

**SENATE STANDING COMMITTEE ON
FOREIGN AFFAIRS, DEFENCE AND TRADE**

LEGISLATION COMMITTEE

**LEGISLATION AMENDMENT BILL
(AID TO CIVILIAN AUTHORITIES) BILL 2000**

SUBMISSIONS

Submission No: 5

Submittor: Attorney-General's Department

Contact: Mr Geoffrey McDougal

Address: Robert Garren Offices
National Circuit
BARTON ACT 2600

Telephone No: (03) 9247 6890

Fax: (03) 9247 6869

E-Mail

No. of Pages: 12

Attachments Nil

Cassidy, Laureen (SEN)

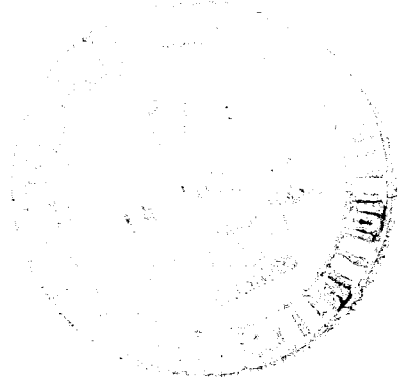
From: McDougall, Geoffrey [Geoffrey.McDougall@ag.gov.au]
Sent: Friday, 14 July 2000 4:38 PM
To: 'Senate FADT C'ttee email'
Cc: Dabb, Geoff; Bunyan, Libby; 'Kelly, Mike ADFA'; 'Kueter-luks, Angela'
Subject: AG's Dept Subm - Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000



DFACP AG Dep Sub

Senate 13/7/0...

Please find enclosed the Attorney-General's Department's submission to the Senate Foreign Affairs, Defence and Trade Legislation Committee's review of the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000.
<<DFACP AG Dep Sub Senate 13/7/00>>



**Submission of the Attorney-General's Department to the
Senate Foreign Affairs, Defence, and Trade Legislation Committees
review of the**

DEFENCE LEGISLATION AMENDMENT (AID TO CIVILIAN AUTHORITY) BILL 2000

HISTORICAL BACKGROUND

Use of Defence Force within Australia to assist in law enforcement

The *Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000* (the Bill) aims to set out processes by which the Defence Force may be called out to assist in law enforcement and the powers that may be conferred on the Defence Force. The Bill provides a considered and balanced powers regime where an emergency situation makes it desirable for the Commonwealth Government to utilise the Defence Force to support State and Territory law enforcement authorities.

2. It is extremely rare for the Defence Force to be used for that purpose. The last occasion that the Defence Force has been called out, on Australian soil, to assist in law enforcement followed the Hilton Bombing on 13 February 1978. There are probably a number of reasons why it has been rare for the Defence Force to be utilised for law enforcement, where use of force may have been required. These include:

- by the time of federation the Australian States had well developed police forces and were no longer reliant on militias to assist in maintaining law and order;
- criminal law enforcement, in circumstances where the Defence Force might be utilised, are primarily state matters (eg offences against persons and property); and

- the Defence Force is a federal body and hence in most circumstances a state government and the Commonwealth government must agree that use of the Defence Force is required.

3. It would seem that there is now, more than ever, an expectation that the Defence Force will be used only sparingly to assist in law enforcement. The Department would also submit that there is good policy reasons for continuing the “tradition” that the Defence Force only be utilised for law enforcement in cases of extreme emergency. Police are trained to deal with and investigate crime and they have day-to-day experience in dealing with crime including resolution of hostage situations. Police are trained and experienced in handling crime scenes, including the apprehension of offenders, the investigation of offences and the preservation of evidence. Furthermore police numbers are greater in Australia than they have ever been, and the number of police relative to Defence personnel is probably as great as it has ever been.

