SENATE FOREIGN AFFAIRS, DEFENCE AND TRADE

LEGISLATION COMMITTEE

DEFENCE LEGISLATION AMENDMENT (AID TO CIVILIAN AUTHORITIES) BILL 2000

SUBMISSION

Submission No: 11

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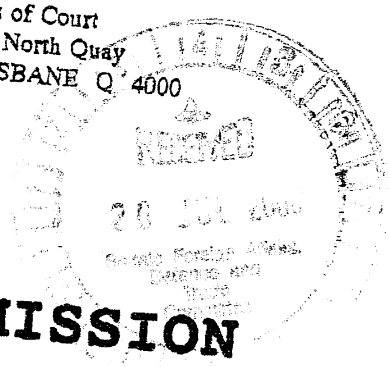

FACSIMILE TRANSMISSION

DATE: 20 — 7 — 00.

TO: Ms. Paul Barsdell, Secretary, References Committee, Australian Senate, Foreign Affairs, Defence and Trade.

FAX NO: (02) 6277 5818.

NO. OF SHEETS TO FOLLOW:

NOTE:

SUBMISSION TO THE INQUIRY INTO THE DEFENCE LEGISLATION AMENDMENT (AID TO CIVILIAN AUTHORITIES) BILL 2000

by

THE SENATE FOREIGN AFFAIRS, DEFENCE AND TRADE LEGISLATION COMMITTEE

1.0 The Authors of this Submission

The Hon John Greenwood RFD QC was a member of the Australian Army Reserve from 1952 until 1994.

Relevantly to this inquiry he served as the senior legal officer in one of the teams advising the Army Commander 1st Military District in the counter terrorist exercises preceding Expo 88. In the latter years of his service he was on permanent call as senior legal officer for one of the counter terrorism shifts for 1MD.

Commissioned in the Infantry, Mr Greenwood transferred in 1973 to the Australian Army Legal Corps. His appointments included that of a Defence Force Magistrate and subsequently a member of the panel of Reviewing Judge Advocates ADF (with the rank of Colonel).

Mr Greenwood has practised as a QC since 1980 and his civilian career is as a barrister in private practice. He has appeared in a number of constitutional cases before the High Court and Privy Council. He was one of Queensland's delegates to the Australian Constitutional Convention (Hobart 1976 and Adelaide 1983), and served in the Queensland Parliament from 1974 until 1983 and the Cabinet from 1976 to 1980.

He was President of the Royal United Service Institute of Queensland from 1995 until 1998.

Dr NJC Greenwood is a mathematician whose primary expertise is in neurosystem modelling and anti-missile defence systems. He does however have a special interest in political and constitutional history, and a Menzies Scholarship to Merton College Oxford enabled him to finish a book – "For the Sovereignty of the People" – which contains an analysis of a number of military coups. He was a delegate to the 1999 Constitutional Convention at Gladstone.

2.0 Contents

3.0 Supplementary References

The document which is of fundamental importance in this branch of the law is Sir Victor Windeyer's opinion to the Hope Inquiry. Para 8 of this submission deals with some developments during the last 20 years which may justify some shifts of emphasis when utilizing Sir Victor's conclusions.

We also append some articles which may not be readily available. They are take from the Bulletin of the R.U.S.I. Queensland:

1. Transcript of address "Constitutional Safeguards and the Command in Chief" 19 Feb 1997 R.U.S.I. Brisbane
2. Article "Mercenaries hired by PNG" (Singirok's refusal of illegal orders) R.U.S.I. Bulletin, March 1997.
3. Article "The Army's role in the Pakistan Republic" R.U.S.I. Bulletin, December 1997.
4. Article "Military Coup in Sierra Leone" R.U.S.I. Bulletin, June 1997.

