SENATE FOREIGN AFFAIRS, DEFENCE AND TRADE

LEGISLATION COMMITTEE

DEFENCE LEGISLATION AMENDMENT (AID TO CIVILIAN AUTHORITIES) BILL 2000

SUBMISSION

Submission No: 11(a)`

Submitter: Hon John Greenwood, QC
Barrister-at-Law

Address: Level 17
Inns of Court
107 North Quay
BRISBANE QLD 4000

Telephone No: (07) 3236 2631

Fax: (07) 3236 3535

E-Mail [resume@powerup.com.au]

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SUPPLEMENTARY 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

12.0 Supplementary Submission Contents:-

13.0 The proposed legislation is probably unconstitutional

Since the hearing before the Senate Committee on Friday 21 July we have given further consideration to Sir Victor Windeyer's opinion and have come to the conclusion that the proposed legislation is probably unconstitutional.

The proposed legislation purports to fetter the power of call out (which the Constitution confers on the Governor-General as Commander-in-Chief) by making call out conditional on the unanimous advice of three named Ministers.

We submit for consideration the following points:

(1) The Constitutional Convention at Melbourne made a deliberate decision to vest the power of the Command in Chief in the Governor-General and not the Governor-General in Council. (See Convention Debates Melbourne 2249 – 2264). An amendment to Section 68 which would have added the words "acting under the advice of the Executive Council" was considered and defeated.

(2) Section 68 as approved by the Conventions and the vote of the Australian people is as follows:

"68 The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative"

(3) The Constitution of the United States, on which the Australian Constitution relies in some respects, also vests the command-in-chief in the President. In times of war and extreme emergency, it is useful that the source of power is unambiguous.

(4) The Australian Constitution sometimes confides powers to the Governor-General in Council and sometimes to the Governor-General. Where the provisions of the Constitution refer to the Governor-General in Council, the provision is to be "construed" (as a result of the express provisions of S.63) "as referring to the Governor-General acting with the advice of the Federal Executive Council".

(5) In a constitutional monarchy the conventions require the Governor-General to have someone to take political responsibility for his actions eg. a call out. But one Minister is sufficient. In the Bowral call out the Prime Minister took responsibility. In an extreme case when no Ministers are available (eg. in Grenada when all were murdered or missing) the Governor-General could still act.

(6) Sir Victor Windeyer (former High Court Judge, former Major General in the Australian Army) expressed his view of S.68 of the Constitution in the following way:

> "It follows that orders by the Governor-General to the Defence Force, including calling it out, are given by virtue of the authority of command in chief. That does not mean that His Excellency may act without ministerial advice. He must act on the advice of a responsible Minister; but not necessarily by an Order – in Council after a meeting of the Executive Council" See Appendix 9 to the Hope Report pp. 280-81; quoted also by Mr Justice Hope p. 146.

(7) The Commonwealth Parliament cannot take away a power which the Constitution confers. This can only be done by Referendum. In any case, the relevant power, the power to legislate with respect to defence under S.51 of the Constitution, is a power that is given "subject to this constitution". The constitution specifically "Vests" the command in chief in the Governor-General just as it "vests" the judicial power in Chapter III Courts (S.71).

In the UK the prerogative can be abridged by Statute because the Queen-in-Parliament is sovereign. In Australia, the parliament cannot abridge a power, whether initially derived from the prerogative or not, when the constitution itself describes the extent of a power and expresses where that power shall reside.

In conclusion, it seems to us that Sir Victor Windeyer would regard those parts of the proposed amendments which make the exercise of the call out powers dependent upon a request from Ministers, as unconstitutional. On reflection, it seems to us that Sir Victor's view is correct.

We should therefore modify to some extent the view which we expressed in the earlier submission.

We have already corrected para 9 sub para 4 (substitute "Minister for Foreign Affairs for Attorney General"). The words "rather than the Executive Council of the Commonwealth" should be deleted in that sub paragraph.

We should withdraw subparagraphs 6 and 7 of paragraph 9 altogether. Moreover the sentence that reads

> "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"

should read

> " ... the right of the Governor-General to act in accordance with the Constitution. Constitutional propriety does not require any particular Minister or Ministers to take political responsibility for a call out.

14.0 The proposed S.51T probably changes military law in quite a fundamental way.

In battle an army is regarded as being entitled to bring maximum force to bear in order to achieve its objectives, although, even here, modern conventions are imposing significant limitations. In aid to the civil power there is a clear duty to attempt only such force as may be necessary to achieve the objective. The use of "excessive force" is illegal.

The doctrine of "minimum force" is fundamental in any discussion of the way in which a soldier is entitled to use force in aid of the civil power.