4. In contrast, the Defence Force’s primary role is to defend the country and its training is geared to combat rather than law enforcement. It is not an appropriate use of resources to utilise the Defence Force for law enforcement except in those rare occasions where it is beyond the capacity of police force to resolve a law enforcement incident such situations as might arise in freeing hostages from a hijacked aircraft.

Current offshore law enforcement role of Navy

5. The Bill is not intended to affect the Defence Force’s role, primarily that of the Navy in offshore law enforcement. There has been a long-standing practice for the Navy to enforce offshore Australian immigration, customs and fisheries laws exercising statutory powers under the *Migration Act 1958*, the *Fisheries Management Act 1991*, the *Customs Act 1901* and the *Crimes Act 1914*. The responsibility for enforcement of Australian laws in the offshore areas of Australia is that of the Commonwealth and not of the States and Territories. The practice of relying on the Navy seems to have developed as an alternative to giving other agencies the capacity to operate effectively offshore.

Antecedents to current Bill - Hope Protective Security Review

6. In 1978 Mr Justice R M Hope was asked by the Prime Minister, Mr Fraser, shortly after the Hilton Bombing, to conduct a Protective Security Review¹, which recommended that the legislative provisions relating to the use of the Defence Force, when called out to assist in law enforcement, were outdated. Hope recommended that the Government consider amending the *Defence Act 1903* and he included draft legislative provisions in his report (Appendix 18). They included the following:

- (i) members of the Defence Force called out should be given the powers of Commonwealth Police officers (note that the powers of a Commonwealth police officer varied from state to state) ;
- (ii) power of the courts to ensure that the law has been complied with;
- (iii) parliamentary oversight and including recall when more than 50 Defence Force personnel were being used for law enforcement;
- (iv) regulations and Defence Instructions need to be revised; and
- (v) if circumstances permit warning to be given when lethal weapons are to be used.

7. The Bill broadly gives effect to the themes contained in Justice Hope's recommendations. However, the Bill departs significantly from the detail contained in Justice Hope's recommendations. Set out below is a short summary of the Bill's provisions against Justice Hope's recommendations paraphrased above:

- (i) members of the Defence Force called out under the Bill are given powers under proposed Division 2 or 3 or both but these powers are not directly referable to police powers;
- (ii) although the Bill is silent on the issue of the power of the courts to ensure compliance with the law, it is clear that the courts retain such a supervisory power eg a soldier who used excessive force is liable to prosecution for assault, manslaughter or murder etc;
- (iii) the Bill provides that the Minister for Defence must report to Parliament within 3 sitting days of a call out order or related orders expiring or being revoked but unlike Hope's recommendation there is no statutory obligation to recall Parliament (new section 51X);

¹ Protective Security Review (unclassified version), Australian Government Publishing Service Canberra 1979

- (iv) the Bill does not set out any obligation on the Government to revise regulations and Defence Instructions but the Government has expressed an intention to repeal inappropriate call out provisions set out in the Australian Military Regulations and in the Air Force Regulations²; and
- (v) there is no proposal to give effect to this recommendation but the Bill provides that only reasonable and necessary force may be used by the Defence Force members.

DETAIL OF LEGISLATIVE SCHEME

8. The Bill aims to modernise the procedures to be followed for utilising the Defence Force to assist in law enforcement emergencies. The bill provides for safeguards including parliamentary scrutiny and it specifies clearly the powers of, and obligations upon, members of the Defence Force when used to assist police in carrying out this role. The Bill will amend the Defence Act by repealing most of section 51 and adding a new Part (Part IIIAAA) to the Defence Act.

Procedures

9. The Defence Force may only be called out under the Bill if the Prime Minister, Attorney-General and the Minister for Defence (“the authorising Ministers” which are defined in new section 51(1)) are each satisfied that;

- a State or Territory is unable to maintain order, or to protect Commonwealth interests, or the State or Territory concerned, against violence;
- that the Defence Force is needed to assist; and

then and only then, the Governor-General may make a written Order directing the Chief of the Defence Force (CDF) to use the Defence Force for that purpose. (new sections 51A, B and C).