We also forward under separate cover, copies of "For the Sovereignty of the People" for each of the members of the Committee. The chapters of particular relevance are "The Issue of Military Command" p. 230; "Military Aid to the Civil Power" p. 236; and "The Army and the President" p. 241. The chapter "Her Majesty's Government" deals with the duty to disobey unlawful orders, see page 58 and page 60. The French military coup of 1958 is dealt with in detail in "Beyond our Shores", p. 91 et seq.

4.0 Criteria for assessing the proposed legislation

It goes without saying that the drafting of legislation that deals with the domestic use of the armed forces is a difficult balancing act.

On the one hand there must be provisions which facilitate the proper intervention of the armed forces in domestic affairs. On the other hand there must be checks and balances which are sufficient to prevent the forces from being used as an instrument of tyranny.

If both aims cannot be completely achieved, an historian might argue that it is more important to safeguard the checks and balances.

However, when amendment to the law is taking place at a time when the Sydney Olympics are imminent and international terrorism must be regarded as a possibility, it may be tempting to conclude that amendments should sacrifice the primacy of checks and balances in favour of facilitating efficient intervention.

5.0 The proper intervention of the armed forces in domestic affairs

Our Constitution recognises both in S.119 (for States) and implicitly in the Executive Power (for the Commonwealth), that aid to the civil power may be given by the armed forces when the ordinary instruments of civilian government are inadequate. Some examples might be:

1. Natural disasters: cyclones, floods, bushfires, earthquakes; sometimes complicated by the disruption of communications and the supply of food and medicine.

2. Widespread or longstanding industrial action affecting essential services; a general strike or strikes which prevent the supply of power, coal, petrol or the flow of exports and imports through the ports.

3. Terrorist attack or blackmail manifested in various ways: kidnapping, hijacking, bomb threats to places of public resort, poisoning of water supplies etc.

4. Riots, looting, mob rule with or without a political or religious agenda.

5. Civil rebellion against the Government.

6.0 The armed forces as an instrument of tyranny

The discussion often focuses on two broad categories:

1. The coup or civil war: The revolutionary events which removes the influence of democratic institutions from the business of government.

2. Systematic Oppression: The situation in "one party states" where the constitutional forms of democratic government may exist but the reality is an oligarchic dictatorship. The communist states are one example. The army is used to inhibit freedom of association, freedom of the press, and the independence of parliamentarians and the civil police.

In paragraph 3 of this Submission we have given references to published works where a number of coups are described in detail (France i.e. the 1958 coup, Sierra Leone, Gambia, Fiji, Grenada) and military interference in civilian administration (Pakistan). We incorporate those references in this Submission.

7.0 The checks and balances

The checks and balances consist not only of the relevant legal provisions but also the soldier's perception of them. The latter results from his or her training. It is therefore useful to refer to those legal provisions and the way they are dealt with in training at the beginning of any discussion of "checks and balances".

Paramount in any discussion of the legal provisions are those sections of the Commonwealth Constitution which are relevant (s.119, 68, 61, 51 (vi), 51 (xxxix) and 51 (xxix). Then of course there is the Defence Act s.51 whose amendment is now under discussion. However the most important provisions from a practical point of view were the provisions of the Military Regulations. At the time of Expo 88 they provided for three steps, "call out", "requisition" and "request". They were usually explained to troops as follows:

"Procedures

There are strict procedures which govern the use of the Defence Force in a law enforcement role. These are:

a. Call Out is the Governor-General's decision, making the Defence Force available to engage in law enforcement of this nature. Call out may take

place at the request of a State or on the initiative of the Commonwealth for the protection of its security, or property or the safeguarding of its interests.

b. Requisition is the civil authority's invitation to the Defence Force to leave its barracks and move to the scene of trouble. Except in cases of great and sudden emergency, Army Personnel may not be deployed without a requisition by a Civil Authority. The person making the requisition should arrange for a magistrate to accompany the Military Force.

c. Request signals the temporary handover of the law enforcement role from the police to the Defence Force; the Civil Authority requiring the Army to commence action which may involve the use of force. The request to take action should be made by a magistrate, if possible in writing, in the case where the Commonwealth proposes to employ the Army on its own initiatives if no magistrate is available, this request may be made by a representative of the Commonwealth Civil Authority. It is at this stage that action may take place.