The test which determines the level of force that will be permitted is usually expressed in terms of what is "necessary". In paragraph 7 we quoted some authorities. Dicey says a soldier acting in aid to the civil power is:

> *"authorized to employ so much force even to the taking of life as may be necessary for that purpose and they are none 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."*

The proposed Section 51T adds a second test. It is not a sufficient justification that the force used is "necessary". It must be "reasonable" as well. The proposed section is in the following terms:

> *"51T (1) A member of the Defence Force may, in exercising any power under Division 2 or 3 or this Division, "(ie 4)" use such force against persons and things as is reasonable and necessary in the circumstances.*

So much is clear. S.51T (1), the section which gives permission to the soldier to use force, will now require two tests to be satisfied; that of reasonableness as well as that of necessity. However when the draftsman comes to subsection (2), the prohibition section, the test of reasonableness is included in 2 (b) but not in 2 (a). We shall not quote subsection 2 because it is not germane to the central argument. We simply note that subsection 2 may cause some confusion. It is certainly arguable that the prohibition against excessive force in subsection 2 means "more than necessary" to prevent serious injury when a civilian is killed by a soldier, but means something different, i.e. "more than reasonable and necessary" in others. But whatever obscurity is caused by the drafting of the prohibition subsection, it seems clear

enough that the permission to use a level of force given by subsection 1 will in future require an additional test and the soldier is, to that extent, more vulnerable.

15.0 The added vulnerability caused by the proposed S.51T to a soldier in the Code States of Queensland and WA.

We have already said (in paragraph 7) that a soldier has a clear duty to disobey an illegal order. This is true in a number of countries and it is certainly true in those countries, like Australia, which inherit the Common Law of England.

However it is also true that the Common Law gave a limited defence to a soldier tried for a crime which he committed when obeying an illegal order.

In the latter part of the nineteenth century the Common Law defence was inserted in the Queensland Criminal Code (which was subsequently adopted by WA) as follows:

"31. A person is not criminally responsible for an act or omission, if he does or omits to do the act under any of the following circumstances that is to say –

(2) .... in obedience to the order of a competent authority which he is bound to obey, unless the order is manifestly unlawful.

Whether an order is or is not manifestly unlawful is a question of law."

At present, when a judge is deciding as a matter of law whether or not an order is manifestly unlawful, he must ask himself whether or not the execution of the order involved a level of force which was manifestly in excess of what was necessary to secure the objective. If it was not manifestly excessive the soldier is entitled to the defence.

If S.51T is enacted the judge will have an additional question to ask. He must ask "was the level of force involved in achieving the objective manifestly unreasonable?" If so the soldier is not entitled to the defence.

It is obvious that soldiers will become much more vulnerable. It is also obvious that for their own protection, they will have to consider whether the force they are ordered to use is a reasonable method of achieving the stated objective. This has hitherto been the prerogative of higher command. It would seem that S.51T, if enacted, could have a profound effect on the discipline and effectiveness of the defence force. Some might regard the change as justified in the cause of protecting civil liberties. This is for the Parliament to judge. But a change there will surely be.

16.0 The added vulnerability caused by the proposed S.51T in "Common Law" States such as NSW.

What is the position of a soldier who uses excessive force when on duty in NSW during the Olympics? He cannot rely on S.31 of the Code because NSW does not have a statutory counterpart to S.31. His defence, if any, is to be found in the Common Law of NSW.

In England the Common Law has long since abandoned the defence of superior orders on which S.31 was based. The present position (since about 1944) is as follows:

(1) The fact that the order was not manifestly illegal does not, of itself, excuse the accused.

(2) However, the accused may be able to raise a defence based on his or her belief: for example if the accused can show that he or she honestly and reasonably believed on reasonable grounds that the execution of the order was lawful.

(See Halsbury 4th Edition 1976 Vol II para 27; Russell on Crime 1964 Edition Stevens and Sons pp. 87-90; The Manual of Military Law 12th Edition H.M.S.O. London 1972 para 23 pages 156-7).

1944 is the date when the Manual of Military Law was changed to reflect the movement in the Common Law.

The position is probably the same in international law, and from about the same time.

Until the question is considered by an appellate court it is difficult to know whether the common law of Australia on "superior orders" will be regarded as remaining in step with the Code states or moving forward with the English Common Law and International Law. If the Common Law of Australia is regarded as being correctly stated by S.31 of the Queensland Criminal Code, then our remarks in paragraph 15 will also apply in NSW.

If the law has moved forward, then a soldier will have to raise an honest and reasonable (though mistaken) belief that the level of force he was ordered to employ was:

(1) Necessary in the circumstances to achieve his task.

(2) Reasonable in the circumstances.

It will then be incumbent upon the prosecution to disprove one or other of those propositions.

17.0 The revised Paragraph 8.0

At the hearing Mr John Greenwood QC indicated that paragraph 8 had been compressed so much that it was difficult to understand. That has now been redrafted as follows:

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.