10. The Order of the Governor-General calling out the Defence Force must state the nature of the violence and the powers that may be exercised by members of the Defence Force. The Order must also state that it comes into force when made, and unless it is revoked earlier, will cease after 20 days. The Order must be revoked if

² Hansard - House of Representatives, Wednesday 28 June 2000, Second Reading Speech to the Bill, at page 16959

the authorising Ministers cease to be satisfied of the matters referred to in paragraph 9 above. The CDF is to use the Defence Force as directed (new section 51D) and the CDF is subject to ministerial directions (new section 51E).

11. The CDF must, as far as is reasonably practicable, ensure that the Defence Force assists and cooperates with the police force of the State or Territory concerned and is not used unless a police officer requests its use. Such a request must be in writing. The Defence Force remains at all times under the command of the CDF. (new section 51F).

Powers to recover buildings and to free hostages

12. If the Governor-General's Order specifies that members of the Defence Force may exercise the power to recover buildings and to free hostages (new Division 2) then those members of the Defence Force called out may use such force as is reasonable and necessary to recapture premises and to free hostages, detain persons, evacuate persons, search for and seize any dangerous thing. (A dangerous thing is defined in new section 51(1) to mean "a gun, knife, bomb, chemical weapon or any other thing that is reasonably likely to be used to cause serious damage to property or death or serious injury to persons").

13. This power might be conferred where, for example, an aircraft has been hijacked and there is the possibility that the Tactical Assault Group of the Special Air Services Regiment may be needed to storm the aircraft. This power is consistent with existing law relating to the use of force in cases of self-defence and for the defence of others.

Cordon, search and seizure powers in General and Designated Security Areas

14. Consideration was given to conferring police powers of the jurisdiction in which members of the Defence Force were called out to assist in law enforcement, something akin to what Justice Hope recommended (see paragraph 6 above). Amongst the difficulties with that policy option, which ultimately led to the development of an alternative proposal set out in the Bill, is that Defence Force might be called out at short notice and its members then be required to utilise police powers that differ in each of the States and the Territories. Instead, under the Bill, special emergency powers may be conferred on members of the Defence Force. The

new Division 3 powers only become available if the Governor-General includes the Division in the call out order and the authorising Ministers, in turn, declare a General Security Area. Further powers become available if the authorising Ministers also declare a Designated Area.

15. Consideration was also given to conferring the powers of the Australian Federal Police (AFP) on the members of the Defence Force called out. This option suffered from similar difficulties to the option to confer the powers of a police officer in a state or territory because members of the AFP also have conferred on them the powers of a constable in the place in which they are acting. In addition it was seen as desirable that members of the Defence Force have a clear but limited set of cordon, search and seizure powers rather than the members of the Defence Force having to content with the complexity of police powers, many of which are irrelevant to the role that the Defence Force might be expected to perform.

16. New Division 3 powers only become available if the authorising Ministers declare a General Security Area. Authorising Ministers may also declare a Designated Area within the General Security Area. Additional powers are available to members of the Defence Force in a Designated Area. These areas may be necessary, for example, to search for, or to keep the public away from a biological device.

General security area

17. If the Order specifies that members of the Defence Force are to exercise general security powers (new Division 3 - subdivision B) authorising Ministers must declare a specified area to be a general security area (new Section 51K). General security powers of the members of the Defence Force may only be exercised in relation to that area. If such an area is declared, then there is a requirement to arrange for a statement advising the public of the description of the general security area and its boundaries, the nature of the violence or threat and the powers which may be exercised by members of the Defence Force.

18. Within that general security area, members of the Defence Force may exercise the following search and seizure powers.

Search of Premises in General Security Area for Dangerous Things such as bombs

19. If the CDF or an authorised officer believes on reasonable grounds that there is a dangerous thing on any premises in that general security area and it is necessary as a matter of urgency to make the dangerous thing safe or to prevent it being used,

members of the Defence Force may be authorised to search those premises (new section 51L).

