

From: s47E(c)
To: s47E(c); s47E(c)
Cc: s47E(c)
Subject: 240926:1218 - s47E(c)]-s47E(c) AUKUS security
Date: Thursday, 26 September 2024 12:18:47 PM
Attachments: [Thistleton, AUKUS physical security legal framework research essay.docx](#)

OFFICIAL

s47E(c),

When I was out at MLTC speaking last week about Domestic Security Ops and noted that maritime terrorism is one of the 8 MBC threatlines, s47E(c) who was coordinating the course subsequently spoke to me about his research essay.

I suggested he forward his thinking through to s47E(c) who had been considering the recent STMP from a practical enforcement perspective which he has now actioned

I have not looked at the work myself but forward it for any interest you might have on its content – s47E(c) might be interested in any thoughts for a response back to s47E(c) perhaps?

Regards

s47E(c)

Fleet Legal Officer

One Fleet – Focused, Lethal, Ready

Department of Defence |

Fleet Headquarters (FHQ), s47E(d) HMAS *Kuttabul*, Potts Point NSW

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From: s47E(c) <s47E(c)@defence.gov.au>
Sent: Wednesday, 25 September 2024 2:16 PM
To: s47E(c) <s47E(c)@defence.gov.au>
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Subject: AUKUS security [SEC=OFFICIAL]

OFFICIAL

Hi s47E

s47E(c) informed me that you had been doing work on AUKUS physical security. I understand that there might be a team involved with this? If so I'd like to pass on my research essay on this topic to you and the team. I think *The Defence (Special Undertakings) Act 1952 (Cth)* would offer robust protection to AUKUS, is fit for purpose and could be applied without legislative amendment – as outlined in my analysis. I've also reviewed other available legislation and physical security matters.

Regards,

s47E(c)

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Is the existing military/naval base security legal framework sufficient to ensure effective protection of nuclear material and infrastructure? If yes, please explain why and if no, please provide recommendations for reform.

Introduction

On 5 August 2024 the three countries of which AUKUS is composed signed a proposed treaty (hereafter AUKUS agreement) in support of the transfer of nuclear material between parties for naval propulsion.¹ According to Australian National Interest Analysis, this new AUKUS agreement 'builds in robust security requirements'.² Under Article VIII of the AUKUS agreement, Australia (as a receiving party) must 'maintain adequate physical security' in receiving nuclear material, and the UK and US (as originating parties) can review the adequacy of such physical protection. With these requirements in mind, it is incumbent for Australia to ensure its legal framework enables sufficient protection for nuclear material and infrastructure it receives from its AUKUS partners.

In answer to the topic question this paper will advance a view that existing legal frameworks are readily adaptable to ensure effective protection. The two legislative frameworks that the paper will analyse for this purpose are Part VIA of the *Defence Act 1903* and the lesser known *Defence (Special Undertakings) Act 1952*.³ Lastly, the paper will consider how an Australian nuclear security constabulary could be established under extant law.

Part VIA *Defence Act*

At a barrier level of protection, Part VIA permits powers to prevent access to persons and objects that could cause harm to nuclear material. Specifically, Part VIA grants *defence security officials* (DSOs) the power to *request* identification details and conduct a consensual search of persons about to pass a *defence access control point*.⁴ *Special defence security officials* (SDSOs) are granted even further power, as they can *require* a person to provide identification details and conduct a non-

¹ 'Agreement among the Government of Australia, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the United States of America for Cooperation Related to Naval Nuclear Propulsion' (Washington 5 August 2024), [2024] ATNIF 20.

² AUKUS agreement [2024] ATNIA 14, page 4 para 13.

³ (Cth), hereafter *Defence Act* and *Defence (Special Undertakings) Act*.