Again army personnel called out may act with force without request only in extraordinary cases of immediate and pressing danger. The three steps are designed to ensure the supremacy of civil authority and in effect provide three checks to the civil government in its commitment to military force."

It was also usual to give troops an explanation of the purpose of Australian Military Regulations Numbers 400, 404, 405, 406, 408, 409, 413 and 414 as follows:

"a. AMR400 (i) Troops are not to be utilised unnecessarily or to an unnecessary extent;

(ii) MIL authorities shall decide the strength and composition of forces called out.

(iii) Civil Authorities' opinion as to size of force required is to be considered but is not conclusive.

b. AMR404 (i) Except in cases of great or sudden emergency, troops who have been called out shall not be ordered or taken out without a written requisition from the Civil Authority.

(ii) Use of the troops shall be totally at the discretion of their Commander.

c. AMR405 and 406 The troops shall be accompanied by a Civil Magistrate or senior policeman who shall be consulted before the disposition of the troops is decided.

d. AMR408 If the Civil Authority concludes that the police are unable to cope with the situation, he shall request the troops take action. The request should be clear, and if possible, in writing.

e. AMR409 (i) Commander of the troops has complete discretion as to whether he responds to the request and as to the extent of his response (i.e. weapons, use thereof),

(ii) Troops remain under command of their Military Commander.

f. AMR413 The troops are not to be withdrawn until the Civil Authority and the Commander decide that they may be withdrawn.

g. AMR414 Repeats the authority for the troop Commander to take action without requisition or request in circumstances of immediate and pressing danger.

h. The AMR also deal with use of humane discretion as to whether to shoot, warnings, and the objects to fire at."

It was usual to explain the legal position. Texts commonly used were the passages quoted hereunder from Lord Haldane, Professor Wood Phillips and Dicey.

"Lord Haldane (then the Right Honourable RH Haldane K.C.) said in evidence given to a Select Committee on Employment of Military in Cases of Disturbance (Parl. Paper 1908 H.C. 236):

> "Broadly stated, there are two principles which form part of the common law of this country. The first one is that every citizen is bound to come to the assistance of the civil authority when the civil authority requires his assistance to enforce law and order. That applies to the soldier, who is in no different position from anybody else. But there is a second principle which does bear upon the duty of the soldier, and that is that when you do come to the assistance of the civil authority which has requisitioned you, neither you, nor for that matter the civil authority is entitled to use more force than is necessary in order to assert the cause of law and order".

Professor O Wood Phillips, (Constitutional and Administrative Law (1973) 5th ed., at pp. 321-314) in discussing the common law principles applicable to the use of armed forces, refers to the report of a Special Commission appointed to report on certain coal strike disturbances in 1893. The Special Commission (which) consisted of Lord Justice Bowen, the then Mr Haldane and Sir Albert Rollet, MP) reported as follows:

> "Officers and soldiers are under no special privileges and subject to no special responsibilities as regards this principle of the law. A soldier for the purpose of establishing civil order is only a citizen armed in a particular manner".

In Dicey's Law of Constitution (1959) 10th ed. at p. 289, the principle is states as follows:

> "It is also clear that a soldier has, as such, no exemption from liability to the law for his conduct in restoring order.
> Officers, magistrates, soldiers, policemen, ordinary citizens, all occupy in the eye of the law the same position; they are, each and all of them, bound to withstand and put down breaches of the peace, such as riots and other disturbances; they are, each and all of them, authorised to employ so much force, even to the taking of life, as may be necessary for that purpose, and they are n one of them entitled to use more; they are, each and all of them, liable to be called to account before a jury for the use of excessive, that is, of unnecessary force; they are each, it must be added – for this is often forgotten – liable, in theory at least, to be called to account before the courts for non-performance of their duty as citizens inputting down riots, though of course the degree and kind of energy which each is reasonably bound to exert in the maintenance of order may depend upon and differ with his position as officer, magistrate, soldier, or ordinary civilian"."