20. The authorisation must set out a number of matters:

- (a) describe the premises, and identify the member in charge;
- (b) authorise that member and other search members to carry out the search;
- (c) authorise the seizure of items believed on reasonable grounds to be dangerous things; and
- (d) state the time that the authorisation remains in force (which cannot be for more than 24 hours).

21. In acting under the authorisation, a member of the Defence Force may use such force as is reasonable and necessary in the circumstances.

Search of Transport in the General Security Area for Dangerous Things

22. Under new section 51O if a member of the Defence Force believes on reasonable grounds that a dangerous things is in or on a means of transport, he or she may use such force as is reasonable and necessary to:

- (a) stop the means of transport (by erecting barricades if necessary);
- (b) detain the means of transport, but only for so long as is necessary to search it;
- (c) search the means of transport and anything in or on it for a dangerous thing; and;
- (d) seize any dangerous thing.

Means of transport is transport is defined in new section 51(1) to mean “a vehicle, vessel, aircraft that is not airborne, train or other means of transporting persons or goods”.

Search of Persons in the General Security Area for Dangerous Things

23. If a member of the Defence Force believes on reasonable grounds that a dangerous thing is in the possession of a person, he or she may search the person and seize any such dangerous thing (new section 51P).

Designated Area Powers

24. Within a General Security Area, the authorising Ministers may declare a specified area to be a designated area or areas and if this is done, reasonable steps must be taken to inform the public of the designated area and its boundaries (new section 51Q). The powers available in the Designated Security Area are powers to control movement of persons and means of transport including the power to move unattended means of transport (new section 51R). In contrast the powers available in the General Security Area provide member of the Defence Force with powers to search for, and seize dangerous things.

25. In relation to that designated area, a member of the Defence Force may use such force as is reasonable and necessary to do any of the following:

- (a) direct a person not to bring a means of transport into the area, take it out of the area, move it from one place in the designated area to another place in the designated area, not to move it at all or not to move it to specified place;
- (b) erect barricades if necessary;
- (c) remove or move unattended means of transport;
- (d) direct a person not to enter a designated area, or to leave the designated area or to move from one place to another place in the designated area; and
- (e) enter and search premises or means of transport for the purposes of directing any person found therein to leave the area.

Safeguards

Safeguards Generally

Calling out the Defence Force - Role of Governor-General and Ministers

26. The Defence Force is only called out if the Prime Minister, the Minister for Defence and the Attorney-General each agree that the State or Territory is not, or is unlikely to be, able to deal with a situation. In addition, only those powers specifically stated in the Order of the Governor-General may be exercised and only for the purpose stated in that Order (new section 51A, B and C).

Scrutiny of the Courts

27. The conduct of individual members of the Defence Force is subject to the scrutiny of the courts. A member of the Defence Force who used more than reasonable force could be subject to prosecution, for example, for assault or murder.

Lawful protest

28. Under the Bill the Defence Force is not to be used to stop or restrict lawful protest or dissent (new section 51G(a)).

Industrial disputes

29. The existing proviso in section 51 of the Defence Act prohibiting use of the Reserve and Emergency Forces of the Defence Force, in connection with industrial disputes, at the request of a State, is retained (a proviso to new section 51B(2)).

Reserve forces

30. Under the Bill, Reserve and Emergency Forces may only be called out, in any circumstance relating to assisting in law enforcement where the Minister for Defence is satisfied that sufficient numbers of the Permanent Force are not available (new section 51G(b)).

Seizing Dangerous Things

31. If during any search, a dangerous thing is seized, such as a firearm, the member of the Defence Force may take action to make the thing safe or prevent it being used; if practicable issue a receipt; if it might have been used in the commission of an offence, then give it to a police officer or otherwise return it to the person (new section 51V).