⁴ *Defence Act 1903* (Cth) (*'Defence Act'*) s 71A.

consensual search of a person.⁵ Additionally, DSOs and SDSOs are empowered to refuse entry to a person beyond an *access control point* should they refuse to comply with identification and search, or as a result of the identification and search.⁶

These powers to screen and bar could theoretically be applied to secondary barriers of protection, if applied to a facility within a base containing nuclear materials or a gangway leading to an AUKUS submarine. This power would be conditional on the facility or gangway entrance being guarded by a DSO or having a physical barrier such as a locked gate, either of which would create an 'access control point'.⁷ One way to simply and practically enable this protection would be to duly authorise gangway staff as DSOs.⁸

Part VIA grants other general powers including the arrest of persons and the power to seize things which constitute a threat to persons or relate to a criminal offence.⁹ These powers, in effect, moderately enhance an ordinary person's ability to lawfully prevent trespass and apprehend persons committing an offence.¹⁰ However, Part VIA's provisions on the use of force substantively enhance the powers granted under the Act. Specifically, the Act authorises DSOs to use force, where reasonable and necessary, to exercise powers under the Act.¹¹ At the most permissive authorisation for use of force under the act, *security authorised member[s] of the Defence Force* are authorised to use lethal force to protect persons from death or serious injury.¹² The Act also permits the use of force in the exercise of powers under the Act, but crucially force in this regard must be non-lethal.¹³ These authorisations for use of force are positively provided in contrast to the mere defences available under the *Criminal Code*.¹⁴

The Act's provisions on force were intended to *strengthen* the ability of ADF members to use force for base security. Yet, its clarification limits its scope by only

⁵ *Defence Act* s 71R.

⁶ *Ibid* S71R, s71H.

⁷ *Ibid* s 71A.

⁸ *Ibid* s 71 D.

⁹ *Ibid* s 72, s 72P.

¹⁰ For example, *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 100.

¹¹ *Defence Act* s 72G.

¹² *Ibid* s 72H.

¹³ *Ibid* s 72G.

¹⁴ *Criminal Code Act 1995* (Cth), s 10.4.

authorising lethal force in response to an 'attack' which is 'occurring or is imminent'.¹⁵ This temporal limitation is appropriate in the context of an immediate terrorist attack on a base. However, it does not contemplate Defence possession of nuclear material, much less the potential lethal exploitation of this material. By illustration, if nuclear materials were being stolen from a Defence premises, and the thieves could not be restrained, the ADF would not be authorised to use lethal force under Part VIA. This would be the case even in circumstances where the ADF had received reliable intelligence that persons intended to steal nuclear material to build and detonate a dirty-bomb at a later date, as such an attack would be foreseeable but essentially not imminent.

Considering the above identified limitation of the statutory authority to use lethal force, it is worth considering whether executive power may be used to authorise lethal force in circumstances such as the dirty-bomb scenario. Firstly, it must be considered whether Part VIA extinguishes executive power. Part VIA *does not* extinguish executive power as it lacks express words required to extinguish prerogative power.¹⁶ Furthermore, executive power is preserved by s 72S of the Act which states that Part VIA "does not, by implication, limit the exercise of the powers...of the Defence Force". Part VIA does not extinguish executive power but analogous to Moore's observations of Part IIIAA "it just makes it mostly unnecessary and therefore unjustifiable, to resort to executive power".¹⁷ At any rate, there exists no executive authority for the use of deliberate lethal force in internal security operations beyond self-defence.¹⁸ However, the war prerogative does permit deliberate killing.¹⁹ Under this prerogative deliberate lethal force could be used against a nationally designated enemy absconding with nuclear material on a Defence premises - beyond what Part VIA permits. While this prerogative power would clearly apply during armed conflict, the full extent of this prerogative power at the margins of conflict is uncertain.²⁰

¹⁵ *Defence Act* s 72H.

¹⁶ *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 at 228; Cameron moor page 73

¹⁷ Cameron Moore, *Crown and Sword*, (Australian National University Press, 2017) 174.

¹⁸ Above n 16, 75; Rob McLaughlin, 'The Use of Lethal Force by Military Forces on Law Enforcement Operations – Is There a "Lawful Authority"?' (2009) 37(3) *Federal Law Review* 441.

