law of New Zealand. It is also to advise on ways in which the law can be made as understandable and accessible as practicable.

The Commissioners are:

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Report/Law Commission Wellington, 1990

ISSN 00113-2334

This report may be cited as: NZLC R12

Also published as Parliamentary Paper E 31H

APPENDICES

A Sections 79 and 79A of the Defence Act 1971  
B Clauses 5, 6, 10 and 11 of the Defence Bill  
C The Amended Clause 10

19 February 1990

Dear Minister

The Law Commission has been asked to report on the law which should govern the action to be taken in a national emergency. The work forms part of the Government's general review of planning for national emergencies being coordinated by the Coordinator, Domestic and External Security.

In the course of its work the Law Commission identified a need to amend existing provisions of the Defence Act 1971 relating to certain types of emergency. Accordingly, when it learned that a new Defence Bill was to be introduced, repealing and replacing the 1971 Act, it took the opportunity to make several proposals which have been included in the Bill now before the House of Representatives.

This First Report on Emergencies: Use of the armed forces develops the issues which arise in this context, comments on the relevant provisions of the Defence Bill, and recommends some amendments. One of the issues we have had to address is the appropriate use of the armed forces during an industrial dispute.

No doubt you will wish to refer this Report to the Foreign Affairs and Defence Committee which is considering the Defence Bill. We are of course willing to assist the Committee in its consideration of the Bill in whatever way the Committee considers appropriate. The enactment of the new Defence Act can proceed independently of any other legislative measures the Commission may recommend.

The Commission is now completing a Second Report on Emergencies which will bring to an end its work on this subject.

Yours sincerely

A O Woodhouse  
President

Hon W P Jeffries MP  
Minister of Justice  
Parliament House  
WELLINGTON

## ACKNOWLEDGEMENT

The Law Commission is grateful for the major contribution to the work on this Report made by Dr C C Aikman who is acting as a consultant to the Commission on this project.

## I

### **Introduction Summary of Conclusions and Recommendations**

#### INTRODUCTORY

1 The Government, acting through the Coordinator, Domestic and External Security, has asked the Law Commission to consider and report on the following questions:

- 1 What executive powers are needed and justified to deal effectively with a national emergency in New Zealand, in a manner consistent with our basic constitutional system and traditions;
- 2 What rights and freedoms ought not to be derogated from in any national emergency;
- 3 What procedures are most appropriate for bringing emergency powers into effect;
- 4 What safeguards are needed to confine the exercise of emergency powers to a national emergency;
- 5 What limits and controls should be placed on the exercise of emergency powers, and what remedies should there be for the abuse of these powers;
- 6 What changes are needed in the existing law to achieve these objects.

2 This First Report discusses certain categories of emergency that might call for the use of the armed forces. In the course of its work the Law Commission identified a need to make several amendments to the Defence Act 1971. It then learned that a Defence Bill was to be introduced, repealing the 1971 Act and replacing it with a new statute. Rather than waiting to propose amendments to a new Defence Act the Commission took the opportunity to make suggestions which have been included in the provisions of the Defence Bill now before the House of Representatives. This Report develops the issues with which the Commission is concerned and comments on the relevant provisions of the Defence Bill. Also, further consideration of the issues since the Bill was introduced has led us to propose amendments to the Bill.

3 The substantive issues with which this Report is concerned are discussed under four headings:

- Chapter II – “The Form of Emergency Legislation: General or Sectoral” - explains the reasons for our early conclusion that there should not be a “national emergencies” statute which would confer powers that would be available in a wide range of emergency situations. We take the view that emergency powers and the legislation conferring those powers should be tailored to the needs of particular emergency situations. We have called this the “sectoral approach”.
- Chapter III – “Low and Medium-Level Contingencies”-deals with the power to requisition (cl 11 of the Defence Bill) and liability for service in the regular, territorial and reserve forces (cls 39, 40 and 41).
- Chapter IV – “Armed Forces Providing a Public Service and Aid to the Civil Power” - deals with cls 5, 6 and 10 of the Defence Bill which relate to the power to raise armed forces, the deployment of armed forces, and the use of the armed forces in the provision of a public service.
- Chapter V – “Emergencies Arising out of Industrial Disputes” - discusses the handling of industrial disputes that have developed into emergency situations. One of the changes to the Defence Act 1971 incorporated in the Defence Bill concerns the use of the armed forces to provide a public service in connection with an industrial dispute (cl 10(2)). This amendment needs to be seen in the context of emergencies arising out of industrial disputes.

4 The provisions of ss 79 and 79A of the Defence Act 1971 are set out in Appendix A, the relevant provisions of the Defence Bill in Appendix B, and a proposed Amended Clause 10 in Appendix C.

## SUMMARY OF CONCLUSIONS

5 The remaining paragraphs of this chapter summarise the Law Commission's conclusions and set out its recommendations.

## CONSEQUENCES OF THE SECTORAL APPROACH

6 The Law Commission study will not lead to recommendations on all emergency sectors. Many emergencies, such as those falling within the economic area and the health and agriculture sectors, are better approached from within the sector. Nevertheless, sectoral legislation that includes provision for emergencies, along with enactments that deal with particular emergencies, should conform to uniform principles. These principles, to be considered in the Commission's second report, will embrace the criteria and procedures for the triggering of emergency powers, the protection of the rights of individuals, and the need for safeguards, such as review by Parliament and by the courts. (paras 32-46)

## LOW AND MEDIUM-LEVEL CONTINGENCIES

7 New Zealand strategic thinking, as developed in the 1987 Defence Review, Defence of New Zealand, is now based on a regionally focused policy. It is recognised that there may need to be military responses to low and medium-level contingencies, as well as to the more remote contingency of war or other full-scale hostilities. Low-level contingencies would include responding to requests for help from partner nations in the South Pacific in countering terrorist attacks and hijacking, or in dealing with a natural disaster or military emergency. It would also

include the evacuation of New Zealand nationals. Medium-level contingencies contemplate the deployment of forces to reinforce those already dealing with a low-level conflict or to operate alongside Australian forces in dealing with a medium-level conflict in the Pacific region. (paras 47-49)

## POWER TO REQUISITION

8 An emergency power that might be required in a low or medium-level contingency is the power to requisition any “ship, vehicle, aircraft, supplies, or equipment ...” (Defence Bill, cl 11(1)(b)). In most situations, the armed forces will contract to lease or hire resources that they do not already possess; but in an emergency this might not be possible. We therefore conclude that a power to requisition, that would be available in the event of an actual or imminent emergency involving the deployment of armed forces beyond New Zealand, should be established by amendment to the Defence Act 1971. Clause 11 of the Defence Bill establishes this power to requisition. The clause includes provision for adequate compensation. We recommend its enactment, subject to minor drafting amendments. (paras 50-67)

## POWER TO CALL UP THE TERRITORIALS OR THE RESERVE

9 A strategic emphasis on low and medium-level contingencies also raises the question whether the terms of service of regular personnel serving abroad on a contingency operation should be extended; and whether the territorial forces and the reserves can be mobilised in any such contingency. Under the provisions of ss 42, 43 and 44 of the Defence Act 1971 these steps can be taken only “[i]n time of war or other like emergency ...”. A low-level contingency and, perhaps, a medium-level contingency are unlikely to fall within this form of words. The need might arise to find a crew for a vessel; but we do not think it appropriate to supplement the right to requisition with a power to direct civilians to perform services in situations possibly involving armed conflict. Alternatively, staff might be required for posts in New Zealand vacated by regular personnel serving abroad on a contingency operation.

10 In view of the difficulties arising from the wording of ss 42, 43 and 44 of the Defence Act 1971, we recommend the inclusion in the Defence Bill of provisions authorising the Governor-General by Order in Council to call up members of the territorial and reserve forces, and to extend the terms of service of members of the regular forces, in the event of an actual or imminent emergency involving the deployment overseas of New Zealand armed forces. There should be a provision under which the Order in Council would state the reasons for the call-up and the House of Representatives would be informed of those reasons. (paras 68-78)

## DEPLOYMENT OF THE ARMED FORCES

11 Clause 5 of the Defence Bill carries forward, with amendments, the provisions of s 4(1) of the Defence Act 1971 which set out the purposes for which the armed forces can be raised and maintained. These purposes, as set out in cls 5 and 10, include not only purposes that are traditional military purposes such as the defence of New Zealand, but also “civil purposes” involving the use of armed services in peacetime activities. (paras 84-85)<sup>12</sup> Clause 6 of the Defence Bill is new and of concern to the Law Commission. The clause authorises the deployment of the armed forces for the purposes specified in cls 5 and 10. The situation can be envisaged in which this provision, read with cl 3, which for the first time expressly states that the Defence Act will bind the Crown, would impose a restraint on the recognised freedom of a government to deploy its armed forces as it sees

fit, particularly in respect of the wide range of situations that might amount to a low or medium-level contingency. We therefore recommend that cl 6 be deleted. (paras 86-93; 102)

13 It has long been recognised that the armed forces should be made available for peacetime purposes. These civil purposes fall into two broad categories: the provision of assistance to the community, such as search and rescue and disaster assistance; and assistance to the police in law and order emergencies involving the use of force, of which a terrorist attack is these days the most likely example. These two categories are represented in the Defence Act 1971 by the provisions relating to armed forces assistance in providing a public service and in providing aid to the civil power (ss 4(1)(e) and (f), 79 and 79A). (paras 79-82; 94-101)

#### PROVISION OF PUBLIC SERVICES AND AID TO THE CIVIL POWER

14 The repeal of the Public Safety Conservation Act 1932 carried with it the repeal of s 79(2) of the Defence Act 1971 (dealing with the relationship between the Public Safety Conservation Act 1932 and the Defence Act 1971) and the enactment of s 79A. Under s 79A the authority of the Prime Minister or next most senior minister available is required for the use of the armed forces to assist the police where an emergency is occurring in which someone is threatening or causing the death of or serious injury to any person or the destruction of or serious damage to any property. The minister giving the authority must be satisfied that the emergency cannot be dealt with by the police without the assistance of the armed forces, and the fact that the authority has been given is to be reported to the House of Representatives. It cannot be extended beyond 14 days without a resolution of the House. Section 79A will be replaced in the Defence Bill by cl 10(3) - (7). (paras 138-143)

15 No constraint, other than the approval of the Minister of Defence, is included in s 79 under which the armed forces can be used to provide any public service. Clearly constraints are unnecessary where the public service is uncontroversial, as in the case of a search and rescue operation or disaster assistance in a civil defence emergency. The position is different when the public service being provided by the armed forces is the performance of an essential service being withheld during an industrial dispute. The repeal in 1987 of the Public Safety Conservation Act 1932 and of s 79(2) removed such constraints as had existed in this area. The Law Commission considered that appropriate procedures, along the lines of those in s 79A, should be introduced.

16 Clause 10(2) of the Defence Bill therefore requires the Prime Minister or another responsible minister to inform the House of Representatives if authority has been granted for the armed forces to provide a public service in connection with an industrial dispute. The authority will lapse unless the House resolves within 14 days to extend it. This procedure is similar to that now required under s 79A of the Defence Act 1971 and maintained in cl 10(3), (6) and (7) of the Defence Bill. (paras 115-122; 191-204)

17 Clause 10(3), in dealing with emergencies in which the armed forces assist the police, widens the provision now in s 79A(1) by including not only emergencies that are "occurring" or "actual" but also those that are "imminent". The minister giving the authority must be satisfied not only that the emergency cannot be dealt with by the police alone, but also that it is "actual" or "imminent". In the Report the primacy of the civil power is emphasised. The function of the armed forces in these situations is to assist the police in carrying out police responsibilities. They act only at the request of the police. (paras 141-154)

#### THE AMENDED CLAUSE 10

18 Since the introduction of the Defence Bill the Law Commission has had an opportunity to reconsider the provisions of cl 10 with the benefit of further discussions with the Ministry of Defence and the Police. The text now submitted as the Amended Clause 10, and set out in Appendix C (at 86), is an agreed text.

19 The Amended Clause 10 embodies drafting changes that:

- distinguish more clearly between the use of the armed forces to perform a public service and their use to assist the civil power in time of emergency (cl 10(1) - para 105);
- tighten the procedures to be followed when the armed forces are to be used to provide an essential service in connection with an industrial dispute by requiring the Prime Minister, or other minister authorising the use, to be satisfied that the use is in the national interest, to specify the use, and to inform the House of Representatives that the authority has been given and of the reasons for it (cl 10(2), (6) and (7) - paras 119-121);
- recognise more clearly the way in which an “imminent” emergency differs from an “actual” emergency (paras 17 and 141);
- omit the provision in cl 10(5)(a) that declares that members of the armed forces deployed to assist the police remain under military command (the provision is thought to be unnecessary) (paras 123-133).

20 A difficult issue that has arisen in the drafting of cl 10 has been the extent to which the armed forces should exercise the powers of the police when they are acting in support of the police in a law and order situation. The drafting of cl 10(3) - (5) of the Defence Bill reflects these difficulties and suggested changes are to be found in the Amended Clause 10.

21 The approach taken in the Amended Clause 10 is that the armed forces should have only the powers that are necessary “to assist the Police” in dealing with the emergency. (cl 10(5)(a) of the Amended Clause 10 – paras 143 and 155-168)

22 Related to the question of powers is the question of civil and criminal liability. The provision conferring powers in cl 10(5)(b) of the Defence Bill was assumed to carry with it the civil and criminal liability of the police (cf s 79A(4)). It is thought that the situation should be clarified. Clause 10(5)(b) of the Amended Clause 10 therefore gives members of the armed forces assisting the police under cl 10 (3) the protections of members of the police as well as other protections which that member may have, such as the superior orders protection given by s 47 of the Crimes Act 1961. (paras 155-168)

23 It should not be necessary to follow the procedure prescribed in cl 10(3) of the Defence Bill in all situations in which the armed forces are providing assistance to the police. There are many occasions in which the armed forces are doing no more than to provide logistical or administrative support to the police. Clause 10(3) and cl 10(3) of the Amended Clause 10 endeavour to make this distinction by relating the need to follow the procedure to situations in which the armed forces will be required to exercise police powers, that is, in emergencies in which the armed forces are supporting the police in the maintenance of law and order. There will be emergencies, especially those involving public protest, in which the distinction between logistic and administrative support

and the exercise of police powers will not be evident to the public. In these situations it is to be expected that a government will follow the procedure prescribed in cl 10(3). (paras 143-150)

## INDUSTRIAL RELATIONS EMERGENCIES

24 Chapter V of the Report sets out the legislative background to emergencies arising out of industrial disputes. This material covers the origins of the Public Safety Conservation Act 1932, its use in the 1951 Waterfront Strike, and the inclusion of s 79(2) in the Defence Act 1971. The significance of the repeal of the Public Safety Conservation Act in 1987 and the associated repeal of s 79(2) is discussed. In particular, the repeals point to the need for the establishment of the procedure for authorising the use of the armed forces to provide an essential service during an industrial dispute that is set out in cl 10(2) of the Defence Bill. (paras 16 and 181-204)

25 The distinction between the use of the armed forces to provide an essential service and their use in connection with coercive action taken to impose a settlement in a labour dispute is emphasised. The armed forces should not be used in the latter context. (paras 205-213 and 233)

26 The nature of an “essential service” is considered. The provision of an essential service as a public service under the Defence Act 1971 or the Defence Bill is not confined to the list of essential services appearing in the Eighth Schedule to the Labour Relations Act 1987. Relevant provisions of the Labour Relations Act 1987 are summarised. (paras 214-217; 222-227)

27 The industrial relations sector is one in which possible government intervention in emergencies must be considered in the context of that government's industrial relations policies. It follows that any legislative action to terminate a strike or lockout or to impose a settlement in a dispute should either be covered in labour legislation or in special legislation dealing with the specific emergency. (paras 218-221; 228-233)

28 The advantages and disadvantages of preparing emergency legislation in advance of a particular emergency are discussed. (paras 234-235)

29 The conclusion is reached that, apart from the provisions in cl 10 of the Defence Bill that enable the armed forces to be used to provide essential services during an industrial dispute if a special procedure is followed, there is no need for general legislation conferring emergency powers for use in connection with an industrial dispute. (para 236)

## RECOMMENDATIONS

30 The Law Commission recommends that

- cl 6 of the Defence Bill be deleted (para 102);
- that, to achieve drafting consistency, the words “or disaster” be deleted from cl 5(e) (paras 100; 102);
- that cl 10 of the Defence Bill - Use of Armed Forces in provision of public service - be enacted in the amended form set out as the Amended Clause 10 in Appendix C (para 179 and at 86);

- that the Ministry of Defence consider further the application of the law relating to the carriage of passengers or goods, when that carriage is performed by the armed forces as a public service for payment, with a view to ensuring that any necessary amendments are included in the relevant statutes when they come up for review - these statutes include the Shipping and Seamen Act 1952, the Sea Carriage of Goods Act 1940, and the Carriage by Air Act 1967 (cl 103 and the First Schedule to the Defence Bill - paras 107-114);
- that, subject to minor drafting changes, cl 11 of the Defence Bill - Powers of requisition - be enacted (para 67);
- that the Defence Bill be amended by including provisions authorising the Governor-General by Order in Council to call up members of the territorial and reserve forces, and to extend the term of service of members of the regular forces in the event of an actual or imminent emergency involving the deployment overseas of New Zealand armed forces; and that there should be a provision under which the Order in Council would state the reasons for the action taken and the House of Representatives would be informed of those reasons (para 78); and
- that, apart from the provisions of cl 10(2) and (7) of the Defence Bill (cl 10(2), (6) and (7) of the Amended Clause 10), there is no need for general legislation to be placed on the statute book giving emergency powers for use in connection with an industrial dispute. (para 236)

31 In the short time available before the Defence Bill was introduced on 17 October 1989, the Law Commission was able to have valuable discussions with officers of the Ministry of Defence and the Police on the issues discussed in this First Report. Clauses 10 and 11 of the Bill as introduced represent the measure of agreement then reached. Since the introduction of the Bill, the Law Commission has had the opportunity to continue its researches and to hold further discussions with interested agencies. These researches and discussions are reflected in this Report. We should like to express our appreciation for the help we have received.