At all levels, from Governor-General to private soldier, all illegal acts ought to meet with resistance. However the orders might not be perceived as illegal.

The soldiers perception of illegality

The individual soldier is more likely to focus on his rules of engagement than the larger question of whether the task that his unit has been committed to is lawful.

One can expect that trained Australian troops would not obey obviously illegal orders e.g. to shoot unarmed civilians without provocation. However the rounding up and detention of civilians, or the interdiction of essential services to a "rebel" held area would not necessarily be perceived as an illegal task if the orders came down the usual chain of command.

The Unit Commander's perception of illegalities

Before the Unit Commander refused to carry out an illegal order he would have to:

(1) Recognise it as illegal.

(2) Have the character, training and conscience to be unwilling to carry out an order which he or she believes to be illegal. In other words, he or she is not an "orders is orders" Commander.

(3) A different type of Commander might be prepared to be guided by an assessment of self interest resulting from weighing the risk of ultimate conviction and punishment for an illegal act against the likelihood of being able to shelter behind the "orders not manifestly unlawful" defence (discussed later in this submission).

(4) Whether he or she is a type (2) or type (3) Commander, the refusal to carry out an order perceived to be illegal is quite certain to damage the Commander's career. Immediate dismissal might or might not be reversed when all the facts emerge. If the Commander's perception of the facts turns out to be incorrect and not reasonably based, a conviction for mutiny is the likely result of a Commander's refusal to carry out an order.

Brigadier (now Major-General) Jerry Singirok M.B.E. is a recent example of a Commander who refused to issue illegal orders. The Sandline Mercenaries developed a plan for dealing with rebels in Bougainville which, in its final form, involved helicopter gunship attacks on villages. This plan would necessarily kill a large number of innocent men, women and children. General Singirok refused to issue these orders and ordered his subordinates to take no part in it.

It would be comforting to assume that Major-General Singirok's response is that which could ordinarily be expected, or at least expected more often than not. Singirok is a deeply religious man and fits into the category (2) Commander we have described above. May we now turn to our category (3) and examine in more detail the defence with would protect a Commander who chose to obey orders which he believed to be unlawful. We are not discussing here a case where the legality of the orders is unclear but the Commander has come to the conclusion that they are probably lawful. We are discussing a case where he has received his orders from his Minister or CDF or Army Commander and he has come to the conclusion that they are probably unlawful.

The law in many Australian States is that a soldier who carries out an illegal command is excused from conviction of the crime involved provided the command is not "manifestly" unlawful.

The Cabinet's perception

It is important to allow the full Cabinet to form a considered view.

The Governor-General's perception

The ultimate safeguard is that of the political umpire.

8.0 Some developments since Sir Victor Windeyer's opinion

The relevant law is stated by Sir Victor Windeyer in the opinion which he gave to Mr Justice Hope. A point should however be made about the defences available to a soldier who has obeyed an unlawful order and committed a criminal act.

Since that opinion was written there have been significant developments in international law relating to war crimes. In particular the view is now held in some quarters that customary international law now includes the Geneva Protocols.

> "It is understood that the "laws or customs of war" referred to in Article 3 (of the Statute setting up the International Tribunal for the Prosecution of War Crimes in the former Yugoslavia) include all obligations under humanitarian law agreement in force in the territory of the former Yugoslavia at the time the acts were committed including Common Article 3 of the 1949 Geneva Conventions and the 1977 Additional Protocols to those Conventions"

In the context "in force" appeared to mean something less than enacted into domestic law. This statement was made by the US Representative in the Security Council and presumable represents the view of the United States. It was quoted by the Hague War Crimes Tribunal in the Delalic decision at paragraph 305. The significance of this is that an Australian soldier is not only governed by those obligations of the international law of armed conflict which have been enacted into our domestic law, the soldier is also governed by those obligations which have become part of customary international law.