¹⁹ *Shaw Savill and Albion Co Ltd* (2012) 248 CLR 156, 361 -362; above n 16 75.

²⁰ Above n 16, 75.

A further deficiency of Part VIA is that it does not consider the critical importance of infrastructure which may be under Defence protection, in contrast to the provisions in Part IIIAAA of the *Defence Act* which contemplates the protection of critical infrastructure. Under Part VIA, lethal force is only authorised to protect persons not property.²¹ In a broad sense, this necessarily accords with general criminal law and moral principles which do not permit killing to prevent the destruction of property.²² However, this limitation makes Part VIA inadequate for the protection of nuclear materials and facilities used for AUKUS assets, the primary purpose of which is to defend against existential threats to Australia. To remedy this gap, Part VIA could be amended to enable lethal force to protect declared nuclear material and facilities, akin to s 51N 3(a)(ii) of Part IIIAAA, which under certain circumstances enables lethal force to be used in the protection of 'declared infrastructure'.²³

The Defence (Special Undertakings) Act 1952 (Cth)

Suitability of the Act for AUKUS security

Today the *Defence (Special Undertakings) Act* is utilised to protect one of Australia's most secure and sensitive sites, the *Joint Defence Facility Pine Gap* (Pine Gap).²⁴ An interesting similarity to this paper's topic, the Act's original purpose was to ensure the security of a sensitive nuclear activity coordinated between Australia and the UK.²⁵ Specifically, the Act created a *prohibited area* to prevent intrusion onto the Monte Bello Islands off the coast of Western Australia where the British were conducting an atomic weapon test.²⁶ This was a joint operation between the UK government, the Royal Navy and the three services of the ADF. The UK had 'executive control' of the project and the ADF had 'the principal responsibility for security'.²⁷ In the following years, the Act was again used to ensure the security of

²¹ Ibid.

²² *Criminal Code Act 1995* (Cth) s 10.4 (3).

²³ See also s 46(5)(d).

²⁴ Per s 8A.

²⁵ 'Defence (Special Undertakings) Bill 1952', Second reading speech, *House Hansard*, 4 June 1952, 1952.

²⁶ Ibid; *Prohibited area* per s7.

²⁷ Ibid.

another nuclear activity by creating a *restricted area* around Rum Jungle, Australia's first uranium mine.²⁸

The aptness of the Act to support AUKUS security is supported by the purpose of the Act (in addition to the historical use of the Act). Section 2A states that the purpose of the Act is to 'provide for the protection by the Commonwealth of works and undertakings' and 'areas' for the 'defence of Australia' or 'the defence of Australia and the defence of another country'. Clearly, this purpose would apply to nuclear material and infrastructure intended for conventionally armed nuclear submarines. Yet, it is the subsequent provisions (ss 2A (c) and (d)) which make the application of the Act particularly compelling. These subsections add that the purpose of the Act is "to provide for the protection by the Commonwealth of works, undertakings and areas that *require special security measures*"²⁹ and 'in order to enable Australia to fulfil its obligations under treaties...and international agreements relating to defence or security'. This purpose aligns well with the recent AUKUS agreements and the security obligations imposed by them.³⁰

Despite the age of the *Defence (Special Undertakings) Act* there have only been two prosecutions made under the Act, both instances having occurred in recent decades in relation to protestors trespassing at Pine Gap.³¹ The convictions from the first prosecution were successfully appealed in *R v Law & Ors*.³² The subject of the appeal being whether a declaration of a *prohibited area* by the Minister (under s 8 of the Act) incontrovertibly created a *prohibited area*, or whether there was an objective precondition requiring the area to be necessary for the defence of the Commonwealth.³³ In the appeal it was held that the trial judge had erred in treating the Ministerial declaration of a *prohibited area* as unchallengeable.³⁴ Consequentially the Act was amended in 2008 with s 8A introduced to expressly declare Pine Gap as a *prohibited area*. This amendment was designed to remove the opportunity for any

²⁸ The Finis River', Markich & Jeffree (ed), <https://apo.ansto.gov.au/server/api/core/bitstreams/aeb3b687-ee9d-76a5-e053-150a9d89ded9/content>, ANSTO 2002; *restricted area* per s 14.