## II

### **The Form of Emergency Legislation: General or Sectoral**

#### A CHOICE OF APPROACHES

32 The preparation of legislation covering emergencies involves a broad choice: should there be a single statute dealing with a wide range of emergency situations; or should relevant provisions be included in separate statutes each concerned only with the area in which a particular emergency situation may arise?

33 The Law Commission's second report on emergencies will discuss the difficulty of framing legislation that will, on the one hand, confer sufficient powers to deal with every conceivable situation that might have the character of a "national emergency", and, on the other, prevent the invoking of drastic powers by executive fiat in a situation where that is not justified. It is not thought possible to draft legislation that can encompass a wide range of "national emergency"

situations and yet define those situations with sufficient precision to ensure that the powers conferred are used only for the emergencies for which they are intended. The legislation would need to include wide emergency regulation-making powers similar to those in the Public Safety Conservation Act 1932. Indeed, to be comprehensive, the discretionary powers conferred would need to be wider than those in the 1932 Act - powers that were often criticised and eventually repealed in 1987.

34 A new “National Emergencies Act” might tighten up the procedures for control of emergency action by Parliament; include specific provisions aimed at ensuring that there was to be no derogation from named individual rights; and facilitate intervention by the courts. The fact remains that a general emergency statute even with these safeguards would impose few restraints on a New Zealand government, supported by a majority in the House of Representatives, in declaring a state of emergency and assuming wide emergency powers if it chose to do so.

## SECTORAL APPROACH

35 An alternative approach to the handling of emergencies is to include such emergency powers as may be required in sectoral legislation; that is, legislation tailored to the needs of particular kinds of emergency. Although there can still be difficulties in reaching a desirable degree of precision, this legislation can more readily define the emergency, set out the powers that are available to a government should that emergency arise, and describe the procedure by which those powers can be invoked. Safeguards appropriate to the situation can be included.

36 This sectoral approach was referred to by the Prime Minister, the Rt Hon David Lange, at the time of the introduction of the International Terrorism (Emergency Powers) Bill, which included a provision for the repeal of the Public Safety Conservation Act 1932. The Government, he said, was

not committed to any proposition whereby repeal of [the Public Safety Conservation Act 1932] leaves a vacuum in the power of a Government responsible for the security of the realm to take such steps as are needed to continue to provide security within New Zealand. The philosophy of the Government is that if special powers are needed in particular cases the power should be tailored to specific matters in specific pieces of legislation. (477 NZPD 6719, 3 February 1987)

In his second reading speech on the Bill, the Deputy Prime Minister, the Rt Hon Geoffrey Palmer, made the same point:

Where there is a need for emergency powers they should be specifically tailored to the type of emergency in contemplation. This Bill exemplifies that approach. (482 NZPD 10115, 30 June 1987)

37 The same approach is favoured in other countries. *States of Emergency* (1983), a study by the International Commission of Jurists of emergency legislation in 15 countries, contained the following recommendation:

The constitution should enumerate and define the situations which justify departure from the normal legal order, preferably distinguishing between various types of emergencies. (at 459)

Professor Andre Tremblay, in the Canadian contribution to States of Emergency, advocated that the Canadian War Measures Act 1914 be abrogated and replaced by sectoral emergency laws, each governing only a certain category of emergency and “[delimiting] clearly the special powers attributed to the executive to cope with the emergency situation” (at 36). The Canadians spent some years working on new emergency legislation - a task made more complex by the need to draw boundaries between federal and provincial jurisdictions. In their preparatory work, they identified five categories of emergency - war, international, public safety, public order, and economic. The first four of these found a place in the Emergencies Act 1988. They are dealt with in separate parts, each of which sets out the definition of the category of emergency, the procedure to be followed in declaring a state of emergency, and the specific powers that may be exercised by order or regulation once the emergency has been declared. There are provisions for compensation and Parliamentary supervision that apply to all four categories of emergency.

38 The sectoral approach can be said to have been followed in New Zealand legislation. There are numerous specific emergency powers scattered throughout the statute book, mostly in statutes not primarily concerned with emergency situations. The second report will provide a list and an analysis of these powers. There is great variation in their scope, the circumstances in which they can be invoked, the mechanisms for invoking them, and the degrees of constraint on their use. Obvious examples are: the Animals Act 1967 (disease in animals - including foot and mouth disease); the Plants Act 1970 (outbreaks of plant disease and pests); the Health Act 1956 (spread of infectious diseases); and the Fire Service Act 1975 (fire emergencies). In the Civil Defence Act 1983 the range of natural and other disasters is treated as a single sector.

39 Advantages of sectoral legislation are that specific and clearly defined emergency powers can be set out in the statute itself, and that a broad regulation-making power can, in most cases, be avoided. Further, the powers in the sectoral statute will be clearly laid down in advance and will already have been subjected to Parliamentary scrutiny. Thus the Public Safety Conservation Act 1932, a general emergency statute relying on a broad regulation-making power, is to be contrasted with the specific provisions that were passed when that Act was repealed. The International Terrorism (Emergency Powers) Act 1987 sets out the available powers in the Act itself with no provision for the making of regulations; and s 79A of the Defence Act prescribes the procedure to be followed when the armed forces are to be used to assist the police in maintaining law and order. The Civil Defence Act 1983, specifically directed at particular emergencies, contains a range of powers that can be used once a civil defence emergency has been declared; but there is in addition a power to make regulations that is available to supplement the civil defence emergency powers. (The regulation-making power is also attached to the provisions in the Act for the declaration of a state of national emergency. These provisions can be applied in a relatively narrow range of circumstances.)

40 The Law Commission is not only concerned with the executive powers that are needed and justified to deal with the response to emergency situations. It also has under consideration the procedures for bringing emergency powers into effect, and the controls and safeguards that need to be attached to their exercise, including appropriate protections for the rights of the citizen. These constraints on the exercise of emergency powers will be considered in the second report. The principles involved apply as much to sectoral as to general emergency statutes. Indeed, as with the conferment of emergency powers, sectoral legislation provides the opportunity to tailor the constraints to the circumstances of the sector involved. A significant feature of both the International Terrorism (Emergency Powers) Act 1987 and s79A of the Defence Act 1971 is the procedure prescribed for invoking the emergency powers - in each case the Prime Minister is

involved if available - and for ensuring that the House of Representatives is in a position to monitor the exercise of the powers.

41 The conclusion is that a sectoral approach should be adopted when considering emergency legislation. This conclusion has corollaries for the Law Commission's emergencies project. As has been pointed out, there are already New Zealand statutes that provide for the response to be made in emergency situations that may arise. This legislation is likely to include provisions directed at ensuring that the emergency does not arise - the mitigation phase - and authorising the making of plans for dealing with the emergency should it arise - the preparedness phase. And planning may include measures of assistance once the danger is over - the recovery phase. Clearly this approach, that all four emergency phases - mitigation, preparedness, response and recovery - should be dealt with in the legislation concerned with a particular sector, is the correct one. The Law Commission does not regard the making of detailed recommendations relating to this sectoral legislation as falling within its emergencies project.

42 Health and agriculture legislation falls within this category as does legislation dealing with economic emergencies such as a banking crisis or a sudden shortage of essential imported commodities. It will be concluded in Chapter V of this Report that legislation in the industrial relations sector, apart from the specific issue of the use of armed forces to provide essential services withheld during an industrial dispute, is in the same category.

43 Nevertheless, the principles that should be observed in the conferment of emergency powers and, in particular, the inclusion of appropriate constraints on the exercise of those powers, apply to all emergency sectors. The principles to be examined in the second report will therefore have general application. Thus they will apply to health, agricultural and industrial relations emergencies, and to specific economic emergencies, as they do to other emergencies.

44 This First Report is concerned with emergency powers that already appear in the Defence Act 1971, and others that might be appropriately included in a new Defence Act. It will also discuss the constraints that should be placed on the exercise of these powers. The second report, in addition to a discussion of general principles applicable to the conferment of emergency powers, will examine particular emergency sectors not already covered in legislation.

45 The second report will therefore discuss war emergencies, which form a sector distinct from the low and medium-level contingencies dealt with in Chapter III of this First Report. The discussion of war emergencies will include a consideration of the legislative steps that it may be appropriate to take in contemplation of such emergencies. The proposals will not, however, involve amendments to the Defence Act 1971 or to a new Defence Act.

46 In summary, the discussion of war emergencies in the second report will address:

- war or high-level armed conflict, conventional or nuclear, in which New Zealand is directly involved, whether or not there is a threat of invasion. This situation would call for
  - the mobilisation of national resources for the actual conduct of hostilities, and
  - the taking of measures for the protection of the civilian population;

- the threat or outbreak of major nuclear war in which New Zealand is not directly involved or a major nuclear event which poses a threat to New Zealand;
- armed insurrection or civil war within New Zealand.

### III

#### **Low and Medium-Level Contingencies**

#### DEFENCE POLICY

47 The capacity to deal with low and medium-level contingencies is now the central requirement of New Zealand defence policy. In such a contingency there may be a need:

- to requisition any ship, vehicle, aircraft, supplies or equipment; and
- to extend the service of members of the regular forces or to transfer the territorial or reserve forces to the regular forces for continuous service.

48 A review of defence policy, Defence of New Zealand (AJHR 1986-87 G 4A), was undertaken in 1987 and developed in subsequent Ministry of Defence Annual Reports (G 4) and in the New Zealand Defence: Resource Management Review 1988 (the Quigley report). These reviews marked a shift in strategy away from the concept of collective security that had been dominant in New Zealand thinking since the days of the League of Nations and had provided the rationale for involvement in Korea, Malaysia and Vietnam. New Zealand policy is now aimed at greater self-reliance and the maintenance, as far as possible, of the ability to meet or deter credible threats to our own security and that of the Island states for which we acknowledge responsibility. Such a regionally focused policy calls for a close defence relationship with Australia and involves a series of more detailed objectives:

- An effective military response to any low-level contingency within New Zealand's area of direct strategic concern, ie, mainland Australia, the South Pacific and the Ross Dependency. A Ready Reaction Force has been established to provide this response. Specific and credible low-level contingencies are: terrorist attacks and hijacking, evacuating New Zealand nationals in the event of disorder in the South Pacific, requests for help from partner nations in the Pacific whether in the event of a natural disaster or military emergency, and infringements of New Zealand's exclusive economic zone.
- The development of an Integrated Expansion Force, a unit of brigade-group size with logistic support, for deployment either independently or in concert with Australian forces, within our area of direct strategic concern where low-level conflict requires a larger commitment, or reinforcement, or to operate alongside Australian forces should there be medium-level conflict in our region. (AJHR 1988 G 4, 11)
- The development of the support necessary to enable the Integrated Expansion Force to conduct independent operations within New Zealand's area of direct strategic concern in medium-conflict situations.

49 The low or medium-level contingencies that are the thrust of the 1987 Defence Review and the Quigley report are unlikely to justify the exercise of wide emergency powers, although a low or medium-level contingency could develop into a war or higher-level armed conflict. Short of this, the powers which may possibly be required are discussed below.

#### A POWER TO REQUISITION

50 Should there be power to requisition means of transport or supplies for use in a low or medium-level contingency? The Quigley report was concerned with the resource implications of the defence objectives described above. Resource constraints, along with the emphasis New Zealand policy places on maritime objectives, increase the likelihood that situations will arise in which some call must be made on commercial or other resources if the armed forces are to carry out their obligations. For instance, the Ministry of Defence has not yet acquired the logistic support ship which the 1987 Defence Review described as "a further and essential part of our ability to mount effective operations in the region ..." (AJHR 1986-87 G 4A, 35).

51 The Government is understood to be prepared to lease or hire any additional defence resources that it needs and to meet whatever costs are involved. No doubt this policy will in most cases ensure that appropriate resources are available. However, a contingency is likely to have an emergency character calling for immediate action, and the situation could arise - as it might have done in the event of an escalation on the occasion of the Fiji coup - where there is no time for discussions as to cost and availability, particularly if immediately available vessels or aircraft are already under contract. Also, there could be a situation where, for political reasons, the owners of the resource are unwilling to make it available.

52 The 1983 Defence Review recognised that it may be necessary in an emergency to make rapid arrangements in circumstances which fall short of full national mobilisation. The Review continued:

As a first step it will be necessary to consider whether the existing legal framework for calling into service civilian owned equipment, such as ships, aircraft, and vehicles, is adequate. (AJHR 1983 G 4A, 37)

53 The problems that might arise are illustrated by two recent incidents:

- In an interview arising out of the Quigley report Lt General Mace, Chief of Defence Staff, when questioned about logistic support for the Ready Reaction Force is reported to have said that in "very exceptional" circumstances a ferry could be "commandeered" (*The Dominion Sunday Times*, Wellington, 5 March 1989, 2).
- In January 1989 the Ministry of Defence, faced with the problem of transporting troops and equipment from Timaru to Napier for the Golden Fleece army exercise, found it necessary to commission a Dutch roll-on roll-off vessel. Initially no New Zealand vessel was available; when one did become available it was offered at a price \$500,000 higher than the Dutch vessel (*The Dominion*, Wellington, 20 January 1989, 1).

The significance of this particular incident is that the Golden Fleece exercise was being prepared months ahead. The same difficulties could not be countenanced in an emergency to which there has to be an immediate response.

54 E D Deane, a former Director of Legal Services in the Ministry of Defence, in two published articles in which he criticised the repeal of the Public Safety Conservation Act 1932, has raised the issue of requisition. Citing the British requisitioning of 54 merchant ships during the Falklands war of 1982, he argues that the New Zealand defence forces, in carrying out their operations, would require considerable logistic support. He identifies transport, ie vessels and aircraft, personnel, refuelling capabilities, ammunition and food as basic needs which the forces would be incapable of providing in an active emergency situation. (Deane, "Public Safety Conservation Act: Repeal and the Armed Forces" [1985] NZLJ 266; "New Zealand Requisition of Ships in Time of War or Other Like Emergency" (1987) 4 MLANZ Journal, 21). Specialised equipment and spare parts can be added to Deane's list.

55 In his articles Deane also raises pertinent questions relating to the legal availability of merchant ships that might be the subject of requisition. He refers to provisions in ss 410(1A) and 424(3A) of the Shipping and Seamen Act 1952 under which the Minister of Transport can withhold consent to a transfer or mortgage of a ship registered in New Zealand "in the interests of national defence" (Deane 1987, 27-28).

56 The Ministry of Transport is working on legislation that will include a requirement that New Zealand-owned ships be registered in New Zealand. The Law Commission will follow the course of this Bill, with particular regard to its defence implications including those affecting the issue of requisition.

#### LEGISLATIVE POWER TO REQUISITION

57 There are a number of New Zealand Acts which authorise the requisitioning of property of various kinds in specified circumstances:

- Civil Defence Act 1983, s 64;
- Designs Act 1953, s 19;
- Health Act 1956, s 71(1);
- International Terrorism (Emergency Powers) Act 1987, s 10(2)(f);
- Patents Act 1953, s 58.

There are other general provisions which would allow the requisitioning of property. Examples are:

- Fire Service Act 1975, s 28;
- Fisheries Act 1983, s 79(1)(f);
- Forest and Rural Fires Act 1977, s 36.

58 Section 22 of the Civil Aviation Act 1964, which conferred a power to requisition aircraft, etc, was repealed in 1987 when there was a transfer of responsibility for the provision of airways services from the Crown to the Airways Corporation of New Zealand Limited (Civil Aviation Amendment Act (No 2) 1987). Section 22 authorised the making of a proclamation by the Governor-General, "[i]n time of war, whether actual or imminent, or of national emergency" for control of the flight of aircraft over New Zealand. It went on:

any such Proclamation may provide for taking possession of and using for the purposes of the Armed Forces of New Zealand any aerodrome or any aircraft, machinery, plant, material, or thing found therein or thereon, or any aviation equipment elsewhere, and for regulating or prohibiting the use, erection, building, maintenance, or establishment of any aerodrome, flying school, or any class or description thereof.

Section 22(3) provided a procedure for fixing compensation to persons suffering “direct injury or loss” under the proclamation.