Detaining Persons

32. If a person, such as a hijacker is detained, a member of the Defence Force may only use force than is reasonable and necessary in the circumstances and, if practicable, the person being detained must be given an idea of the nature of the offence unless the person should know the substance of the offence. Further in using force against a person members of the Defence Force may not subject a person to greater indignity than is reasonable and necessary in the circumstances. A person detained must be handed over to police at the earliest practicable time (new section 51T).

Non-compliance with obligations.

33. If a member of the Defence Force fails to comply with any obligation in relation to the exercise of any power under the Bill, then he or she is taken not to have been entitled to exercise the power (new section 51W).

Reporting to Parliament and to the public

34. The Minister for Defence must arrange to report to the public within 7 days of the expiry or revocation of an Order or Orders relating to an incident for which the Defence Force was called out. Use may be made of web site to report or by tabling in Parliament if Parliament is sitting. In any event the Minister is obliged within 3 sitting days after the Defence Force has ceased to be called out to table a report in Parliament. These reports are only required after the Defence Force is no longer called out to ensure that the obligation on the Minister to report does not inhibit peaceful resolution of law enforcement emergencies by requiring the Minister to disclose sensitive information while an incident remains unresolved (new section 51X).

Additional safeguard when rescuing hostages - Ministerial Consent

35. Under the Bill (new subsections 51I(2) and (3)) the consent of authorising Ministers or of a Minister authorised by those Ministers, is required before a deliberate assault is carried out, for example, to free hostages from an aircraft hijacking. This further safeguard enables Ministers to advise the Governor-General to order out the Defence Force and for the appropriate units to deploy to the site of an incident to prepare to rescue hostages while delaying the final ministerial decision on whether to authorise a deliberate assault to a point later in time, if at all. Ministerial consent is not to be required where there is a sudden and extraordinary emergency, such as might occur if hijackers were to unexpectedly start killing hostages. In these circumstances those elements of the Defence Force called out

should be able to respond without requiring the consent of a Minister (new section 51I(2) and (3)).

Safeguards in relation to proposed general security powers (general and designated security areas)

36. If the proposed general security powers were conferred on the Defence Force when called out, the safeguards set out in paragraphs 26 to 34 above would be applicable together with a number of further safeguards which include:

- (a) publication of the declaration of a general security area and any designated area within the general security area (new sections 51K(2) and 51Q(3));
- (b) authorisations to search premises in the general security area may be in force no longer than for 24 hours (new section 51L(2)(g));
- (c) searches of premises may only be undertaken where there are reasonable grounds for believing that there is a dangerous thing in the premises (new section 51L(1));
- (d) the person in charge of the search must be identified (new section 51L(2)(c));
- (e) the occupier of premises is entitled to be present for the search and to be given a copy of the search authorisation (new section 51M);
- (f) property or persons detained by Defence Force personnel must be handed over to a police officer at the earliest practical time (new sections 51I(1)(b)(ii) and 51V); and
- (g) receipts must be given for property seized wherever practicable (new section 51V(b)).

Identifiers including offence for not displaying identifiers

37. Members of the Defence Force exercising powers under new Division 3 are required to wear uniforms displaying their surname as well as numbers or alpha numerics to allow each member to be uniquely identified. It is an offence for a member of the Defence Force exercising Division 3 powers not to wear a uniform or

display such identifiers. It is a defence if the contravention was as a result of the act of another person (new section 51S).

Martial law

38. The Bill in no way is intended to create a situation where martial law might be declared or found to apply. Should the Defence Force be called out under the Bill the general law would continue to apply. The ordinary law also continues to apply in General or Designated Security Areas.

39. Martial law³ comes about where there is a war and the civil courts have no jurisdiction over the actions of military authorities. The Bill also has no application to war nor will it apply to the activities of the Defence Force overseas such as during peace keeping operations.

0o0

³ There is a good explanation of Martial Law in the Appendix 21 of the Protective Security Review.