²⁹ Emphasis added, Defence undertaking Act s2A(c) emphasis added.

³⁰ Above n 1 article VIII.

³¹ *Ibid*.

³² [2008] NTCCA 4, hereafter *R v Law*.

³³ *Ibid* 8 [18].

³⁴ *Ibid* 57 [135].

future defendants to argue 'about the validity of a declaration' of Pine Gap being a prohibited area.³⁵

Unlike the case with Pine Gap, it would be unnecessary to amend the Act to create *prohibited areas* surrounding areas containing AUKUS nuclear material. It would be sufficient for the Defence Minister to declare AUKUS sites as *prohibited areas* in the *Gazette* (per s 8 of the Act), as was previously the practice for Pine Gap prior to its explicit reference in s 8A.³⁶ Indeed, the amendment of s 8A to maintain Pine Gap as a prohibited area is itself not strictly necessary. In *R v Law* the judge found in obiter that the 1967 *Gazette* notice 'established at least a prima facie case that, as from 9 November 1967, the Facility was a prohibited area'.³⁷ The judge also found that the *Gazette* itself could amount to proof of the objective requirement for Pine Gap to be used for the purpose of the defence of Australia.³⁸ Notwithstanding, the Judge also acknowledged that 'The continuing effect of the declaration does not deny the possible existence of grounds for challenging the continuing validity of the declaration'. The judge also found, 'there may or may not be good reason for doubting that after 38 years after the declaration it remained necessary for defence purposes that the Facility be declared a prohibited area' and in theory the declaration could cease to have effect 'by the effluxion of time'.³⁹ It is this mere possibility of challenge to the status of Pine Gap as a *prohibited area* that lead to the 2008 legislative amendment.

The Government's concern to ensure that the status of the *prohibited area* is not subject to challenge is rooted in the secretive function of Pine Gap. In the second reading speech for the amending bill the Minister referred to the 'sensitive' aspects of Pine Gap's functions and the risk of 'public exposure'. In this regard, it is apparent the Government sought to avoid any prospect of having to adduce evidence of Pine Gap's function to justify the objective test of its defence purpose in future prosecutions.⁴⁰ Therefore the amendment was taken out of an abundance of caution

³⁵ 'Defence Legislation (Miscellaneous Amendments) Bill 2008', Second reading speech, *House Hansard*, 3 December 2008, 12291.

³⁶ Above n 35, 6 [12].

³⁷ Above n 32, 13 [33].

³⁸ *R v Law* [25] 11.

³⁹ *Ibid* 15 [33].

⁴⁰ *Ibid* [21] 9.

against a risk of challenge to the status of the *prohibited area*. The risk being remote, given the judge's findings in *R v Law* that the Ministerial declaration formed at least prima facie evidence of the defence purpose, which remained in effect unless invalidated by a court.⁴¹ This risk would not similarly pose a concern for areas containing nuclear material for AUKUS submarines. This is because while material and information relating to submarines is highly secretive, the nature of a naval submarine and its associated nuclear material means that its defensive purpose is self-evident.

Advantages and issues

The primary advantage of applying the Act to the protection of nuclear material is that the Act is already in force. Even if newly drafted security legislation for AUKUS were to successfully pass through Parliament, it seems unlikely that in contemporary times such legislation would be as robust. Consider for example s 72K under the recent addition of Part VIA to the *Defence Act*. Defence security officials exercising powers under Part VIA 'must not stop or restrict any protest, dissent, assembly or industrial action'. This restriction was included because the *Australian Anti-bases* group lobbied the Defence Minister 'to give a public assurance the Bill would not in any way impede the rights of people to peacefully protest against military installations'.⁴² In contrast, the *Defence (Special Undertakings) Act* does not impose any such restriction on the powers that it grants (including powers of arrest).⁴³ Indeed, as mentioned, the only prosecutions under the Act have been in relation to protestors at Pine Gap. While the first conviction was quashed, the convictions in the second instance were successfully maintained by the Crown.⁴⁴

The *Defence (Special Undertakings) Act*, is appealing in its simplicity for officials enforcing its powers, by contrast to Part VIA of the *Defence Act*. As discussed, Part VIA creates several separate classes of Security Officials vested with different

⁴¹ Ibid 15 [33].