## OVERSEAS PROVISIONS

59 A right to requisition for defence purposes is to be found in overseas jurisdictions. The most interesting is that in the Canadian Emergencies Act 1988. An international emergency is distinguished from a war emergency and is defined as “an emergency involving Canada and one or more other countries that arises from acts of intimidation or coercion or the real or imminent use of serious force or violence and that is so serious as to be a national emergency.” (s 27)

60 In such an emergency, the following are amongst the powers that can be taken by regulation (s 30):

- (a) the control or regulation of any specified industry or service, including the use of equipment, facilities and inventory;
- (b) the appropriation, control, forfeiture, use and disposition of property or services;
- ...
- (e) the authorisation of or direction to any person, or any person of a class of persons, to render essential services of a type that that person, or a person of that class, is competent to provide and the provision of reasonable compensation in respect of services so rendered;
- ...

Part V of the Emergencies Act 1988 contains detailed provisions for the payment of compensation.

61 It is clear that in the United Kingdom the Crown has the right to requisition British ships in territorial waters, and perhaps on the high seas or in foreign ports, in times of war or national emergency. Thus the requisitioning of merchant ships at the time of the Falklands crisis was effected by an Order in Council issued under the royal prerogative.

## NEW ZEALAND POSITION

62 During World War II, New Zealand took action to empower the requisitioning of ships - the Shipping Requisitioning Emergency Regulations 1939 (SR 1939/129) initially made under the Public Safety Conservation Act 1932 and kept in force under the Emergency Regulations Act 1939.

63 The effect of these provisions, and their subsequent revocation or repeal, on the existence in New Zealand of a prerogative power to requisition ships is unclear (de Smith and Brazier, Constitutional and Administrative Law, 6th ed, 1989, 132-133). Moreover, it is highly questionable whether the power could be exercised in the circumstances of a low-level or even a medium-level contingency.

## CLAUSE 11 OF THE DEFENCE BILL

64 The conclusion is that there should be a statutory power to requisition in the event of a low or medium-level contingency. Appropriate provision has been made in clause 11 of the Defence Bill (see Appendix B) which is based on a draft prepared by the Law Commission.

65 It can be expected that in most situations the procurement arrangements made by the armed forces will have ensured that adequate resources are available - if necessary by lease or hire - for contingencies that are likely to arise. The power of requisition would be intended for use only as a back-up in an exceptional situation which called for urgency and in which it was not possible to obtain necessary resources in any other way.

66 Attention is drawn to the following features of Clause 11:

- The power to requisition applies in “an actual or imminent emergency involving the deployment beyond New Zealand of any part of the Armed Forces...”. This formula is intended to identify a low or medium-level contingency of the kind discussed above. Therefore, one requirement is a decision to deploy armed forces beyond New Zealand.
- The power to requisition will not be available for the purpose of military exercises conducted in or beyond New Zealand: these do not constitute an “emergency”. Nor does it apply where the armed forces are used within New Zealand to provide a public service or aid to the civil power - see cls 5 and 10 of the Bill.
- The limited power conferred by cl 11 is supplemented by the statutory provisions giving a power to requisition listed in para 57. These include the power given in s 64 of the Civil Defence Act 1983 to requisition in civil defence emergencies. In emergencies where the armed forces are acting in the aid of the police, they are exercising police powers (cl 10(5)(b) of the Defence Bill). If, contrary to present thinking, any statutory power to requisition is thought to be required in these situations, the power should be vested in the police. This is an issue which will be discussed in the second report.
- Although the requisition power is concerned primarily with the acquisition of resources such as any “ship, vehicle, aircraft, supplies, or equipment” it extends to the requisitioning of any “land, building, or installation” that might be necessary to enable the use of those resources. Thus it may be necessary to requisition wharf facilities to hold supplies as a complement to the requisitioning of a ship.
- The Minister of Defence has to be satisfied that requisitioning is necessary before giving authority for it to take place. Once this political responsibility is accepted it is for the Chief of Defence Force to effect the requisition within the scope of the authority conferred.
- A procedure is laid down for the requisition.
- There is a provision for the payment of just compensation for the use of the property and for any loss or injury sustained as a result of that use.
- The clause does not confer any power to direct any person to perform any service.

RECOMMENDATION

67 It is recommended that cl 11 - **Powers of requisition** - of the Defence Bill be enacted.

Note: As a matter of drafting, the words “of the Defence Force” should be substituted for the words “of the Armed Forces” at the end of cl 11(3) and for the words “of any part of the Armed Forces” in cl 11(5).

#### SERVICE BY REGULAR, TERRITORIAL OR RESERVE FORCES

68 New Zealand defence policy now emphasises self-reliance and the capacity of the armed forces to meet low or medium-level contingencies in our own regional area of concern. Circumstances may arise in which our regular armed forces are unable to meet the commitments arising from this policy. Although it is not possible to foresee what these circumstances might be, here are two scenarios:

- There is a contingency in a South Pacific Island country involving the deployment of parts of the New Zealand armed forces. The contingency makes such extensive demands on the regular forces that it is necessary to call up personnel from the territorial or reserve forces for assignment to posts in New Zealand in place of regular forces sent overseas.
- A ship taken over on contract or requisitioned for use in a contingency requires a crew. There are insufficient volunteers or regular naval personnel available for this purpose.

Also, the situation may arise in which regular service personnel deployed overseas in a low or medium-level contingency have come to the end of their regular service obligations.

69 Under the provisions of the Defence Act 1971, the Governor-General may by proclamation “[i]n time of war or other like emergency”

- make an order that servicemen of the regular forces, entitled to be discharged or released, shall be liable to continue to serve;
- declare any part of the territorial forces to be liable for continuous service, either in New Zealand or elsewhere;
- transfer any part of the reserve forces to the regular forces or the territorial forces, so that the forces so transferred are liable for continuous service, either in New Zealand or elsewhere.

These provisions in ss 42, 43, and 44 of the Defence Act 1971 are now to be found in cls 39, 40, and 41 of the Defence Bill.

70 The assumption must be that a low-level contingency and possibly a medium-level contingency do not amount to a “war or other like emergency” that would bring them within the above provisions. It follows that there is no authority for the call-up of the territorial or reserve forces, or for extending the term of service of the regular forces, in circumstances such as those envisaged above.

71 An alternative, available under the Canadian Emergencies Act 1988 in the event of an “international emergency”, would be to empower the direction of persons, a course of action of

particular relevance in the second of the scenarios, ie, the crewing of a vessel (see para 60). There are provisions in New Zealand legislation under which a person can be directed to perform particular tasks. Animals Act 1967, s 6(2); Aviation Crimes Act 1972, s 15; Civil Defence Act 1983, s 73; Forest and Rural Fires Act 1977, s 38; International Energy Agreement Act 1976, ss 6, 7; Petroleum Demand Restraint Act 1981, s 7; Police Act 1958, s 53; Shipping and Seamen Act 1952, ss 293, 343. Nevertheless, it is not proposed that the power to requisition recommended in this Report should be supplemented by a power to direct persons to provide services. Involvement in a low or medium-level contingency may well mean involvement in hostile action. If this possibility is to be faced by civilian personnel it can only be on a contractual basis. Otherwise the armed forces - regular, territorial or reserve - should be used.

72 The issue of the peacetime call-out of the reserve forces was under discussion in Australia for some years. Under legislation enacted in 1964 (s 50A of the Defence Act 1903) the reserves could be called out for continuous service by proclamation "in time of war or in time of emergency". Paul Dibb in his Review of Australia's defence capabilities (1986) reviewed developments since 1964 and said:

In low-level contingencies, governments would be understandably reluctant to take the seemingly escalatory if not reactive step of declaring a defence emergency. Yet it is precisely during a period of tension potentially leading to a low-level conflict that some elements of the Reserve Forces would be most likely required. (at 157)

Dibb concluded that, if the value of the reserve forces was to be exploited fully in providing an effective defence capability for Australia, the issue of legislative provision for limited call-out short of the declaration of a defence emergency needed to be resolved (at 158).

73 In 1987 the Australian Government introduced legislation providing for the peacetime call-out of the reserve forces. The Minister of Defence, Mr Beazley, in his Second Reading speech in the House of Representatives, listed a range of tasks for which reserve units might be used. "The utility of reserve forces in a wider role has been made clear. This development is of course bound up with the notion of defence self-reliance for Australia." (1987 Vol H of R 153, 1049)

74 The amendment to the Defence Act 1903 adopted in 1987 (s 50F) reads

(1) Where, otherwise than in time of war or defence emergency, the Governor-General considers it desirable to do so for the defence of Australia, the Governor-General may, by Proclamation, call out any part of the Reserve Forces for continuous full time service.

Limits are placed on the period of full-time continuous service. The proclamation is to state the reasons for which it is being made, and the Governor-General is to communicate those reasons to each House of Parliament (s 50G).

75 Statements on the possible deployment of New Zealand territorial and reserve forces do not stress their usefulness over as wide a range of defence contingencies as do Australian statements. Nevertheless, the possible deployment abroad of territorial personnel is recognised in the following "Objectives Statement" in the Ministry of Defence Annual Report for the year ending 31 March 1988:

To develop the Integrated Expansion Force, a unit of brigade group size with logistic support, comprising Regular Force and Territorial Force Personnel, for deployment, either

independently or in concert with Australian forces, within our area of direct strategic concern where low-level conflict requires a larger commitment, or reinforcement, or to operate alongside Australian forces should there be a medium-level conflict in our region. (AJHR 1988 G 4, 11)

76 This statement in itself makes the case for the introduction of an amendment to the Defence Bill that will authorise the Governor-General by proclamation to declare that members of the territorial or reserve forces are liable for continuous service, or to extend the term of service of members of the regular forces, during a low or medium-level contingency. It is understood that the Minister of Defence proposes to introduce amendments to the Defence Bill to this effect. The Ministry of Defence is also examining, in consultation with the Department of Labour, the protection of the employment of territorial or reserve personnel called-up under the proposed amendments. (Compare the Volunteers Employment Protection Act 1973.)

77 It is to be noted that the Australian precedent, set out in para 74, requires the call-out of the reserves to be for "the defence of Australia". It would be difficult to bring some of the low-level contingencies which the New Zealand Defence authorities have in mind within this formula (para 48).

## RECOMMENDATION

78 It is recommended that there be an amendment to cls 39, 40 and 41 of the Defence Bill that will authorise the Governor-General by Order in Council to call up members of the territorial and reserve forces, and to extend the term of service of members of the regular forces in the event of an actual or imminent emergency involving the deployment overseas of New Zealand armed forces. There should be a provision, along the lines of that in the Australian Defence Act 1903, under which the Order in Council would state the reasons for the action taken and the House of Representatives would be informed of those reasons.

## IV

### Armed Forces Providing a Public Service and Aid to the Civil Power

## PROVISION OF COMMUNITY SERVICES

79 It has long been accepted in New Zealand that the armed forces should provide support for the New Zealand community. This was recognised in the 1987 Defence Review:

5.20 Maintaining or increasing resources for military purposes has a much greater justification if these resources provide capabilities which serve important peacetime purposes. Many of the skills and capabilities of the military can be called upon in the event of a major civil defence emergency or natural disaster. Greater attention will therefore be given to increasing the role our defence forces can play in disaster relief in New Zealand, and assisting hurricane-prone South Pacific island states.

5.21 Our defence forces also provide valuable assistance to the community on a day-to-day basis in a wide range of practical ways. These services include search and rescue, fisheries resource protection, hydrographic research, and support for Antarctic research activities and the Police's anti-terrorist role. All these operations are valuable contributions by the forces

to our national security. As has been noted, no direct military threat to New Zealand is in prospect. These services to the community, on the other hand, are in constant demand. (AJHR 1986-87 G 4A, 29)

80 The following selection of civilian tasks undertaken by the Royal New Zealand Navy, the New Zealand Army and the Royal New Zealand Air Force during the last three years has been extracted from Ministry of Defence Annual Reports (AJHR G 4):

- The Army provided support in the civil defence emergency on the East Coast during and following Cyclone Bola. On average, 98 personnel and 30 vehicles of all types were deployed.
- Army personnel throughout New Zealand were involved in exercise RU WHENUA, a major civil defence exercise held in May 1987.
- The RNZAF participated in various civil defence symposia and civil defence search and rescue field exercises.
- In the year ending 31 March 1987 RNZAF Iroquois and Sioux helicopters flew 285 hours in support of police anti-cannabis operations.
- On 17 October 1988 Burnham Camp received a request from the New Zealand Fire Service Commission for assistance in extinguishing a large fire in forest and scrub at Woodend Beach.
- During the period 12-31 December 1988 Army and RNZAF personnel were deployed into the Selwyn Plantations at Dunsandel, working alongside civilian firefighters.
- Two soldiers, using metal detectors, assisted police on 20 July 1988 in a search for a murder weapon at Oxford. On 28 January 1989, 60 soldiers assisted police in a search of the Taupo area for evidence in the Plumley-Walker murder case.
- A terminal operations team of one Army officer and 11 other ranks was deployed to McMurdo Station in October 1988 for air cargo unloading duties in support of the Department of Scientific and Industrial Research Antarctic programme.
- In the year ending 31 March 1989 fourteen return trips were flown to Antarctica involving 238 flying hours by Hercules aircraft.
- Hydrography was conducted in the East Cape area by HMNZ Ships *Monowai*, *Tarahunga*, and *Takapu*. In the year ending 31 March 1989 nine new charts, two specialised fishing charts and one new edition were published; and 61 charts were reprinted.
- In the year ending 31 March 1989 involvement in search and rescue operations was less than in previous years. Even so, there were 19 Orion flights and 44 Iroquois missions.
- During the year ending 31 March 1987 the RNZN Operational Diving Team provided 4851 man hours of assistance to government departments including the Ministry of Transport and the Police.

- In the year ending 31 March 1987 a total of 833 hours were flown by RNZAF Orion and Friendship aircraft on resource protection patrols.

81 New Zealand Governments have on relatively few occasions called upon the armed forces to maintain essential services withheld during an industrial dispute. The majority of instances have been in one particular area – the provision of air services. There have been other cases in which the Government has been prepared to use the armed services, but in which the scale of the threat to the service or the resumption of work has made that use unnecessary. Thus, in 1979, when a general strike by the Drivers Union was threatened, the Deputy Prime Minister, Mr Talboys, was reported as saying that the Minister of Defence would “look at the possibility of using the army as the effects of the strike became known ...” (*The Evening Post*, Wellington, 9 July 1979).

82 There are four services which have at times been provided by the armed services in industrial disputes: work on the waterfront, transport, firefighting and psychiatric nursing.

### *Waterfront*

There were two occasions (1942 and 1944) during the war years on which soldiers were used to load and unload vessels. In 1950 the watersiders refused to work certain cargoes. The Navy was called upon to unload perishable goods, but the watersiders resumed work. During the 1951 Waterfront Strike service personnel were employed on the wharves under the authority of the Waterfront Strike Emergency Regulations 1951 (SR 1951/24).

### *Transport*

In 1969, 1971, 1976, 1979 (twice), 1980 and 1983 the RNZAF, supported by Army personnel, mounted airlifts across Cook Strait. In 1981 the RNZAF participated in a trans-Tasman airlift of more than 2000 passengers stranded by industrial action on both sides of the Tasman. These airlifts were known as “Operation Pluto” (Pluto 1-8). [Operation Pluto is examined by Mark Pedersen, *Aid to the Civil Power: The New Zealand Experience* (1987), MA Thesis, Massey University.]

### *Firefighting*

In January 1975, Army and RNZAF firefighting crews went on duty in Christchurch when the Christchurch fire services went on strike.

### *Psychiatric nursing*

In 1971 soldiers were employed as orderlies at Oakley Hospital in Auckland on the occasion of a strike by psychiatric hospital nurses. Armed forces were used to staff the maximum security unit at Lake Alice Hospital in January 1987 during a strike by psychiatric hospital workers.

## AUTHORITY TO DEPLOY THE ARMED FORCES

83 It is a well established constitutional principle that Parliamentary authority must be obtained for the raising and maintaining of a standing army in peacetime (Bill of Rights, 1688, declared to be part of the law of New Zealand by the Imperial Laws Application Act 1988). This principle is reflected in the provisions of section 4(1) of the Defence Act 1971, and again in cl 5 of the Defence Bill, in that both authorise the Governor-General to raise and maintain armed forces.

84 Section 4(1) of the Defence Act 1971 goes on to set out the purposes for which the armed forces may be raised and maintained. Those relevant to the present discussion are:

- (a) The defence of New Zealand:
- (b) The protection of the interests of New Zealand, whether in New Zealand or elsewhere:  
...
- (e) The provision of assistance to the civil power either in New Zealand or elsewhere in time of emergency or disaster:
- (f) The provision of such public services as may from time to time be required by or for the Government of New Zealand.

(Paras (c) and (d) relate to the use of armed forces in fulfilment of international obligations such as those under collective security treaties and the Charter of the United Nations.)

85 These purposes, with the exception of para (f), have been retained in cl 5 of the Defence Bill in the following form:

- (a) The defence of New Zealand, and of any area for the defence of which New Zealand is responsible under any Act:
- (b) The protection of the interests of New Zealand, whether in New Zealand or elsewhere:  
...
- (e) The provision of assistance to the civil power either in New Zealand or elsewhere in time of emergency or disaster.

86 Clause 6 of the Defence Bill is new:

**6. Deployment of Armed Forces** - The Armed Forces may be deployed –

- (a) For any purpose specified in section 5(1) [sic] of this Act; and
- (b) For any purpose authorised by or under section 10 or section 11 [sic].

Note: There is no subsection (1) in cl 5, and cl 11, dealing with the power to requisition, is not concerned with deployment.