9.0 A critique of the proposed changes

The changes consist of:

1. The repeal of s.51 (State initiated call out). The replacement (s.51B) removes some of the steps previously necessary,

2. The institution of a statutory framework for a Commonwealth initiated call out, which in most respects conforms with the new regime for State initiated call outs (s.51A).

3. The conferring of powers on members of the armed forces eg. s.51I(1)(b), and the clarification of the manner in which some existing powers are to be exercised.

The following points should be made:

1. The new s.51B cuts out the first step, namely, the proclamation by the State Governor that domestic violence exists.

2. The new section allows a call out not only for domestic violence that "is occurring" but also that which is "likely to occur". This is a significant extension.

3. The request for assistance is to be made by a "State Government", not the "Executive Government of the State". The meaning of the expression "State Government" is by no means clear. In the constitution of the Republic of Ireland the expression "Government" does not include the President. It is therefore at least arguable that a request by the State Government can be made by the politicians sitting without the Governor.

4. "Authorising Ministers", rather than the Executive Council of the Commonwealth, are given the power to recommend call out. This is a significant limitation. The authorising Ministers moreover, do not include the Attorney General.

5. In Fiji recently the three who would, in Australia, have been the authorising Ministers, were taken hostage. Would the proposed provision prevent a call out to rescue them?

6. The Constitution would probably allow the Governor-General to call out on the advice of a quorum of the Executive Council. That is Windeyer's view of the power of the Command in Chief. However the new Section 51A with its apparent limitation is capable of creating confusion.

7. A similar point may be made about sub-section 51A(6) – "If the authorising Ministers cease to be satisfied ... the Governor-General must revoke the order."

The important point is to preserve in a way that is readily acknowledged from the text of the statute, the right of the Governor-General to act on the advice of the Executive Council. This of course involves his or her ability to dismiss advisers who advocate constitutional impropriety of a nature that is potentially irreversible; a critical matter when it involves use or misuse of the coercive power of the State.

It also involves the Governor-General's right to seek advisers who would both advise against such impropriety and in favour of the holding of an election to put the question to the people.

10.0 Practical problems

(i) Nolle Prosequi in a federal system:

In a federal system it is the State police that have the duty to decide on the launching of prosecutions for murder, manslaughter or other crimes that may have been committed by the Defence Force. It is the State Attorney General or Director of Prosecutions who might or might not decide to enter a Nolle.

There is no easy solution to this problem.

(ii) the need for a cordon with adequate powers, training and the abillty to deploy very quickly:

The proposed amendments are useful in providing adequate powers. Mirror legislation by the States may however be needed.

(iii) the absence of an Australian counterpart to the English Justice of the Peace who makes a "request":

One of the most important checks and balances historically has been the need for a final "request" from a Magistrate before armed force is finally used.

The English JP was very much a local personage and the interests of the local community in which he lived were likely to be both important to him and well understood by him. We have no comparable "Magistrate".

11.0 Conclusions

We have already raised some concerns in paragraph 9. The legislative framework, although important, is a necessary but not sufficient protection of Australians' civil liberties. A regulatory framework which provides a series of steps which allow a measure of reflection and allow the process of armed intervention to be halted or reversed as well as confirmed, is also quite vital. The content of the regulatory regime requires vigilance by the Senates Subordinate Legislation committee.

Again the training of Commanders in their obligations, and adequate deployment of the Australian Army Legal Corps to assist them, is necessary. Most important of all perhaps is a Governor-General who is above party politics and with the courage to dismiss advisers attempting to breach the law.

Respectfully submitted

JW Greenwood

NJC Greenwood