⁴² Defence Legislation Amendment Bills Digest No. 29 2010-11, Paula Pyburne, page 5 <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillsds%2F321735%22>.

⁴³ s 22.

⁴⁴ Unreported; Steven Schubert, 'Pine Gap activists found guilty over entering top secret US-Australian facility', <https://www.abc.net.au/news/2017-11-24/pine-gap-activist-found-guilty-over-entering-top-secret-facility/9188980> 24 Nov 2017; 'No gaol for Peace Pilgrims : Sentence' <https://alicespringsnews.com.au/2017/12/04/peace-pilgrims-fined-but-no-gaol/> 4 December 2017.

powers and obligations. By comparison, the *Defence (Special Undertakings) Act*, provides equal powers to constables as it does to *Commonwealth Officers* under the Act. The term *Commonwealth Officer* is defined broadly, extending to Defence Force Members, APS or a person permanently or temporarily employed 'in connection with, the Defence Force' or persons 'in the service of an authority or body constituted by or under an Act'.⁴⁵ The latter category has the advantage of enabling future authorities such as a nuclear protection police force to enforce the Act. Part VIA also includes more onerous impositions on the powers it confers. Such as the requirement for security officials to produce identity cards and the requirement to inform persons of criminal offences they have committed when exercising certain powers.⁴⁶ Equivalent impositions do not exist for powers conferred by the *Defence (Special Undertakings) Act*.⁴⁷ The latter also provides protection from civil action in exercising powers, whereas Part VIA does not.⁴⁸ Moreover, powers under Part VIA are to be exercised on 'defence premises'.⁴⁹ Whereas the *Defence (Special Undertakings) Act* provides the ability to exercise powers (such as an arrest) 'in the neighbourhood of', a prohibited area.⁵⁰

The *Defence (Special Undertakings) Act* contains offences which are commensurate with the obligations required under the AUKUS agreement. The AUKUS agreement requires parties to the agreement to maintain physical security against 'sabotage'.⁵¹ Section 13 of the Act creates an offence for persons who engage in sabotage towards specified 'things' used for a special defence undertaking. Of relevance to AUKUS objects, 'things' includes a 'roadway, wharf, pier or jetty'; 'navigational aid'.⁵² However, the list of things is limited and none of them would directly cover a submarine or nuclear material. Nevertheless, the Act applies stronger measures in preventing unauthorised access to such things as required by the AUKUS agreement.⁵³ The Act creates an offence for persons that enter a *prohibited area*,

⁴⁵ *Defence (Special undertakings) Act* S4.

⁴⁶ s 72B.

⁴⁷ See for example s 72C.

⁴⁸ s 26.

⁴⁹ *Defence act*, s 71.

⁵⁰ S20, s23.

⁵¹ Above n 1 page 10, Article VIII..

⁵² S 13 (2).

⁵³ Above n 1 Article VIII D.2.

including by ship or fly over without a permit.⁵⁴ Furthermore, outside of *prohibited areas* the Minister may by notice in the Gazette declare associated areas of land and/or water to be *restricted areas* to protect a special defence undertaking. Both *restricted* and *prohibited areas* create offences for unauthorised photography, or gathering of information relating to the area.⁵⁵ These provisions would support the obligations under the AUKUS agreement to protect against 'espionage'.⁵⁶

The final point to be made in support of the application of the Act to AUKUS is its severity of punishments. Under the Act, persons can face a punishment of up to 7 years imprisonment for unlawful entry into a *prohibited area*.⁵⁷ This term is appreciably more severe than a fine that would apply under similar trespass provisions that could be applied.⁵⁸ In relation to taking unauthorised photographs, the *Defence Act* imposes a maximum term of imprisonment of 6 months, whereas the *Defence (Special Undertakings) Act* provides for a term of up to 7 years.⁵⁹ These severe punishments would act as a firm deterrent to persons who would pose a risk to physical security of nuclear material.