87 A good argument can be made for deleting the statement of purposes in cl 5 of the Defence Bill. New Zealand legislation had no such general list before 1971 and they appear to be uncommon elsewhere. But in case the clause is retained, the recommendations in this First Report take account of its present form and likely effect.

88 Clauses 5 and 6 of the Defence Bill, read together with the new cl 3 which expressly states that the Defence Act 1971 will bind the Crown, call in issue (in a way the Defence Act 1971 does not) the authority of a government in New Zealand to deploy its armed forces. It has been recognised that once forces have been raised the Crown has the prerogative power, exercisable on the advice of the government of the day, to deploy those forces as it thinks fit. Thus Lord Hodson said in *Chandler v Director of Public Prosecutions* [1964] AC 763, 800: “The Crown has, and this is not disputed, the right as head of the State to decide in peace and war the disposition of its armed

forces ...”.

89 Since the prerogative can be abridged by statute, the impact of the statement of purposes in s 4(1) of the Defence Act 1971 on the prerogative right to deploy is not completely clear. It appears to be the case that a government continues to have the right to deploy the armed forces not only for the stated purposes, but also for others.

90 The effect of cl 6 of the Defence Bill, read with cl 3, is to cast further doubt on the extent of the prerogative right to deploy the armed forces. Clause 6 says that they may be deployed for any purpose specified in cl 5 or authorised by cl 10. Does this mean that any residual right to deploy the armed forces for other purposes will be abrogated? This result would be particularly significant in relation to the use of the armed forces for purposes which are traditionally thought of as military (cl 5(a) - (d)).

#### DEPLOYMENT FOR MILITARY PURPOSES

91 So far as military purposes are concerned, cl 6 raises the possibility, for instance, that, in the case of a low or medium-level contingency, the use of armed forces on the basis that it was for the “protection of the interests of New Zealand ... .” might be questioned and contested in the courts on the ground that involvement in that particular contingency was not in the interests of New Zealand. This possibility conflicts with the principle that there should be no impediment, other than the possibility of a political sanction, to the deployment of the armed forces for any military purpose.

92 The situation was stated most emphatically by Lord Reid in *Chandler v Director of Public Prosecutions* [1964] AC at 791:

It is in my opinion clear that the disposition and armament of the armed forces are and for centuries have been within the exclusive discretion of the Crown and that no one can seek a legal remedy on the ground that such discretion has been wrongly exercised .... Anyone is entitled, in or out of Parliament, to urge that policy regarding the armed forces should be changed; but until it is changed, on a change of Government or otherwise, no one is entitled to challenge it in court.

93 Accordingly, there is good reason to delete cl 6 of the Defence Bill. The Ministry of Defence supports this conclusion.

#### USE OF ARMED FORCES FOR CIVIL PURPOSES

94 The early paragraphs of this chapter (paras 79-82) emphasise the extent to which the armed forces provide important peacetime services, including assistance in the event of natural and other disasters, day-to-day help to the community, and the provision of essential services during an industrial dispute. In addition, it is accepted that there may be circumstances in which the armed services will be called upon to support the police in the maintenance of law and order. These “non-military” purposes, which can be described as “civil purposes”, are recognised in paras (e) and (f) of s 4(1) of the Defence Act 1971, quoted in para 84 above. Paragraphs (e) and (f) are complemented by the provisions of ss 79 and 79A of the Defence Act 1971, which set out the circumstances in which the Minister of Defence may authorise the armed forces to perform a public service (s 79) and in which the Prime Minister or another senior minister may authorise the use of the armed forces to assist the civil power (s 79A). Here again, the question arises as to the impact of legislative provisions on the prerogative right to deploy. Is there a prerogative right to deploy

which would enable the armed forces to be used for civil purposes without complying with the requirements of s 79 and 79A?

95 The answer to this question is not clear, but in the Defence Bill it is resolved by cl 10. The words “Subject to the succeeding provisions of this section” in cl 10(1) are intended to exclude the possibility of reliance on prerogative powers to authorise the use of the armed forces to provide essential services withheld during an industrial dispute or to support the police in the maintenance of law and order in circumstances that do not fall within the requirements of cl 10(2)-(7).

#### AID TO THE CIVIL POWER

96 The provisions of the Defence Act 1971 and of the Defence Bill distinguish between provision of assistance to the civil power and provision of public services. Historically, the expression “assistance to the civil power” referred to the assistance given by soldiers to the civil authority in case of riot or other disturbances of the peace to prevent, contain or suppress violence. The British Manual of Military Law in Section V: “Employment of Troops in Aid of the Civil Power”, having recognised the common law responsibility of troops to provide this assistance, continues:

For convenience, there are included in this section ... notes on other forms of assistance to the civil power, for example, towards maintaining supplies and public services during strikes, combating floods and forest fires ... . (at 501)

It follows that in Britain a clear distinction has not been drawn between situations in which the armed forces are used in law and order situations, involving the possible use of force, and those in which they are used in other ways to provide support for the community.

97 The Australian Defence Instructions draw a distinction between Defence Force Aid to the Civil Power and Defence Assistance to the Civil Community. Aid to the civil power involves law enforcement measures in situations where there is a likelihood that members of the defence forces may be required to use force. The force to be used may differ in degree from deliberate acts of minor physical contact or restraint to the use of weapons or other means causing death or injury. Defence assistance to the civil community is “the provision of Defence resources for the performance of tasks which are primarily the responsibility of the civil community.” It includes law enforcement related tasks where there is no likelihood that Defence personnel will be required to use force. (DI(G) OPS 05-1)

98 These two categories of civil aid are recognised in s 4(1)(e) and (f) and in ss 79 (Provision of public services by Armed Forces) and 79A (Use of Armed Forces to assist the civil power) of the Defence Act 1971. The difference is that in New Zealand the second Australian category is described as “provision of public services”.

99 In the Defence Bill, purpose (f) - the provision of public services - has been omitted from cl 5, while purpose (e) - aid to the civil power - has been retained. The rationale given for this change is that the armed forces are not raised and maintained for the provision of public services. Nevertheless, as pointed out in paras 79 and 80, it is now recognised that the armed forces should provide support for the community (para 79).

100 The omission of purpose (f) from cl 5 does point up an anomaly in s 4(e) of the Defence Act 1971 which has been carried through to cl 5(e) of the Defence Bill. This is the coupling of assistance in a disaster with aid to the civil power. The use of the word “disaster” is usually

associated with natural disasters and those arising from breakdowns in technology. Assistance provided by the armed forces in such a case is more properly described as a public service. That assistance therefore falls under s 79 and not s 79A of the Defence Act 1971. Accordingly, the words “or disaster” should be deleted from cl 5(e) of the Defence Bill.

101 In New Zealand the civil power is represented by the police, acting within the authority conferred on them by law. This is reflected in the provisions of s 79A of the Defence Act 1971 and cl 10(3) of the Defence Bill. In providing aid to the police under these provisions the armed forces are undertaking tasks which are primarily the responsibility of the police. The armed forces act at the request of the police; their duty is to uphold the law; and they remain bound by the law. In other words, the armed forces recognise the primacy of the civil power (see paras 144-154).

## RECOMMENDATIONS

102 It is recommended

- that, unless the list of purposes in cl 5 is deleted, the words “or disaster” be deleted from cl 5(e); and
- that cl 6 be deleted.

## CLAUSE 10 OF THE DEFENCE BILL

103 Clause 10 of the Defence Bill replaces ss 79 and 79A of the Defence Act 1971. Since the Bill was introduced discussions between the Ministry of Defence, the Police and the Law Commission have led to agreement that parts of the clause should be redrafted. The changes have been incorporated in the Amended Clause 10 set out in Appendix C (at 86). In paragraphs 104 and 105 the proposed amendments to cl 10(1) are considered. In the remainder of the Chapter - paragraphs 106-179 - there is a discussion of issues that arise in relation to cl 10 as a whole and of the reasons for other proposed amendments to the clause. In so far as cl 10 is concerned with the provision of essential services during an industrial dispute, the discussion is supplemented by material in Chapter V.

104 As at present drafted, cl 10(1) provides that the armed forces “may continue to be deployed ... for the purpose of providing a public service, including assistance to the civil power.” In the Amended Clause 10, subsection (1) reads:

- (1) Subject to the succeeding provisions of this section, the Armed Forces may be used in New Zealand or elsewhere
  - (a) to perform any public service; or
  - (b) to provide assistance to the civil power in time of emergency.

105 The two substantive changes incorporated in the Amended Clause 10, subsection (1), are:

- The use of the word “deployment” is avoided - here and elsewhere in the Amended Clause 10 - as being inappropriate in the context of civil uses of the armed forces.

- The distinction is made between the use of the armed forces to provide a public service and their use to assist the civil power.

Like cl 10(1) of the Defence Bill, cl 10(1) in the Amended Clause 10 omits the requirement for ministerial authority contained in s 79 of the Defence Act (para 117).

## ISSUES TO BE DISCUSSED

106 The provisions of ss 79 and 79A of the Defence Act 1971 and of cl 10 of the Defence Bill raise a number of issues:

- The law governing the conveyance of passengers and goods by the armed forces for payment (paras 107-114).
- Provision of a public service, including the use of the armed forces to provide essential services during an industrial dispute (paras 115-122).
- Observance of military commands by members of the armed forces when carrying out civilian tasks (paras 123-133).
- The use of the armed forces to assist the police (paras 134-150).
- Armed forces assisting the police to act at the request of the police (paras 151-154).
- The powers and protection of the armed forces when assisting the police (paras 155-168).
- The availability to members of the armed forces of the defence of superior orders (paras 169-179).

## CONVEYANCE OF PASSENGERS AND GOODS BY THE ARMED FORCES FOR PAYMENT

107 clause 103 and the first schedule to the defence bill make a Consequential amendment to s 4(2)(a) of the carriage of goods act 1979. That Subsection will read as follows:

(2) nothing in this act applies to -

(a) The carriage of goods by the New Zealand Defence Force or the Ministry of Defence, except for the purpose of providing a public service in New Zealand or elsewhere for payment (other than payment by or on behalf of the military Authorities of any other State); ...

The effect is to preserve the exclusion of carriage of goods by the armed forces from the ambit of the Carriage of Goods Act 1979, except where the carriage is for the purpose of providing a public service for payment. At present the exclusion is effected by the interaction of s 4(2)(a) of the Carriage of Goods Act 1979 and s 79(6) of the defence act 1971.

108 in reconsidering s 79 of the Defence Act 1971, the other effects of Subss (4) and (6) were examined. These subsections at present provide:

...

(4) if any such ship, aircraft, vehicle, or equipment is operated for payment otherwise than for or on behalf of the military authorities of any other State, it shall, for the purposes of any other act relating to the carriage of passengers or goods, be deemed not to be in use for military purposes.

...

(6) Subject to subsection (4) of this section, the conveyance of passengers or goods under this section for payment shall be subject to the Carriage of Goods Act 1979, the sea carriage of goods act 1940, and the Carriage by Air Act 1967, and, so far as those Acts make no provision, the common law.

109 in relation to subsection (6), it was found that the Sea Carriage of Goods Act 1940, and parts I and II of the Carriage by Air Act 1967, already apply to carriage by the armed forces for the purpose of providing a public service for payment. There is therefore no need to make separate provision to this effect in the Defence Act 1971. The common law, similarly, can be taken as applying without so providing by statute. Accordingly, apart from the recommended consequential amendment to s 4(2)(a) of the Carriage of Goods Act 1979, s 79(6) of the defence act 1971 should not be reenacted.

110 the effect of subsection (4) was tested by attempting to apply it in the context of a major piece of relevant legislation - the shipping and seamen act 1952. the impact of the general formula in s 79(4) on the provisions of this act specifically applying to ships and in some cases seaplanes and hovercraft "set aside for or being used by the armed forces of New Zealand" is far from clear, and may possibly give rise to results neither foreseen nor desired.

111 it is therefore concluded that, as in the case of the carriage of goods act 1979, the application of all other acts dealing with the carriage of passengers or goods to the case where the armed forces carry passengers or goods for payment should be considered in the context of each individual act. in the meantime, the best course is not to reenact the general formula in s 79(4).

112 the extent to which the ordinary law should apply when the armed forces are performing a public service in return for payment should be governed by the following principles. when the service, though rendered for payment, still has an overwhelmingly military character, there may be good reason to exclude the application of some of the rules designed to protect the safety or the economic interests of members of the public. if, however, the service is performed on a commercial basis in competition with other providers, then, it seems, the carriage should so far as practicable be governed by the same law as applies to other carriers.

113 in applying this policy, there are complex questions to be resolved about the extent to which the relevant statutes affect the rights of the crown. the law commission is addressing this issue in a general way in the context of its reference on legislation. this includes a review of s 5(k) of the acts interpretation act 1924. it is also necessary to consider the extent to which the crown can be sued for any breach of its obligations both under statute and the common law. these matters will be taken up in the course of the reference recently given to the law commission on the legal status of the crown, including the crown proceedings act 1950.

*Recommendation*

114 Taking account of the outcome of these wider studies, the application of the law relating to the carriage of passengers or goods when the carriage is performed by the armed forces for payment should be further considered by the ministry of defence. The opportunity should be taken to do this whenever any of the relevant statutes comes under review.

#### PROVIDING A PUBLIC SERVICE, INCLUDING AN ESSENTIAL SERVICE DURING AN INDUSTRIAL DISPUTE

115 Section 79 of the Defence Act 1971 sets out a procedure to be followed where any part of the armed services is to be used for performing a “public service”. The Minister of Defence can authorise such a use if that Minister considers that it is in the public interest to do so.

116 Clause 10(1), (2) and (7) of the Defence Bill would replace s 79. the provisions of cl 10(1) and of the suggested redraft of cl 10(1) in the Amended Clause 10 have been discussed in paras 104-105.

117 Both cl 10(1) in the bill and cl 10(1) in the Amended Clause 10 omit the requirement for ministerial authority contained in s 79 of the Defence Act 1971. This change recognises that the majority of cases in which the armed forces are called upon to perform a public service - such as civil defence and search and rescue - have come to be recognised as part of their responsibilities and do not call for specific ministerial authority. Decisions to provide a particular service can be made at the appropriate level of command, with reference to the Minister of Defence and through the minister to cabinet if, in a particular case, this should be thought appropriate. Moreover, it is unnecessary to make specific provision for the use of ships, aircraft, vehicles or equipment belonging to the armed forces in connection with any public service; or to identify the account into which any payment for public services is to be paid (s 79(4) and (5)). The situation with regard to conveyance of passengers or goods for payment (s 79 (4) and (6)) has been discussed in paras 107-114.

118 clauses 10(2) effects a significant change. Paragraphs 81-82 show that there have been a number of occasions when units of the armed forces have been used to maintain essential services withheld during an industrial dispute. Since 1971 this use of the armed forces has been justified under the provisions of s 4(1)(e) and (f) and of s 79 of the Defence Act 1971. The implications of the repeal of s 79(2) by the Defence Amendment Act 1987 at the time of the repeal of the Public Safety Conservation Act 1932 are discussed in paras 193-199 and 202-204. The position now is that armed forces can be used in connection with an industrial dispute on the authority of the Minister of Defence alone and there is no provision ensuring that the circumstances in which that authority is given are brought to the attention of the house of representatives.

119 Under cl 10(2) the Prime Minister or another responsible minister is to report any authority given to provide a public service in connection with an industrial dispute to the House of Representatives. It is proposed that this provision be replaced in the Amended Clause 10 by the following more specific definition of the ministerial power to authorise the service:

(2) Where the Prime Minister or, if the Prime Minister is unavailable, the next most senior Minister available is satisfied that it is in the public interest to use any part of the Armed Forces to provide any public service in New Zealand in connection with an industrial dispute, the Prime Minister or the other Minister may authorise the use of that part of the Armed Forces to provide such public services in that connection as the Prime Minister or the other Minister may specify.

This redraft more clearly places the responsibility for giving the authorisation on the Prime Minister, or next most senior Minister available, and requires the authorising Minister to be satisfied that the use of the armed services is in the national interest and to specify the public service that is to be provided.

120 The actual procedure to be followed with regard to the authorisation under cl 10(2) of the Amended Clause 10 is set out in cl 10(6) and (7). It is the same as that in cl 10(2) and (7) of the Defence Bill and substantially the same as that now prescribed in s 79a in respect of an emergency involving armed services aid to the civil power. The minister granting the authority is to inform the House of Representatives forthwith, or, if the House is not sitting, as soon as practicable, that the authority has been given and why this action was taken.

121 The authority is to lapse on the expiration of 14 days after the day on which it was given unless the House of Representatives passes a resolution extending the authority for such period as is specified in the resolution. The effect of cl 10(7) is that, if the House is not sitting at the time the authority is given, and it is considered desirable to extend the duration of the authority, a government must ensure that it sits within the 14 day period to enable the passage of an extending resolution. Should it not be possible to summon Parliament because of its dissolution or expiry, the governor-general in executive council may extend the authority by proclamation.

122 The significance of the provisions of cl 10(2) and (7) of the Defence Bill in the overall context of emergencies arising out of industrial disputes is discussed in chapter V.