Public Licence vs AUKUS Obligations

Heath has criticised the Act as 'a draconian piece of Cold War legislation' due to the severe punishments available under the Act and for its 'suppression of dissent'.⁶⁰ Undoubtedly, the penalties available under this legislation are severe. The Act tempers this by only allowing prosecutions to be instituted under the Act with the consent of the Attorney-General.⁶¹ However, as Heath highlights this has not stopped the Act from being used to prosecute dissent.⁶² This concern may be at least somewhat assuaged by the fact that the only punishments imposed under the Act to-date have been minor fines.⁶³ It is also necessary that strong protections are available for the security of AUKUS nuclear material. Indeed, Australia recognises in

⁵⁴ s 9.

⁵⁵ s 14, S 9.

⁵⁶ Above n 1, 10 Article VIII D.2.

⁵⁷ S 9.

⁵⁸ For example s72P *Defence Act* and s s89 *Crimes Act 1914*.

⁵⁹ *Defence Act* s82 (1A), s 9 (2).

⁶⁰ Mary Heath, 'Continuing the Cold War tradition and supressing contemporary dissent' (2017) *Alternative Law Journal* 42(4), 248.

⁶¹ s 28.

⁶² Above n 60 252.

⁶³ Above n 44.

a treaty proclamation the requirement for military nuclear material to 'be accorded stringent physical protection'.⁶⁴ As a corollary stringent physical security protection requires stringent legislation in support.

Nevertheless, Australia will need to balance the need to satisfy the UK and US as to its physical security measures with the importance of 'social licence'. Yet, the predominant concerns of social licence amongst the commentariat are so far concerned with disparate issues of sovereignty and nuclear waste.⁶⁵ Indeed, there is an apparent lack of overall public inquiry regarding AUKUS. As Tingle bemoans, "The AUKUS submarine saga moves on with not much scrutiny in Australia".⁶⁶ While AUKUS enjoys bipartisan support, and little scrutiny, the long-term nature of the AUKUS project leaves room for the erosion of public confidence.⁶⁷ So whilst *The Defence (Special Undertakings) Act* remains available as a robust statutory framework for the protection of nuclear material, its severity will need to be justified in light of the strategic importance of the AUKUS project.

Nuclear Police Force

As discussed, the AUKUS agreement contains provisions whereby parties delivering nuclear material can review the adequacy of a recipient parties' physical security. The agreement also requires each party to identify agencies and authorities responsible for ensuring the adequacy of physical security.⁶⁸ In this respect the UK would refer to the Special Escort Group (a unit of the Ministry of Defence Police, hereafter SEG)⁶⁹ and The United States would refer to the Department of Energy

⁶⁴ Amendment to the Convention on the Physical Protection of Nuclear Material' (Vienna, 8 July 2005) [2016] ATS 22, 2.

⁶⁵ Lee et al., 'The social licence for AUKUS has not yet been earned', <https://www.lowyinstitute.org/the-interpreter/social-licence-aukus-has-not-yet-been-earned>, Lowy Institute 25 August 2023.

⁶⁶ Laura Tingle, Australia is still finding out about what it doesn't know about its secretive AUKUS deal', <https://www.abc.net.au/news/2024-08-10/australians-in-dark-on-aukus-commitments-joe-biden-revealed/104206862>, ABC 10 August 2024.

⁶⁷ 'Some Australians are increasingly sceptical of AUKUS'; 'The AUKUS awkward squad', *The Economist* 12 April 2024.

⁶⁸ Above n 1 Article VIII D4.