#### OBSERVANCE OF COMMANDS BY MEMBERS OF THE ARMED FORCES CARRYING OUT CIVILIAN TASKS

123 Although the use of troops in England to replace strikers goes back to the nineteenth century, a question arose after World War I: are members of the armed forces employed on civilian work subject to the code of military discipline that requires a soldier to obey the lawful command of a superior officer? In other words, is an order to perform duties which are ostensibly “non-military” a lawful command? The answer is not clear and the situation has been dealt with in a number of Commonwealth jurisdictions by express provision in statute or regulation.

124 This difficulty was one of the reasons given for the enactment of the Emergency Powers Act 1920, in Great Britain. Regulations made under the act have required members of the armed forces to obey commands given by superior officers when engaged in work of a non-military character. the Emergency Powers Act 1964 (UK), which gave a permanent statutory basis to an earlier wartime regulation, has the effect of providing that, where the defence council authorises members of the armed forces to be engaged in agricultural work or other urgent work of national importance, each such member is

..to obey any command given by his superior officer in relation to such employment, and every such command shall be deemed to be a lawful command within the meaning of the Naval Discipline Act, the Army Act 1955, or the Air Force Act 1955, as the case may be.

125 A comparable provision in s 282 of the Canadian National Defence Act RSC 1985 applies when service personnel are called out for service in aid of the civil power.

126 In New Zealand the Public Safety Conservation Act 1932 was based on the Emergency Powers Act 1920 (see para 184). Regulation 10 of the Waterfront Strike Emergency Regulations 1951 (SR

1951/24), made under the 1932 Act, authorised Service Boards to order the temporary employment of service personnel “in any kind of work specified in the order”. The regulation proceeded to require those personnel “to obey all commands given by a superior officer in relation to any work of a kind to which the order relates, and every such command shall be deemed to be a lawful command ...”

127 In 1971, parts of the separate Acts dealing with the three services, navy, army, and air force, were combined into one Act, the Defence Act 1971. Section 4 of the new Act added to the statutory list of purposes for which the armed forces could be raised and maintained the purposes (e) and (f) quoted in para 84, ie, the provision of assistance to the civil power and the provision of public services. These additions were significant in regard to the questions raised above. Statutory statements that the provision of assistance to the civil power and the provision of a public service are purposes for which the armed forces are raised and maintained gives those purposes the status of “military purposes”, with the consequence that commands addressed to service personnel who are so engaged are lawful commands if they otherwise meet the tests for lawful commands.

128 The provisions of s 79 and later s 79A of the Defence Act 1971, in specifying the circumstances in which a public service or aid to the civil power can be provided, give further statutory confirmation that the provision of this assistance is a “military purpose”.

129 The provisions of the Armed Forces Discipline Act 1971 are to the same effect. Under s 6 of that act all regular members of the armed forces and all officers of the territorial and reserve forces are subject to the Act at all times. Significantly, too, other members of the territorial and reserve forces are subject to the act when called out under any enactment in aid of the civil power; called out under any enactment to render assistance in a disaster. it is to be noted that a call-out to provide a public service, other than to render assistance in a disaster, is not expressly included.

130 clause 5 of the defence bill, which authorises the raising and maintaining of the armed forces for specified purposes, has already been discussed (paras 83-102). as has been seen, the clause could be relevant in helping to establish that the performance of a public service or the giving of aid to the civil power is a military purpose. but, even without cl 5, cl 10 as it stands, and even more clearly as revised in the amended clause 10, puts this question beyond doubt.

131 clause 10(1) is discussed in paras 104 and 105. the succeeding subclauses (2), (3), (6) and (7) set out the procedures to be followed in the use of the armed forces to provide a public service in connection with an industrial dispute or to assist the police in certain public order emergencies. there can be no suggestion that members of the armed forces authorised under these provisions to provide a public service or to assist the civil power are not carrying out a military purpose in respect of which they are liable to be charged in respect of disobedience to any otherwise lawful order given for the attainment of that purpose. the observance of the prescribed procedure could be important. the use of the armed forces in a particular emergency may be controversial and there may be opposition not only from the public but also from members of the armed forces who are directed to provide the assistance. in these circumstances, failure to follow the procedure would give those members the opportunity to claim that the direction was unlawful.

132 clause 10(5)(a) of the defence bill under which members of the armed forces deployed in aid of the police “remain under military command” was included with the problems discussed above in mind. it is now thought that this provision is unnecessary and it does not appear in the amended clause 10. (the drafting in cl 10 of the bill is defective in that the provisions of cl 10(5)(a) would be

relevant not only when the armed forces are assisting the police but also when they are providing a public service, particularly if that public service was the provision of essential services during a strike.)

## RECOMMENDATION

133 It is recommended that cl 10(5)(a) be deleted. (This recommendation is implemented in the Amended Clause 10.)

## THE USE OF THE ARMED FORCES TO ASSIST THE POLICE

### *Police Act 1958 and Crimes Act 1961*

134 Under the common law, which governs soldiers and civilians alike, anyone who failed to come to the aid of the civil power when the civil power required assistance to enforce law and order committed an offence. In New Zealand this common law offence has been abrogated and the position is now covered by s 53 of the Police Act 1958. Under this section any member of the police may call upon any male, not under the age of 18 years, to apprehend or secure any person or to convey any person in his charge to a police station or other place. This statutory obligation is narrower than that at common law.

135 The power thus given to the police to call upon any male member of the armed forces to perform a limited range of tasks is complemented by the provisions of ss 34 to 47 of the Crimes Act 1961. These sections, while conferring a range of powers that can be exercised by members of the armed forces as members of the public in effecting arrests, or assisting in the prevention of certain offences, do not confer on the police any additional authority to require members of the armed forces to become involved. If they do become involved they have the protections referred to in para 156.

136 During the Queen Street (Auckland) riot in 1984 assistance given to the police by a party of sailors is said to have been provided under the above provisions (see Pedersen, referred to in note to para 82, at 15-16). Pedersen notes that during the 1981 Springbok tour soldiers were withdrawn from the vicinity of Athletic Park before the rugby test took place. One of the reasons for this action was to prevent "the eventuality of a hard pressed police officer invoking the provisions of the Police Act 1958 and the Crimes Act 1961 to gain military reinforcements. This would have placed the senior military officer in an awkward and unpleasant situation." (at 104)

137 The obligation to assist under s 53 of the Police Act 1958 falls equally on a member of the armed forces and on a private individual, but it is the obligation of the individual member and not of the part of the armed forces to which he is attached. In the same way, the protections afforded by the Crimes Act provisions apply to members of the armed forces in their capacity as individuals. Since the armed forces operate as organised units and not as a series of individuals, s 53 could not be used to compel assistance by the armed forces acting as such. However, it had been understood both by the Police and the Ministry of Defence that a unit commander could order the members of the unit to provide assistance on an individual basis. The question may arise as to whether such an order is a lawful command which members of the unit are obliged to obey. If they did obey they would have the protections provided by the Crimes Act 1961. However, the Police and Crimes Act provisions are an unsatisfactory basis for armed forces assistance to the civil power. Consequently, the police welcomed the passage in 1987 of s 79A of the Defence Act 1971.

## *Section 79A of the Defence Act 1971*

138 The enactment in 1987 of s 79A of the Defence Act 1971 was made necessary by the repeal at that time of the Public Safety Conservation Act 1932 and of s 79(2) of the Defence Act 1971. The repeals involved the removal of such restraints as existed on a government decision to use the armed forces to assist the police in time of civil disturbance. (paras 193-199 and 202-204)

139 Section 79A of the Defence Act 1971 is concerned with emergencies involving the death of or serious injury to any person and the destruction of or serious damage to property. It sets out circumstances in which the Prime Minister or another senior minister can authorise the use of the armed forces to assist the police in dealing with such an emergency and the procedures to be followed in connection with the obtaining of that authority. Clause 10(3)-(7) of the Defence Bill would replace s 79A. The procedure prescribed in cl 10(6) and (7) for referring the authorisation to the House of Representatives, which has already been discussed in paras 119-121, is substantially the same as that contained in s 79A(5) and (6). However, there are significant changes in cl 10(3)-(5). These changes arise from the initiative taken by the Law Commission, but further discussion with the interested agencies has resulted in agreement that these subclauses need to be amended.

140 In the Amended Clause 10, subclause (3) is worded as follows:

- (3) Where the Prime Minister or, if the Prime Minister is unavailable, the next most senior Minister available is satisfied, on information supplied by the Commissioner of Police or a Deputy Commissioner of Police,
- (a) either
- (i) that there is in New Zealand an emergency in which one or more persons are threatening to kill or seriously injure, or are causing or attempting to cause the death of or serious injury to any other person or the destruction of or serious damage to any property; or
  - (ii) that such an emergency is imminent; and
- (b) that the emergency cannot be dealt with by the Police without the assistance of members of the Armed Forces exercising powers that are available to members of the Police, the Prime Minister or the other Minister may authorise any part of the Armed Forces so to assist the Police in dealing with the emergency.

141 Section 79A(1) deals only with an emergency that is “occurring”. In practice, it will be important that, if possible, intervention should take place before death, injury, destruction or damage occurs. Clause 10(3) of the Defence Bill, which consolidates s 79A(1) and (2), enables armed forces' assistance to be provided where the emergency is either “actual or imminent”. However, the drafting of cl 10(3)(a) is imperfect in that it suggests that there can be an imminent emergency in which one or more persons are “causing or attempting to cause the death of ... any other person”. In the Amended Clause 10, the redraft of cl 10(3)(a) meets this difficulty by distinguishing an actual from an imminent emergency.

142 Under s 79A(2), the Prime Minister, or other authorising minister, has to be satisfied, on information provided by the police, that the emergency is one which cannot be dealt with without the assistance of the armed forces. Since the emergency is “occurring”, the minister is not required to address the question of its existence. However, the question whether an emergency is imminent

calls for the exercise of judgment and this is required of the minister under cl 10(3) in both the Defence Bill and the Amended Clause 10.

143 The emergencies envisaged in s 79A and cl 10(3) are those in which the armed forces may be required to exercise force, or to take some other action involving interference with the rights of individuals. However, there will be many emergency situations in which the police require only the logistical or administrative assistance of the armed forces - such as the use of a helicopter. In these circumstances, it should not be necessary to require the Prime Minister's authority and to have the grant of that authority referred to the House of Representatives. The distinction is one which presents drafting difficulties which the words "exercising the same powers as members of the Police" in cl 10(3)(b) of the Defence Bill were intended to meet. This formula perhaps went too far in suggesting that members of the armed forces will, in practice, exercise all the powers of a trained member of the police. Clearly, the police powers to be exercised by members of the armed forces assisting the police in an emergency should be limited to those required for that purpose. To this end cl 10(3) of the Amended Clause 10 substitutes "exercising powers that are available to members of the Police." A complementary change is made at the end of cl 10(3) of the Amended Clause 10. These changes need to be read with the comments on the powers and protections of the armed forces, discussed in paras 155-168.

#### *Areas of uncertainty*

144 The enactment of cl 10(3) - (7) of the Amended Clause 10 will leave scope for uncertainty as to the use of the armed forces in the event of a terrorist emergency or the outbreak of civil disturbance. The areas of uncertainty cannot be removed by legislative enactment; they can be resolved only by the exercise of the political judgment of the government of the day and discretion on the part of the police and the armed forces. Two particular areas of uncertainty are:

- The parallel existence of the provisions of the Police Act 1958 and the Crimes Act 1961 on the one hand and s 79A of the Defence Act 1971 (cl 10(3)-(7) of the Defence Bill) on the other.
- The distinction between logistic and administrative support for the police and involvement in police enforcement action.

145 The primacy that must be accorded to the civil power means that the use of the armed forces to supplement police responsibilities in the enforcement of law and order is a step that should be taken only as a last resort. Indeed, Sir Robert Mark, former Commissioner, Metropolitan Police, London, in advice to the Australian Commonwealth Government, has said:

The over-riding principle governing [military aid to the civil power] is that troops should never, in any circumstances, be used to confront political demonstrators or participants in industrial disputes. Whatever logistical support they render, they must be protected by police who alone must deal with any violence arising from objection to their support. (*Report to the Minister for Administrative Services on the Organisation of Police Resources in the Commonwealth Area and Other Related Matters, 1978, 15*)

Sir Robert recognises that in today's conditions there is a need to make contingency plans for military aid to deal with terrorist situations in which defensive armour, sophisticated weaponry and specialised training might minimise loss of life (at 57). This need is recognised in New Zealand. The police maintain an anti-terrorist squad which operates in close liaison with the Ministry of

Defence to ensure effective co-ordination in the event of a terrorist operation requiring defence support.

146 The decision to use the armed forces as a last resort to support the police in their law enforcement function is clearly one that should be taken at the highest level under the procedure provided by s 79A (cl 10(3) - (7) of the Defence Bill). There may, however, be situations in which immediate action is required and where the police wish to take advantage of the provisions of the Police Act 1958 and the Crimes Act 1961 in calling upon members of the armed forces who are readily available to act in their personal capacity. Nevertheless, such assistance by members of the armed forces with their training (and possibly their equipment) cannot in fact or in the eyes of the public be equated with assistance afforded by ordinary members of the public. It can be expected, therefore, that the police will in all but the most extraordinary circumstances use the procedures provided by s 79A and cl 10(3) - (7) of the Defence Bill.

147 The distinction between the use of the armed forces for administrative and logistic support and their use in assisting in the maintenance of law and order arose in New Zealand during the 1981 Springbok tour. The Government decided not to declare an emergency under the Public Safety Conservation Act 1932 but to rely on s 79 of the Defence Act 1971. Initially it was intended that armed forces involvement should be restricted to logistic support such as transport and accommodation, but, as the emergency heightened, Cabinet decided "that Defence can be called upon to provide logistic and personnel support to the Police compatible with the need to maintain public order at a level which the public expects the Government to sustain within the law." (See Pedersen, referred to in note to para 82, at 88.)

148 The Cabinet decision led to the use of army engineers to erect barbed wire entanglements both outside and within rugby grounds. Explosive Ordnance Disposal teams were on standby throughout the tour. The police were provided with transport, rations and accommodation in military establishments and they were allowed to conduct riot training in army camps. The RNZAF made 880 flights throughout the country in support of the police operation.

149 Pedersen records that "At no time during the tour were service personnel engaged in policing operations, nor were they used to replace police who had been released from non-essential duties to carry out Springbok Tour tasks." When soldiers were erecting wire, police were present to provide security. Throughout, the Ministry of Defence was concerned to keep military involvement in the tour to a minimum. (at 87-88; 92; 105) 150 Section 79A of the Defence Act 1971 was not enacted until 1987. The intention is that the wording of the Amended Clause 10 should make the position with regard to administrative and logistic support for the police clearer than it was under ss 79 and 79A when read together (para 143). Nevertheless, the circumstances of the Springbok tour illustrate the difficulty in drawing a clear-cut distinction between the provision of logistic and administrative support and involvement in police action involving the use of police powers. Logistic and administrative level support can be expected to be an everyday event (see para 80). However, there will be situations, where public feelings have been aroused, that call for a substantial level of armed forces involvement short of enforcement action. In such cases governments should use the procedure that would be provided under cl 10(2) - (7) of the Amended Clause 10 and advise the House of Representatives of the steps that are authorised and the reasons for those steps.

#### ARMED FORCES ASSISTING THE POLICE TO ACT AT THE REQUEST OF THE POLICE

151 The police, as representing the civil power, are responsible for the maintenance of law and order. Like s79a(2) of the Defence Act 1971, cl 10(3) and (4) make it clear that it is for the police

to consider whether they need to seek the help of the armed forces in a particular operation. The example usually thought of is an operation against hijackers or terrorists calling for specialised equipment or training that the police do not have. If the necessary authorisation is given by the minister and the armed forces are introduced into an operation, the enforcement of the law remains a police responsibility. It is for the police to determine the task that is to be allocated to the armed forces. It is then for the officer commanding the armed forces to determine how that task is to be carried out. In practice, the action taken will be the result of collaboration between the two commanders.

152 Sir Robert Mark in his report (referred to at para 145) said:

There is no question of one service coming under command of the other. The police commander would simply indicate to the military commander the problem and the target and offer him whatever support he required whilst playing a containing or supporting role. The army commander would act in accordance with the joint police/army plan. He would not be under the command of the police commander but would act in conjunction with him... (at 59)

153 The procedures set out in cl 10(3) and (4) of the Defence Bill reflect the relationship between the police and the armed forces just described. It is the police who take the initiative in seeking the assistance of the armed forces, and, if and once ministerial authority has been obtained, the armed forces act at the request of the police commander who is responsible for setting the objective. Section 79a (3) of the Defence Act 1971 uses the formula "shall, in providing such assistance, act at, and in accordance with, the request of the member of the Police who is in charge of operations in respect of that emergency." the words "and in accordance with" have been deleted since they might be regarded as limiting the responsibility which the officer commanding the armed forces on the spot, and the officer's superiors, have for determining how those forces are to be used to achieve the objective.

154 Section 12 of the International Terrorism (Emergency Powers) Act 1987 provides that members of the armed forces assisting the police in an emergency falling within the provisions of the act can exercise the emergency powers given to police under the act "as if that member of the armed forces were a member of the police." these powers can be exercised only "at, and in accordance with, the request of a member of the police." this provision will be discussed in the law commission's second report.

## THE POWERS AND PROTECTIONS OF THE ARMED FORCES

155 Given that authority has been granted for the armed forces to assist the police in an emergency that will possibly involve the use of force, the question arises as to what powers members of the armed forces can exercise and what protections they should have.

### *Crimes Act 1961*

156 The provisions in the Crimes Act 1961 referred to in para 135 need to be taken into account in answering this question. Members of the armed forces have the same obligations and protections under the law as other citizens. Therefore, members of the armed forces can exercise in their personal capacities the powers of arrest given in ss 35-38 of the Crimes Act 1961. Furthermore, they are justified in using such force as may be reasonably necessary:

- to overcome resistance to an arrest (s 39);

- to prevent an arrested person from escaping (s 40);
- to prevent the commission of certain offences (s 41);
- to prevent a breach of the peace (s 42);
- to suppress a riot (s 43); and
- to defend themselves or others (s 48).

157 Nevertheless, these powers are not as extensive as those available to the police under common law or statute. The real issue is the extent to which members of the armed forces, while assisting the police, should have the powers of the police.

158 Mr Justice Hope, in his *Protective Security Review*, a 1979 report to the Australian Commonwealth Government, made the point that the duties and obligations of soldiers acting in aid of the civil power are analogous to those of the police, rather than those of private citizens:

If the Defence Force is called in to assist the civil power to prevent, contain or suppress violence, they are doing something which it is primarily the role of the police to do but which in the circumstances the police are unable to do or, because of the special skills and equipment needed, they should not do. Subject to whatever results from their being members of the Defence Force, servicemen should therefore have the same obligations and the same powers as police officers performing the same task. (at para 10.93)

159 There will be situations where it is important for members of the armed forces to be able to exercise particular police powers. These include the power to enter on premises to prevent the commission of an offence that would be likely to cause immediate and serious injury to persons or property (s 317(2), Crimes Act 1961) and the power to search any person in a public place who is suspected of being in possession of any firearm, ammunition or explosive in breach of the Arms Act 1983 (s 60(1)). Another useful power is the power to require drivers of motor vehicles to identify themselves and produce their drivers' licences (s 41 of the Transport (Vehicle and Driver Registration and Licensing) Act 1986). The motor vehicle is now an important tool of persons engaged in criminal activity and these persons are vulnerable through their vehicles which are much more rigorously documented and controlled than the persons themselves.

160 The provisions of s 12 of the International Terrorism (Emergency Powers) Act 1987, under which the emergency powers given by the Act may be exercised by any member of the armed forces who is assisting the police, are referred to in para 154.

#### *Defence Act 1971 and Defence Bill*

161 Section 79A(4) of the Defence Act 1971 deals with the issues we have been discussing by the following provision:

(4) For the purposes of civil and criminal liability, every member of the Armed Forces shall, while acting in accordance with any request given pursuant to subsection (3) of this section, be treated as if that member were a member of the Police.

This subsection is replaced by cl 10(5)(b) of the Defence Bill:

(5) Every member of any part of the Armed Forces so deployed –

...

(b) Shall, subject to any other enactment, have all the powers of a member of the Police.

162 In the Amended Clause 10, the following text for cl 10(5) is proposed:

(5) Every member of any such part of the Armed Forces

- (a) may, for any purpose necessary to assist the Police in dealing with the emergency, exercise any power of a member of the Police; and
- (b) shall, for the purposes of civil and criminal liability, have the protections of a member of the Police, in addition to all other protections which that member of the Armed Forces may have.

163 The statement in s 79A(4) of the Defence Act 1971, that members of the armed forces, acting under the section, are to have the criminal and civil liability of members of the police, leaves open the question whether members of the armed forces can exercise the powers of the police. On the other hand, the wording of cl 5(b) of the Bill - that a member of the armed forces is to have all the powers of a member of the police - is based on the view that this grant of power carries with it the civil and criminal liability of a member of the police.

164 The Law Commission's second report on emergencies will consider the powers of the police to deal with emergency situations that arise in the public order area. In particular, there will be a discussion of the special powers, if any, that should be available to the police in the event of an emergency, and of the procedure by which these powers could be invoked.

165 Some of the issues involved will also fall within the province of the project on criminal procedure that the Law Commission is undertaking. That project also calls for a consideration of the powers of the police.

166 Uncertainty about the powers of the police in emergency situations has, of course, a bearing on the issue of the powers that should be available to the armed forces when they are assisting the police. Except in the case of Service Police, members of the armed forces who are assisting the police are not likely to have had the benefit of police training. They should not, therefore, be placed in the position of being expected to exercise the powers to arrest and search normally exercised by the police, particularly where they are operating without police in attendance.

167 Clause 10(5)(a) and (b) in the Amended Clause 10 attempt to clarify the position for the limited purposes of the Defence Bill. Under (a), the armed forces would have only those police powers necessary to deal with a particular emergency. Because the scope of police powers is not always capable of being easily ascertained, the provision does not have the precision that is desirable, but further consideration will be given to the issues involved in the course of the Law Commission's work on criminal procedure.

168 Clause 10(5)(b) in the Amended Clause 10 in effect reenacts s 79A(4), with the important additional words "in addition to any other protections which that member of the Armed Forces may have". This addition will dispose of any uncertainty as to whether members of the armed forces continue to have the benefit of provisions such as s 34 of the Crimes Act 1961 which gives a person who assists a constable in making an arrest wider protection from criminal and civil liability than the constable. The addition is also important in the context of superior orders. See paras 169-179.

THE DEFENCE OF SUPERIOR ORDERS

169 The issue of whether service personnel are bound to obey superior orders assumes particular importance when members of the armed forces are used to assist the police in the maintenance of law and order. They can be confronting civil situations with which they are unfamiliar, and which may involve the dilemma of choosing between obeying the commands of their superior officers, and observing the ordinary criminal law with its emphasis on individual responsibility. As Dicey explained (*A v Dicey*, *The Law of the Constitution*, 10th ed, 302-306): soldiers may be condemned by a court-martial if they disobey an order and by a judge if they obey it. The question, therefore, arises as to whether a member of the armed forces, ordered to do something illegal, is subject to civil or criminal sanctions for carrying out that order.

170 There are three distinct approaches to this question. The first is that obedience to superior orders is a defence to a criminal charge. There is the intermediate position that it is a defence to obey orders which are not manifestly unlawful or which are reasonably believed to be lawful. The third approach is that obedience to superior orders is not a defence.

171 The British Emergency Powers Act 1964 and Regulation 10(2) of the Waterfront Strike Emergency Regulations Act 1951 (SR 1951/24) in New Zealand required members of the armed forces to obey commands given in connection with the activities specified in the legislation, and also provided that those commands were to be deemed to be lawful commands. These provisions precluded the legality of the commands being called into question should the defence of superior orders be invoked by members of the armed forces charged with a criminal offence.

172 The above provisions may be compared with the wording of s 47 of the Crimes Act 1961 (not included in the 1989 Crimes Bill):

**47. Protection of members of New Zealand forces -**

- (1) Every one bound as a member of the New Zealand forces to obey the lawful command of his superior officer is justified in obeying any command given him by any such officer for the suppression of a riot, unless the command is manifestly unlawful.
- (2) It is a question of law whether any particular command is manifestly unlawful or not.

The defence afforded by this section is limited in its application to orders given for the suppression of riots. However, the “manifest illegality principle” on which it is based was, prior to World War II, viewed as having general application by the British *Manual of Military Law* and the New Zealand Army *Code of Military Law*. These military authorities stated that if commands were not obviously and decidedly in opposition to the law of the land then the duty of the soldier was to obey.

173 It is generally accepted that under the common law obedience to superior orders is not a defence to a criminal charge (Halsbury's Laws of England (4th ed) vol 11, para 27). In the words of Mr Justice Murphy in a 1984 High Court of Australia decision (*A v Hayden* 156 CLR532 at 562):

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

This approach was adopted in the 1944 edition of the British *Manual of Military Law* and is now supported in the New Zealand *Manual of Armed Forces Law*. The New Zealand Manual recognises

that a person who is bound to obey a superior is under a legal duty to refuse to carry out an order to do something that is manifestly illegal. It then goes on to say:

3. As a general rule, even if the order is not manifestly unlawful the recipient is still criminally responsible if he obeys the order and in doing so commits a crime, although it may give rise to a defence on other grounds, eg by negating a particular intent which may be a complete defence or reduce the crime to one of a less serious nature, or by excusing what appears to be negligence. (DM 69, 9-24)

174 In recent legal writing, there have been pleas for a return to the middle ground represented by the “manifest illegality” principle, and recognised in s 47 of the Crimes Act 1961. (See Brownlee, “Superior Orders - Time for a New Realism?” [1989] Crim LR 396; Brewer, “Their's Not to Reason Why - Some Aspects of the Defence of Superior Orders in New Zealand Military Law” (1979) 10 VUWLR 45; Lee, *Emergency Powers* (1984) 241-247.) The point is made that these days the armed forces are more likely to find themselves engaged in giving aid to the civil power or in providing a public service than in more traditional military roles. It is said that, in these circumstances, members of the armed forces should be protected against charges if they can establish that they acted bona fide in obedience to an order which, even if it was unlawful, was not manifestly so. Under this view, the strict position that unlawful superior orders do not provide a defence

... is unrealistic because it requires the individual soldier to be able to make decisions on legal niceties in situations where sometimes his or her military competence and perhaps even instinct for physical survival will compel instant obedience. (Brownlee at 411)

175 The New Zealand Court of Appeal, in *Police v Vielle* [1989] 1 NZLR 521, a recent case involving the use of the armed forces in a typical military situation, decided that it was not necessary to consider argument on the superior orders point. The Court referred to the British and New Zealand *Manuals* and to s 47 of the Crimes Act 1961 and said of the latter:

That special provision tends by implication to support the view that in general a superior order cannot be itself a defence if what was done or ordered to be done was unlawful. While not doubting the propositions contained in the *Manuals*, we think it better not to give a formal answer to [the question of the availability of the general defence of acting under superior orders where the issue does not arise]. (Cooke P at 524)

176 The Crimes Bill, now before Parliament, does not contain a clause corresponding to s 47. The explanatory note states that ss 43-47 of the present Act make separate provision for the suppression of riots by the police, by members of the armed forces and by others: “[Clause 40] applies the same provision to all.” Thus the distinction that is made in respect of members of the armed forces would not be continued. Clause 40 provides:

**40. Use of force in preventing riots or certain other offences** - Every person is justified in using such force as may be necessary –

- (a) To prevent or suppress a riot; or
- (b) To prevent the commission of any offence that is likely to cause –
  - (i) Immediate and serious injury to any person; or

- (ii) Immediate and serious damage to any property.

The effect of this change would be to leave the applicability of the defence of superior orders in a riot situation, as in other situations, to the common law.

177 The status of the defence of superior orders is relevant in contexts other than those with which we are concerned in this First Report, ie, the use of members of the armed forces in providing a public service or aid to the civil power. It follows that any steps to give rules concerning the effect of superior orders statutory imprimatur should await their examination against a wider background. In the meantime, the present status of the defence at common law is an issue which, it is to be inferred from the decision in *Police v Vialle*, is left for future determination.

178 On the basis of research to date, the principle of “manifest illegality” seems to provide the correct approach to the defence of superior orders when it arises in the context of armed forces engaged in assisting the police under cl 10(3) of the Defence Bill. Nevertheless, for the reasons given above, the Law Commission is not proposing that this approach should be given legislative status at this stage. On the other hand, any protections that the common law may give a member of the armed forces so engaged and the protection afforded by s 47 of the Crimes Act 1961, if that provision or an equivalent provision is retained, should be preserved. We have, therefore, proposed that the words “in addition to any other protections which the member of the Armed Forces may have” should be added to cl 10(5)(b). See para 168.

## RECOMMENDATION

179 It is recommended that cl 10 of the Defence Bill be enacted in the amended form set out as the Amended Clause 10 in Appendix C (at 86). This recommendation is supported by the Ministry of Defence and the Police.

## V

### **Emergencies Arising Out of Industrial Disputes**

180 The Law Commission's decision to adopt a sectoral approach to emergency powers requires a consideration of whether there is a need for powers to deal with emergencies arising out of industrial disputes in addition to the powers discussed in Chapter IV. Also, the proposal for the enactment of cl 10(2) of the Defence Bill (as revised in the Amended Clause 10), under which the armed forces can be called in to provide essential services withheld during industrial action, should be seen in the overall context of emergencies associated with industrial disputes.

## COERCIVE LEGISLATION IN NEW ZEALAND

181 There have been four occasions in New Zealand this century in which the response to a serious industrial dispute has been the passage or use of coercive legislation directly related to the dispute. These were in 1913, 1932, 1951 and 1984.

182 The 1913 strike involving seamen, watersiders, and coalminers, to which the 1912 Waihi strike of goldminers had been a prelude, was resolved by the use of special constables, including volunteers drawn from the armed forces, to back up the police. In the words of the *Oxford History of New Zealand* (W H Oliver, ed, 212): “Massey followed up his victory in the streets with legislation. The Police Offences Amendment Act (1913) restricted picketing and the Labour

Disputes Investigation Act (1913) was passed to prevent unions registered under the 1878 Trade Union Act from striking without penalty.” The Labour Disputes Investigation Act 1913 was repealed by the Industrial Relations Act 1973. Introducing the Industrial Relations Bill in 1972, the Minister of Labour stated that Part X of the Bill replaced the 1913 Act, simplifying its provisions and ensuring that labour organisations and employers were subject to the restraints in Part XI (enforcement and penalties). The Industrial Relations Act 1973 was itself repealed by the Labour Relations Act 1987. The provisions of the Police Offences Amendment Act 1913 were included in the Police Offences Act 1927 and remained in force until their repeal by the Summary Offences Act 1981.

183 When riots broke out in Auckland on 14 April 1932 a detachment of sailors from the New Zealand Division of the Royal Navy assisted in the restoration of order by marching through Auckland with fixed bayonets. The Public Safety Conservation Act 1932 was rushed through Parliament under urgency, but the Act was not used when there were further riots in Wellington in May 1932.

184 The language of the Public Safety Conservation Act 1932 was drawn from that of the United Kingdom statute, the Emergency Powers Act 1920. It did, however, contain significant additions. The 1920 Act, which was to be frequently relied on in Britain as the legal basis for the use of troops in industrial disputes, authorised the making of a proclamation of emergency where there were events that were “calculated, by interfering with the supply and distribution of food, water, fuel, or light, or with the means of locomotion, to deprive the community, or any substantial portion of the community, of the essentials of life ...”. The Public Safety Conservation Act 1932 added the words: “... or if at any time it appears to the Governor-General that any circumstances exist, or are likely to come into existence, whereby the public safety or public order is or is likely to be imperilled ...”. Corresponding additions were made to s 3 which provided for the making of emergency regulations once a state of emergency had been declared.

185 The 1920 British Act has a significant proviso not included in the New Zealand Act:

Provided also that no such regulation shall make it an offence for any person or persons to take part in a strike, or peacefully to persuade any other person or persons to take part in a strike.

186 The Public Safety Conservation Act 1932 was used on three occasions. In September 1939, a proclamation of emergency was made, along with a whole series of emergency regulations, in anticipation of the outbreak of World War II. Soon after war was declared, the Emergency Regulations Act 1939 replaced the 1932 Act as authority for the emergency regulations.

187 Problems on the waterfront in 1950 and 1951 led to two separate proclamations of emergency under the Public Safety Conservation Act 1932. The first was in September 1950 (revoked October 1950), the second in February 1951 (revoked July 1951). The second of these proclamations led to the making of the Waterfront Strike Emergency Regulations 1951 (SR 1951/24).

188 Since the circumstances in which the Public Safety Conservation Act 1932 was invoked in 1939 and 1951 did not fall within the essential services theme of the British Act of 1920, the validity of the proclamation and accompanying regulations in each case depended on the wider provisions of the New Zealand Act. Thus the Waterfront Strike Emergency Regulations 1951 (SR 1951/24) authorised the Minister of Labour to require a union to end a strike that had caused or was likely to cause serious loss or inconvenience and to declare the strike a “declared strike” if it was

not ended. It was an offence to be party to a declared strike; a union was guilty of an offence if more than 20 per cent of its membership were parties to a declared strike; and provision was made for the freezing of the assets of a union. There were provisions for censorship; and it was an offence to supply food or clothing to the striking watersiders. And the authority given in reg 10 under which members of the armed forces could be temporarily employed was not confined to the provision of essential services - it applied "to any kind of work specified in the order [of the appropriate Service Board]".

189 The National Government threatened the use of the Public Safety Conservation Act 1932 in 1976, during a dispute with electricity workers, and in 1982, during a dispute at the Marsden Point refinery. This proposed use of the Act in labour disputes led to Labour Party policy proposals to repeal what was described as "unnecessarily repressive" legislation. The repeal was effected in 1987. (See 449 NZPD 5322, 8 December 1982; Patterson, "The Spectre of Censorship Under the International Terrorism (Emergency Powers) Act 1987" (1988) 18 VUWLR 259; Roth, "Emergency Powers Legislation After the Repeal of the Public Safety Conservation Act" (1988) 6 Otago L Rev 682; New Zealand Labour Party 1984 Policy Document 54; see also articles by Deane, referred to in para 54.)