⁶⁹ Ministry of defence, <https://www.mod.police.uk/our-operational-units-and-groups/> (43 Commando task relates protection of UKs Nuclear deterrent not nuclear material for propulsion in general see <https://www.royalnavy.mod.uk/organisation/units-and-squadrons/commando-brigade/43-cdo-fleet-protection-group>; <https://publications.parliament.uk/pa/cm201719/cmselect/cmdfence/622/62207.htm>)

Protective Forces.⁷⁰ As a matter of reciprocity it is foreseeable that the UK and USA would expect Australia to appoint an authority principally tasked with the protection of nuclear material provided to it.

An Australian nuclear protection police force should be established as a unit within the Protective Service Officers branch of the Australian Federal Police (AFP). In keeping with the approach of this paper, the rationale for this is that the existing *Australian Federal Police Act 1979*, would support the functions and establishment of such a unit.⁷¹ In accordance with s 8 of the *Act* it is a function of the AFP to provide police services for Commonwealth property and places, and to safeguard Commonwealth interests. Furthermore, the Minister can direct which functions of the AFP are a protective service function per s 8A. At present, AFP Protective Service Officers protect Defence establishments.⁷² Division 3 of the *Act* provides Protective Services Officers with various powers of arrest, search and the use of force in making an arrest. Protective Service Officers are given these powers in relation to service offences, which includes offences against the *Defence (Special Undertakings) Act*.⁷³

Protective Service Officers are only permitted to use lethal force 'to protect life or prevent serious injury'.⁷⁴ This imposes less restraint than Part VIA, as the lethal force is not required to be in response to an attack. However, this restriction would still limit the circumstances in which lethal force could be used against someone stealing nuclear material.

As mentioned, there is also scope to extend the authority to use lethal force under Part VIA in relation to nuclear material, because similar provisions exist within Part IIIAAA of that *Act*. However, it is the writer's view that the scope to use lethal force should not be similarly broadened under the *AFP Act*, as this is an exceptional permission that should be restrained. The US Protective Forces have legal authority

⁷⁰ Defense Nuclear Security', <https://www.energy.gov/nnsa/defense-nuclear-security>, National Nuclear Security Administration.

⁷¹ (Cth).

⁷² 'Protective Service Officer', [https://www.afp.gov.au/jobs/roles/protective-service-officer#:~:text=AFP%20protective%20service%20officers%20\(PSOs,Defence%20establishments,AFP.](https://www.afp.gov.au/jobs/roles/protective-service-officer#:~:text=AFP%20protective%20service%20officers%20(PSOs,Defence%20establishments,AFP.)

⁷³ s 4, s14A.

⁷⁴ s 14B.

to apply lethal force to prevent theft or sabotage of nuclear material.⁷⁵ However, no such authority was identified for the UK's SEG, who have similar legislative restraints to use of force as the AFP.⁷⁶ Given this and the close relation of the Australian legal system to the UK's, an Australian nuclear protection police unit should model the UK model rather than the US model.⁷⁷

Conclusion

The new AUKUS agreement requires parties to the agreement to maintain robust physical security measures for the protection of nuclear material. The implementation of these measures correspondingly necessitates robust legislation in support. A close analysis of Part VIA of the *Defence Act* and the *Defence (Special Undertakings) Act* shows that the available legal framework would enable sufficient physical security of nuclear material, when appropriately implemented. With the former, this requires amendment to Part VIA to allow the use of lethal force to protect AUKUS assets, akin to its permitted use in protecting critical infrastructure under Part IIIAAA. With respect to implementing the *Defence (Special Undertakings) Act*, this would only require minimal amendment and Ministerial notice. Likewise, the *Australian Federal Police Act* is sufficient in its current form to enable the establishment of an Australian nuclear security constabulary.

⁷⁵ Department of Energy regulation Part 1047.7(4), <https://www.ecfr.gov/current/title-10/chapter-X/part-1047>.

⁷⁶ Per s 3 *Ministry of Defence Police Act 1987* (UK); s 3 *Criminal Law Act 1967* (UK).

⁷⁷ With our legal systems only having separated well into the eighties; *Australia Acts 1986* (Cth).