190 The National Government chose not to use the Public Safety Conservation Act 1932 in dealing with later troubles at Marsden Point, but to pass ad hoc legislation in the form of the Whangarei Refinery Expansion Project Disputes Act 1984. The Act was directly aimed at the resumption and continuation of work on the expansion of the Whangarei Refinery at Marsden Point "and for the compliance with the terms and conditions of employment applying in relation to that work and for the resolution of industrial disputes arising in relation to that work". The Act was repealed by the Labour Relations Act 1987.

#### DEFENCE ACT 1971 - PUBLIC SERVICE AND AID TO THE CIVIL POWER

191 Before the passage of the Defence Act 1971, the only express statutory provision authorising the use of the armed forces in a community situation was s 144 of the Royal New Zealand Air Force Act 1950. Under this section:

(1) Where the Minister is of the opinion that it is in the public interest to do so, he may, by writing addressed to the Air Board, authorise the Air Force to operate aircraft for hire or reward.

192 When the consolidation of the legislation relating to the three services was effected in the Defence Bill of 1971, the contributions that the three services might make, and had in fact made, to the community were expressly recognised. The statement of purposes for which the armed forces could be raised and maintained included the provisions now in s 4(1) and set out in para 84, ie,

(e) The provision of assistance to the civil power either in New Zealand or elsewhere in time of emergency or disaster:

(f) The provision of such public services as may from time to time be required by or for the Government of New Zealand.

The Bill complemented (f) with cl 79 under which the Minister of Defence could authorise the armed forces to perform public services.

193 The Minister of Defence said of cl 79 that, while it has been the practice for many years for the armed forces to provide assistance to the community, it was thought that the existing power in s 144 of the Royal New Zealand Air Force Act 1950 was inadequate (375 NZPD 4170, 28 October 1971). The Bill as introduced did not include the provision that eventually became s 79(2).

194 Dr Finlay, for the Opposition, pointed out that cl 79, in enabling the Minister of Defence to authorise the use of the armed forces for a public service, did not bring that use within the purview of Parliament as would be the case if it was authorised under the Public Safety Conservation Act 1932. He was concerned that the Government should be required to use the latter Act, with its procedural protections, in situations that were serious enough to fall within its terms. Dr Finlay's intervention led to the amendment that became s 79(2):

(2) The Minister shall not authorise any part of the Armed Forces to perform any public service in New Zealand pursuant to subsection (1) of this section in circumstances such that a Proclamation of Emergency could lawfully be issued under the Public Safety Conservation Act 1932, unless such a Proclamation is for the time being in force.

This amendment would, Dr Finlay said: "... allow the use of military forces to be challenged if this ever reaches major proportions, and so guarantee, if they are used, that the proper constitutional course is followed as is required by the Act of 1932. ... a situation of military dominance could not be achieved by stealth." (at 4153)

195 In referring to the Finlay amendment, the Minister of Defence, the Hon David Thomson, recognised: "In an industrial dispute of the nature of the 1951 dispute ... the Public Safety Conservation Act would be required ..." (at 4170).

196 The Minister will have been referring to the Waterfront Strike of 1951 and to situations in which coercive action is required in order to break a strike. As has been pointed out in para 184, the Public Safety Conservation Act 1932 authorised the making of a proclamation of emergency where action had been taken or was threatened

of such a nature and on so extensive a scale as to be calculated, by interfering with the supply and distribution of food, water, fuel, or light or with the means of locomotion, to deprive the community or any substantial portion of the community of the essentials of life... .

197 British experience has drawn attention to the fact that this language does not cover all classes of strikes, such as those involving doctors, nurses and other health service workers and prison officers. (See Morris, *Strikes in Essential Services*, 1986, 52; 81-82.) Nevertheless, the language is wide enough to cover many situations in which an industrial dispute is interfering with the supply of essential services. In such situations, the effect of s 79(2) was to require a government that wished to use the armed forces to provide an essential service to go to the lengths of proclaiming an emergency, issuing emergency regulations under the Public Safety Conservation Act 1932, and advising Parliament. (The Civil Defence Act 1983 covers the interruption of essential services by an event such as a natural disaster. The Public Safety Conservation Act 1932 expressly excepted emergencies declared under that Act.)

198 Governments which have used the armed forces to provide an essential service have relied on ss 4 and 79 of the Defence Act 1971. Thus a note in the *Manual of Armed Forces Law* says: "In recent years ss 4 and 79 have been used to authorise the participation of 1 or more of the services in

the provision of ... firefighting services in a city during a firemen's strike, and of air transport services between the North and South Islands when inter-island services have been strike-bound." (DM 69, 2-62, n 3; see also para 82.) Given the terms of s 79(2), the question can be asked whether the strike affecting inter-island services was not such an interference with the means of locomotion as to bring it within the ambit of the Public Safety Conservation Act 1932, and so to require a proclamation of emergency under that Act before the armed forces could be used to provide a service. On the other hand, the provision of service personnel to replace striking psychiatric nurses could not be regarded as falling within the Act - it could properly be authorised under s 79.

199 Armed forces involvement in the firefighters' strike in Christchurch in 1975 provides a useful illustration of the problems that could arise. Although the strike did not clearly fall within the "essential services" provisions of the Public Safety Conservation Act 1932, it was thought that it might be seen as coming within the "public safety" provisions of the Act. As there was no wish to make a proclamation of emergency under the Public Safety Conservation Act 1932 in accordance with s 79(2) of the Defence Act 1971, use of the armed services was regarded as authorised by the provision in s 4(e) of the latter Act authorising the use of the armed forces "in time of emergency or disaster".

## BRITISH EXPERIENCE

200 British governments have over the years frequently used troops to replace striking workers - there were 30 occasions over the period 1945-1982. In the period before World War II, the powers given by the Emergency Powers Act 1920 were used. This procedure presented the difficulty that it involved the proclamation of a full-scale state of emergency - and, having taken this step, the Government was prone to take wider regulatory powers than were required in the circumstances. (See Morris, referred to at para 197, and Peak, *Troops in Strikes: Military Intervention in Industrial Disputes*, 1984.)

201 In 1964, a World War II regulation was given permanent statutory form by the Emergency Powers Act 1964, amending the Emergency Powers Act 1920. Under the amendment the Defence Council can

authorise officers and men of Her Majesty's naval, military or air forces ...to be temporarily employed in agricultural work or such other work as may be approved in accordance with instructions issued by the Defence Council as being urgent work of national importance ... .

This 1964 Act does not, as did the 1920 Act, involve Parliament in the decision to use troops. Although the decision is essentially a political one, there has been criticism that it can be taken by the Defence Council without being subjected to public debate or scrutiny. As it has been put by Gillian S Morris (referred to at para 197):

... the power to deploy [troops as substitute labour] on civilian work still remains important. In a political system which is based on the principle of democratic accountability, it is inexcusable that such a power can be exercised without reference to Parliament. (at 124)

## REPEAL OF PUBLIC SAFETY CONSERVATION ACT 1932

202 The repeal of the Public Safety Conservation Act 1932, accompanied by the repeal of s 79(2) of the Defence Act 1971, removed any formal legal restraints on government use of the armed

forces to provide a public service or aid to the civil power. The enactment of s 79A of the Defence Act 1971 met one of the gaps thus created by subjecting the use of the armed forces, in assisting the police in a public order emergency involving law enforcement action, to the requirements set out in the section. Clause 10(3) - (7) of the Defence Bill maintains those requirements.

203 Section 79A went some way to meet the original concern expressed by Dr Finlay in 1971 and then accepted by Parliament, but it did not provide safeguards in respect of the use of the armed forces to provide an essential service withheld during an industrial dispute.

204 Clause 10(2) and (7) of the Defence Bill, and cl 10(2), (6) and (7) of the Amended Clause 10, are designed to remedy the latter situation by requiring basically the same procedure for the use of the armed forces as substitute labour in an industrial dispute as for their use in aid of the police under s 79A. Under the Amended Clause 10 the authority of the Prime Minister or the next most senior minister available is required, the use to which the armed forces is to be put must be specified, and the House of Representatives is to be informed as soon as possible of the authority and the reasons for it. A resolution of the House of Representatives is required for an extension of the authority. (paras 120-121)

#### WHAT SERVICES SHOULD BE PROVIDED BY THE ARMED FORCES?

205 There is a much-quoted statement by Sir Winston Churchill, made in the House of Commons in 1919:

To use soldiers or sailors, kept up at the general expense of the taxpayer, to take sides with the employer in an ordinary trade dispute ... would be a monstrous invasion of the liberty of the subject, and ... it would be a very unfair, if not an illegal, order to give to the soldier. But the case is different where vital services affecting the health, life or safety of large cities or great concentrations of people are concerned. (HC Deb, vol 116, col 1511)

206 This statement makes a distinction between the provision of essential services and the impact of the provision of those services on an industrial dispute. That distinction is implicit in the proviso to the British Emergency Powers Act 1920, quoted in para 185, and it was discussed in the debates that preceded the enactment of the Emergencies Act 1988 in Canada.

207 One of the powers that the Government of Canada can assume by order or regulation, once a public welfare emergency has been declared, is that of regulating  
the distribution and availability of essential goods, services and resources. (s 8(1)(e))

This provision, as it appeared in the original Bill, was criticised on the ground that it could be invoked to interfere in a dispute between management and labour. In particular, the provision might, it was said, be used to require the strikers themselves to go back to work or an employer to terminate a lockout if the Government considered that they were engaged in an essential service. And "essential" was not defined. As one Parliamentary critic said: "... the Government will not have to bring in back-to-work legislation and let Parliament decide each case on its own merits. It has only to invoke that clause of the Bill which means that a fundamental right to strike or, for that matter, the fundamental right of an employer to lock out, is denied in advance for all time." (129 HCD, 10936, 18 November 1987)

208 The difficulties raised by the essential services provision in the context of the settlement of industrial disputes were stated clearly by the Canadian Civil Liberties Association in its submission on the Emergencies Bill:

Despite the economic disruptions which may be inflicted by strikes in the post office, the railways, or even the auto industry, we would be loathe to see them become ready targets for emergency powers. While there may be some circumstances in which some strikes have to be terminated in the public interest, we believe it is preferable that such action be taken in the context of well-balanced labour legislation or by specific statutes narrowly addressed to the specific circumstances. (Submissions to the Legislative Committee on Bill C-77 (The Emergencies Act), Appendix "C-77/2", 1 March 1988)

209 The Minister in charge of the Emergencies Bill, the Hon Perrin Beatty, in his second reading speech, stated that the Act was not intended to be used to settle a legitimate dispute between an employer and employee. He undertook that any uncertainty in this regard would be removed in Committee (129 HCD, 10810, 16 November 1987). An amendment was introduced in Committee and embodied in the Emergencies Act 1988. Any power conferred by any order or regulation under s 8(1)

shall not be exercised or performed for the purpose of terminating a strike or lockout or imposing a settlement in a labour dispute. (s 8(3)(b))

210 Although the debate on the Canadian provisions centred on the use of coercive action to force strikers in an essential service back to work, the distinction that is drawn between the provision of essential services and interference in an industrial dispute is, of course, relevant to a discussion of the provision of essential services by the armed forces.

211 The distinction is a fine one and will not always be easy to apply to a particular situation. If troops are used to provide a service that is being withheld during a strike, the effect must be to strengthen the bargaining power of management at the expense of those taking part in the industrial action. Also, a government authorising the provision of the services is likely to be involved itself either through its role as employer or through concern for the impact of the dispute on the national economy. Thus the Australian Commonwealth Government's intervention in August 1989 in the airline pilots' dispute has been justified on the grounds that a decision by the airlines to grant the increases sought by the pilots would result in a wage break-out and an increase in inflation.

212 The question of degree and nice political judgment that can be involved can be illustrated by the use of the RNZAF to ferry passengers across Cook Strait during a strike on the Cook Strait ferries. The alternative of using service personnel to crew and sail the ferries would be likely to enlarge a dispute. The same choice of methods in providing an essential service would not be available in the case of a strike of Electricorp workers. In this case, the use of the armed forces would involve them in the operation of the generators. If service personnel with the necessary skills were available, they would face the strong possibility of confrontation with striking workers.

213 There is another factor that will militate against the frequent use of the armed forces to provide an essential service - the increasing complexity of modern industry and its dependence on advanced technology. The armed forces may not be able to provide persons with the skills that will enable them to replace a trained workforce. In other situations the use of armed forces will be possible only if key personnel with the necessary skills are willing to stay on duty. Thus, during the 1951 Waterfront Strike, merchant marine officers remained on their vessels to assist the naval personnel assigned to take over the duties of striking crew members. It is significant that Operation Pluto

provides the majority of New Zealand instances of the use of the armed forces to provide a service during a strike. It is in the transport area that armed forces personnel, using service vehicles, aircraft or vessels, are likely to be most effective. However it has to be appreciated that each Pluto Operation has been relatively small in scale. Clearly Defence resources would be strained by a major national strike.

## DEFINITION OF ESSENTIAL SERVICES

214 There would be few, if any, industrial relations systems that do not recognise that some activities are of critical importance to the community and that industrial disputes that interfere with those activities should be subject to special rules. There are a variety of ways in which the activities which are to be given this protection are defined and in which the protection is actually provided. (Pankert, "Settlement of Labour Disputes in Essential Services" (1980) 119 Int Lab Rev 723)

215 There are two broad approaches to the definition of "essential services". There can be an enumeration of those services, or else there can be a general definition or formula. A list of essential services will reflect factors peculiar to the country concerned. It will in many instances extend beyond the production and distribution of basic foodstuffs, water, gas, electricity, transport and communications, to include the maintenance of services which are regarded as pivotal to the national economy. Thus the list of "Essential Services" appearing in the Eighth Schedule to the New Zealand Labour Relations Act 1987 includes:

### *Part A*

... .

7. The provision of all necessary services in connection with the arrival, berthing, and departure of ships at any port.

... .

15. The production of butter or cheese or of any other product of milk or cream and the processing, distribution, or sale of milk, cream, butter, or cheese or of any other product of milk or cream.

### *Part B*

1. The slaughtering of meat for the domestic or export market.

... .

These three items clearly reflect the importance of the export market to New Zealand's national economy.

216 In other countries, the use of a general formula provides greater flexibility. We have seen the British formula ratified by the Emergency Powers Act 1964: "urgent work of national importance" (para 201). In the United States, the provisions of the Taft Hartley Act of 1947 relating to labour disputes can be applied only when a dispute will imperil "the national health or safety".

217 The words "public services" and "public service" in s 79 of the Defence Act 1971 and cl 10 of the Defence Bill can be regarded as general formulas. They cover the provision of services by the armed forces, when the ordinary providers of those services have withheld them in the course of an industrial dispute. A government, in deciding whether to exercise this power, is not to be constrained by the definition of "essential services" in the Eighth Schedule to the Labour Relations

Act 1987. It can decide for itself what services are of sufficient importance to justify invoking armed forces assistance. Indeed, Pedersen has made the point that Operation Pluto has in practice been used to alleviate distress and inconvenience to the public. The Cook Strait ferries provide an essential service within the meaning of the Eighth Schedule (Part A, 8) Labour Relations Act 1987, but it is unlikely that any economically essential goods were ever moved by the Operation. (at 73)

## SETTLEMENT OF LABOUR DISPUTES AFFECTING ESSENTIAL SERVICES

218 Chapter II (paras 41-43) of this Report shows that in some sectors the conferral and definition of emergency powers are best approached from within the sector concerned. This is the case with economic emergencies and with emergencies arising in the health and agricultural sectors. Nevertheless, all legislation conferring emergency powers should be expected to conform to relevant principles and safeguards.

219 The industrial relations sector is also one in which the power of a government to intervene in emergencies must be considered against the background of that government's labour relations policies. Those policies have altered over the years and cannot sensibly be examined in the Law Commission's project on emergencies. Overseas experience and the approach adopted under the present New Zealand law do, however, bear on the options that might be available in an emergency situation.

220 A useful basis for analysis is to be found in the article by Pankert referred to at para 214. The author examines the "variety of existing systems" for the settlement of labour disputes in essential services that have been adopted in industrial nations. He draws a distinction between those countries which are primarily concerned to find a satisfactory solution to the dispute and those which give priority to protecting the community against its harmful consequences. Pankert also distinguishes between countries where the nature of the measures applied in the event of disputes affecting essential services is determined in advance in relevant legislation and those in which it is generally only fixed on an ad hoc basis when a dispute arises.

221 Pankert recognises that industrialised countries have one point in common: "Most of these countries, while not excluding recourse to coercion as an exceptional measure, nevertheless feel a certain repugnance to it. ...This no doubt explains why they resort more and more rarely to such methods as compulsory arbitration, requisition, industrial conscription or seizure." (at 733)

## LABOUR RELATIONS ACT 1987

222 In New Zealand, the Labour Relations Act 1987 recognises the worker's right to strike and the employer's right to lockout but subject to constraints. Special constraints apply to essential services as defined in the Eighth Schedule to the Act (Part x, ss 230-250).

223 A distinction is made between lawful and unlawful strikes and lockouts. Among the latter are strikes and lockouts in essential services in which the worker or employer concerned has failed to meet the requirements as to notice set out in the Act.

224 Statutory penalties are not imposed for an unlawful strike or lockout, but proceedings for damages in tort or for an injunction can be taken before the Labour Court. The tort action provides a powerful financial incentive to keep those involved within the bounds of lawful industrial action as defined. The significance of this action is becoming apparent as the first damages actions are

being brought - the unions are especially vulnerable. The jurisdiction to grant injunctions is also showing itself to be quite effective.

225 There are other provisions that apply where a strike or lockout, lawful or unlawful, exists or is threatened in an essential service and substantially affects or will substantially affect the public interest. Initiatives can be taken by the Chief Mediator, appointed under the Act, or by the Minister of Labour. These initiatives can lead to the reference of the dispute to the Labour Court. If it is satisfied that the public interest is or will be substantially affected, the Labour Court can make either a determination settling the dispute or prescribing the procedure to be followed in its settlement, or an order referring particular disputes to the Arbitration Commission. If full work is not resumed, the Labour Court can order a resumption of work.

226 If work is not resumed in response to the Labour Court order, the Court may issue a compliance order (s 207). The Court is given powers, akin to contempt powers, to enforce that order. These may lead to the striking out of the party's claim or defence, imprisonment, fine or sequestration.

227 A Minister of Labour who has reasonable grounds for believing that a strike or lockout exists or is threatened has the power to call a ministerial conference or to appoint a committee of inquiry (ss 247 and 248).

## GOVERNMENT CHOICES

228 A New Zealand government, faced with a situation where an industrial dispute has led to an emergency that is seriously interrupting the provision of essential services to the community, damaging the economy, or leading to a breakdown of law and order, has a choice of courses of action. The choice taken will be dictated by a government's industrial relations policies, the severity of the emergency, and the political realities of the situation, including the longer-term implications of the choice.

229 Choices are:

- Leave the dispute for settlement by the parties themselves, operating within the framework of current industrial relations legislation, now the Labour Relations Act 1987. This choice involves an acceptance of the effect of the dispute on the provision of services and its impact, over the short-term, on the national economy.
- Invoke such powers as are available to a government under its industrial relations legislation.
- Invoke the power, recognised in s 79 of the Defence Act 1971 (cl 10(1) and (2) of the Defence Bill and the Amended Clause 10), to call in the armed forces to provide a public service.
- Enact ad hoc legislation to authorise the taking of appropriate action, including any coercive steps that may be necessary.

230 Another possible choice, the use of the armed forces (under s 79A of the Defence Act 1971 or cl 10 of the Defence Bill) to provide assistance to the police should an industrial dispute lead to outbreaks of civil disturbance and violence, is not one that should be readily contemplated. As has

already been pointed out (para 145), Sir Robert Mark uses still stronger language: “troops should never, in any circumstances, be used to confront ... participants in industrial disputes.” It follows that the handling of industrial disputes that have erupted into public order emergencies is one for the police alone; although, as in other emergencies, the situation can be envisaged in which the armed forces would be called on to provide logistic and administrative support.

231 The use of volunteers on an organised basis to provide essential services has not been suggested as a choice open to a government. In most circumstances volunteers would not have the necessary skills to provide needed services and it is accepted that their presence would arouse greater hostility on the part of strikers than that of members of the armed forces. The health area, however, is one in which volunteers, recruited on a community basis, have provided assistance. Volunteers played an important part during the nurses' strike in 1989, but this was practicable only with the support of skeleton regular staff.

232 There are English precedents for the use of police in providing ambulance services during a dispute involving ambulance drivers. Nevertheless, there is a general acceptance in New Zealand that the role of the police in an industrial dispute is solely to prevent breaches of the peace and protect property and preserve public order. Their instructions require them to maintain an attitude of perfect impartiality towards the dispute.

233 The conclusion is that it would be an abuse of the provisions of the Defence Act 1971 and cl 10 of the Defence Bill (or the Amended Clause 10) if a government were to direct the powers they confer towards terminating a strike or lockout or applying any form of coercion to an industrial dispute. As emerged very clearly in the debates preceding the enactment of the Emergencies Act 1988 in Canada, coercive action should be based either on “well-balanced labour legislation or [on] specific statutes narrowly addressed to the specific circumstances.” (para 208)

234 These are alternatives to which governments need to address themselves where coercive industrial legislation may be required. There is a case for including relevant provisions in carefully drafted sectoral labour legislation. The Canadian Emergencies Act 1988 is an example of the advantages to be gained from taking time over the preparation of emergency legislation. The Bill was prepared over a number of years, public discussion documents were issued, and opportunity given for detailed submissions by interested organisations. The result, recognised in the debate in the House of Commons, was well-honed legislation with appropriate restraints on its use. Experience in New Zealand and elsewhere has, however, shown that attempts to pass coercive legislation in advance can also involve the conferment of wider powers than will be required for particular emergencies, with the likelihood that those wider powers will be invoked when an emergency arises.

235 Specific or ad hoc legislation has the advantage that the House of Representatives itself can examine the suitability of the action that a government is proposing in relation to the particular circumstances; wide emergency powers can be avoided; and care can be taken to ensure that the legislation conforms to principle and contains appropriate safeguards. In New Zealand the frequency of Parliamentary sittings and the speed with which the House of Representatives can be called together make the passage of ad hoc legislation to deal with a particular emergency a practical option. Nevertheless, there are plenty of illustrations of the dangers of passing legislation under pressure of an emergency. Too often, it is poorly drafted, contains wider powers than are necessary to meet the immediate situation, and ignores safeguards.

CONCLUSION

236 The Law Commission does not propose any general legislation granting emergency powers for use in connection with an industrial dispute additional to those already included in the Defence Bill (see cl 10(2) and (7) and the Amended Clause 10(2), (6) and (7), Chapter IV above).

## **APPENDIX A**

### **Sections 79 and 79A of the Defence Act 1971**

**79. Provision of public services by Armed Forces** - (1) If the Minister considers that it is in public interest to do so, he may authorise any part of the Armed Forces to perform any public service capable of being performed by the Armed Forces, either in New Zealand or elsewhere, subject to such terms and conditions (including payment) as he may specify.

[(2) The Minister shall not authorise any part of the Armed Forces to perform any public service in New Zealand pursuant to subsection (1) of this section in circumstances such that a Proclamation of Emergency could lawfully be issued under the Public Safety Conservation Act 1932, unless such a Proclamation is for the time being in force.]

(3) Any authority given under subsection (1) of this section may authorise any ships, aircraft, vehicles, or equipment of the Armed Forces to be operated in connection with the performance of any such public service.

(4) If any such ship, aircraft, vehicle, or equipment is operated for payment otherwise than for or on behalf of the military authorities of any other State, it shall, for the purposes of any other Act relating to the carriage of passengers or goods, be deemed not to be in use for military purposes.

(5) Any payment made for the performance of any public service under this section shall be paid into the Consolidated Account.

(6) Subject to subsection (4) of this section, the conveyance of passengers or goods under this section for payment shall be subject to the Carriage of Goods Act 1979, the Sea Carriage of Goods Act 1940, and the Carriage by Air Act 1967, and, so far as those Acts make no provision, the common law.

Cf. 1950, No. 40, s. 144

Section 79 (2) was repealed by s 2 of the Defence Amendment Act 1987.

**79A. Use of Armed Forces to assist the civil power** - (1) Subject to subsection (2) of this section, where an emergency in which any person is threatening, causing, or attempting to cause -

- (a) The death of, or serious injury or serious harm to, any person or persons; or
- (b) The destruction of, or serious damage or serious injury to, any property -

is occurring in any area, the Prime Minister, or (if the Prime Minister is for any reason unavailable) the Deputy Prime Minister, or (if both the Prime Minister and the Deputy Prime Minister are for any reason unavailable) the next highest ranked Minister of the Crown available may, after consultation (where practicable) with the Minister, authorise any part of the Armed Forces to assist the Police to deal with the emergency.

(2) The Prime Minister or, as the case may require, the Deputy Prime Minister or the next highest ranked Minister of the Crown shall not give any authority under subsection (1) of this section unless the Prime Minister or, as the case may require, the Deputy Prime Minister or that Minister of the Crown is satisfied, on information provided by the Commissioner of Police or a Deputy Commissioner of Police, that the emergency cannot be dealt with by the Police without the assistance of the Armed Forces.

(3) Every part of the Armed Forces authorised to assist the Police pursuant to subsection (1) of this section shall, in providing such assistance, act at, and in accordance with, the request of the member of the Police who is in charge of operations in respect of that emergency.

(4) For the purposes of civil and criminal liability, every member of the Armed Forces shall, while acting in accordance with any request given pursuant to subsection (3) of this section, be treated as if that member were a member of the Police.

(5) Where any authority is given pursuant to subsection (1) of this section, the Minister of the Crown who gave that authority shall inform the House of Representatives that that authority has been given, and of the reasons why it was given, -

(a) Forthwith, if the House of Representatives is then sitting; or

(b) If the House of Representatives is not then sitting, at the earliest practicable opportunity.

(6) Any authority given pursuant to subsection (1) of this section shall lapse after the expiration of 14 days after the day when it was given unless -

(a) The House of Representatives passes a resolution providing for the extension of that authority for such period as is specified in the resolution; or

(b) If, when any authority is given pursuant to subsection (1) of this section, Parliament has been dissolved or has expired and no Proclamation has been made summoning Parliament to meet on a day not later than the day on which that authority would expire, the Governor-General, by Proclamation approved in Executive Council, where the Governor-General is satisfied that it is necessary to extend that authority, extends that authority for such period as is specified in that Proclamation.

Section 79A was inserted by s 3 of the Defence Amendment Act 1987.

## **APPENDIX B**

### **Clauses 5, 6, 10 and 11 of the Defence Bill**

**5. Power to raise armed forces** – The Governor-General may from time to time, in the name and on behalf of the Sovereign, continue to raise and maintain armed forces, either in New Zealand or elsewhere, for the following purposes:

(a) The defence of New Zealand, and of any area for the defence of which New Zealand is responsible under any Act:

(b) The protection of the interests of New Zealand, whether in New Zealand or elsewhere:

- (c) The contribution of forces under collective security treaties, agreements, or arrangements:
- (d) The fulfilment of obligations undertaken by New Zealand in or under the Charter of the United Nations, or in association with other organisations or States and in accordance with the principles of that Charter:
- (e) The provision of assistance to the civil power either in New Zealand or elsewhere in time of emergency or disaster.

Cf. 1971, No. 52, s. 4(1), (2); 1976, No. 122, s. 3(8)

**6. Deployment of Armed Forces** - The Armed Forces may be deployed -

- (a) For any purpose specified in section 5(1) of this Act; and
- (b) For any purpose authorised by or under section 10 or section 11 of this Act.

... .

**10. Use of Armed Forces in provision of public service** - (1) Subject to the succeeding provisions of this section, the Armed Forces may continue to be deployed in or beyond New Zealand for the purpose of providing a public service, including assistance to the civil power.

(2) Where any part of the Armed Forces is authorised to provide any public service in New Zealand in connection with an industrial dispute, the Prime Minister or another responsible Minister shall inform the House of Representatives, forthwith if the House is then sitting or at the earliest practicable time if it is not, that the authority has been given and of the reasons for giving it.

(3) Where the Prime Minister or, if the Prime Minister is unavailable, the next most senior Minister available is satisfied, on information supplied by the Commissioner of Police or a Deputy Commissioner of Police, that -

- (a) There is in New Zealand an actual or imminent emergency in which one or more persons are threatening to kill or seriously injure, or are causing or attempting to cause the death of or serious injury to any other person or the destruction of or serious damage to any property; and
- (b) The emergency cannot be dealt with by the Police without the assistance of members of the Armed Forces exercising the same powers as members of the Police, -

the Prime Minister or the other Minister may authorise the deployment of any part of the Armed Forces to assist the Police in dealing with the emergency.

(4) Every part of the Armed Forces that is assisting the Police in accordance with an authority given under subsection (3) of this section shall act at the request of the member of the Police who is in charge of the operations in respect of the emergency.

(5) Every member of any part of the Armed Forces so deployed -

- (a) Shall, during that deployment, remain under military command; and
- (b) Shall, subject to any other enactment, have all the powers of a member of the Police.

(6) The Prime Minister or other Minister granting any authority under subsection (2) of this section shall inform the House of Representatives, forthwith if the House is then sitting or at the earliest practicable time if it is not, that the authority has been given and of the reasons for giving it.

(7) Any authority referred to in subsection (2) of this section or given under subsection (3) of this section shall lapse on the expiration of 14 days after the day on which it was given unless -

- (a) The House of Representatives passes a resolution extending the authority for such period as is specified in the resolution; or
- (b) If Parliament was dissolved or had expired when the authority was given and has not been summoned to meet before the authority would lapse, the Governor-General, being satisfied that it is necessary to extend the authority, extends it by Proclamation approved in Executive Council for such period as is specified in the Proclamation.

Cf. 1971, No. 52, ss 79, 79A; 1987, No. 180, s.2

**11. Powers of requisition** - (1) Where the Minister is satisfied -

- (a) That there is an actual or imminent emergency involving the deployment beyond New Zealand of any part of the Armed Forces; and
- (b) That it is necessary to requisition -
  - (i) Any ship, vehicle, aircraft, supplies, or equipment for the use of the Armed Forces in connection with the emergency; or
  - (ii) Any land, building, or installation required to enable the use of any ship, vehicle, aircraft, supplies, or equipment by the Armed Forces in connection with that emergency, -

the Minister may authorise the Chief of Defence Force to exercise the powers conferred by subsection (2) of this section in respect of any specified property or type of property referred to in that subsection.

(2) The Chief of Defence Force may, where so authorised by the Minister under subsection (1) of this section, requisition -

- (a) Any ship, vehicle, aircraft, supplies or equipment necessary for the use of the Armed Forces; or
- (b) Any land, building, or installation necessary to enable the use of any ship, vehicle, aircraft, supplies, or equipment by the Armed Forces -

in connection with an actual or imminent emergency involving the deployment beyond New Zealand of any part of the Armed Forces.

(3) Subject to subsection (4) of this section, in exercising the powers conferred by subsection (2) of this section, the Chief of Defence Force shall give to the owner or person in control of the requisitioned property a written statement specifying the property and requiring it to be placed forthwith under the control of a member of the Armed Forces.

(4) Where the owner or other person in control of the requisitioned property cannot be found immediately, the Chief of Defence Force -

- (a) May direct that a member of the Defence Force shall assume forthwith the control of the property; and
- (b) Shall, on giving any such direction, ensure that as soon as is reasonably practicable, a written statement specifying the requisitioned property is given to the owner or person formerly in control of the property.

(5) Where any requisitioned property has come under the control of any part of the Armed Forces under this section, there shall be payable, out of money appropriated by Parliament, to any person having an interest in the property, just compensation for its use, including any loss, injury, or damage suffered by that person and arising out of that control.

(6) Any court of competent jurisdiction may determine any dispute about the liability of the Crown to pay any compensation under this section, or the amount of any such compensation, or the entitlement of any person to all or part of any compensation payable.

## **APPENDIX C**

### **The Amended Clause 10**

#### **10 Use of Armed Forces to provide public service or assist the civil power**

(1) Subject to the succeeding provisions of this section, the Armed Forces may be used in New Zealand or elsewhere

- (a) to perform any public service; or
- (b) to provide assistance to the civil power in time of emergency.

(2) Where the Prime Minister or, if the Prime Minister is unavailable, the next most senior Minister available is satisfied that it is in the public interest to use any part of the Armed Forces to provide any public service in New Zealand in connection with an industrial dispute, the Prime Minister or the other Minister may authorise the use of that part of the Armed Forces to provide such public services in that connection as the Prime Minister or the other Minister may specify.

(3) Where the Prime Minister or, if the Prime Minister is unavailable, the next most senior Minister available is satisfied, on information supplied by the Commissioner of Police or a Deputy Commissioner of Police,

- (a) either
  - (i) that there is in New Zealand an emergency in which one or more persons are threatening to kill or seriously injure, or are causing or attempting to cause the death of or serious injury to any other person or the destruction of or serious damage to any property; or
  - (ii) that such an emergency is imminent; and

(b) that the emergency cannot be dealt with by the Police without the assistance of members of the Armed Forces exercising powers that are available to members of the Police, the Prime

Minister or the other Minister may authorise any part of the Armed Forces so to assist the Police in dealing with the emergency.

- (4) Every part of the Armed Forces that is assisting the Police in accordance with an authority given under subsection (3) of this section shall act at the request of the member of the Police who is in charge of the operations in respect of the emergency.
- (5) Every member of any such part of the Armed Forces
  - (a) may, for any purpose necessary to assist the Police in dealing with the emergency, exercise any power of a member of the Police; and
  - (b) shall, for the purposes of civil and criminal liability, have the protections of a member of the Police, in addition to all other protections which that member of the Armed Forces may have.
- (6) The Prime Minister or other Minister granting any authority under subsection (2) or subsection (3) of this section shall inform the House of Representatives, forthwith if the House is then sitting or at the earliest practicable time if it is not, that the authority has been given and of the reasons for giving it.
- (7) Any authority given under subsection (2) or subsection (3) of this section shall lapse on the expiration of 14 days after the day on which it was given unless
  - (a) the House of Representatives passes a resolution extending the authority for such period as is specified in the resolution; or
  - (b) if Parliament was dissolved or had expired when the authority was given and has not been summoned to meet before the authority would lapse, the Governor-General, being satisfied that it is necessary to extend the authority, extends it by Proclamation approved in Executive Council for such period as is specified in the Proclamation.

Cf 1971, No 52, ss 79, 79A; 1987, No 180, s 2