Whatever the uncertainty about the Protocols it is clear that customary international law includes Geneva Conventions 1, 2, 3 and 4.

The Conventions 1 to 4 apply to international armed conflicts; Protocol I to international armed conflicts with an extended definition to include fighting against alien occupation in the exercise of claimed self-determination; and Protocol II to armed conflicts of an internal rather than international nature.

In the Tadic Jurisdiction decision the Appeals Court regarded the Geneva Conventions as part of customary international law (see Tadic Jurisdiction decision of the International Tribunal for the Prosecution of War Criminals in the Former Yugoslavia) paras 79-85 and subsequent Tadic trial decision IT-94-I-T, 7 May 1997 para 577; the majority also agreed with in this respect by dissenting judgment of Judge McDonald para 1). The Court was split on whether the particular conflict it was considering was international in nature so as to attract the provisions of the conventions. They were in agreement in holding that the Conventions were part of international customary law and applied whether the nation concerned had acceded to them or not.

It is therefore clear that Common Article 3 to the Geneva Conventions is part of customary law and is of such underlying importance that it applies in any armed conflict whether it is of an international character or an internal armed conflict (see paragraph 306 of the Delalic decision and previous paragraphs).

Common Article 3 of the four Geneva Conventions includes a measure of protection for civilians. It is now accepted that even in an internal armed conflict to which the four conventions would not normally apply the provisions of Common Article 3 are part of customary law, e.g.:

> *"Persons taking no active part in the hostilities ... shall in all circumstances be treated humanely ...*
>
> *To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the abovenamed persons:*
>
> *(a) violence to life and person, in particular murder of all kinds..."*

It follows that a soldier can be tried for a breach of this Article whether his country has enacted it into its own domestic law or not.

In addition, the US has expressed the view that Additional Protocols I and II of 1977 to the 1949 Geneva Conventions are now part of international customary law.

In the course of coming to its conclusion that Common Article 3 of the Conventions is part of customary law the Delalic Court cites a passage from a speech of the US Representative in the Security Council in which the view is expressed that the United States regards not only the four Geneva Conventions of 1949 but also the two Protocols of 1977 as now being part of international customary law. The US Representative is speaking of Article 3 of the Statute setting up the International Tribunal. As he also refers to Common Article 3 of the Conventions in the same sentence the nomenclature is a little confusing. Article 3 of the Statute setting up the Tribunal confers jurisdiction to try "violations of the laws or customs of war." It is obviously a provision which refers to the whole body of international customary law. The Court in Delalic paragraph 305 made the following comment:

> *"That common article 3 [ie of the Conventions] was considered included in the law to be applied by the Tribunal is borne out by the statement of the*

representative of the United States upon the adoption of Security Council Resolution 827, which was not contradicted by any other State representative, that ...

"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 presumably 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.

18.0 Submission of the Western Australian Government

In a teleconference on Friday 21st July the officers of the Western Australian Government responsible for Federal-State relations and associated legal issues indicated that:

(i) there had been no consultation with their State Government on the proposed amendments.

(ii) some of the proposed amendments to the Defence Act would, arguably, override the relevant Western Australian criminal law.

The representative of the Commonwealth Attorney-General's Department agreed that the only consultation with the State Governments had taken the form of the various meetings of the police representatives who form the State and Commonwealth Anti Terrorist Committee.

The Western Australian Submission that the proposed amendments would, arguably, override the relevant provisions of the WA Criminal Code came after Mr Greenwood had given his evidence. In view of the importance of that submission we wish to revisit the question.

Whether the Criminal Law of the Australian States is to be displaced by amendments to the Defence Act is a matter of fundamental importance to Australians. Hitherto the Defence Force has operated on the assumption that:

1. Although the Commonwealth Crimes Act provides for a number of significant offences, the content of criminal law in Australia is for the most part determined by State (and Territory) Parliaments. It is by the States that the offences of murder, manslaughter, kidnapping and assault etc. are defined and the parameters of appropriate defences are determined.

2. Traditionally, the members of the ADF at all times remain subject to the criminal law of the State where they are operating. There is no immunity conferred on the Armed Forces.

3. Although the ADF is also subject to a disciplinary regime under the Defence Force Discipline Act, the obligations under this regime are added to and do not displace the members' obligations under the state Criminal Law. At all times the soldier remains liable for prosecution by State Authorities (see Re Tracey; ex parte Ryan (1989) 166 CLR 518, 63 ALJR 250; Re Nolan, ex parte Young (1991) 172 CLR 460, 65 ALJR 486; Re Tyler, ex parte Foley (1994) 181 CLR 18, 68 ALJR 499. The judgment of Sir William Deane in Re Tracey is of especial importance as a lucid explanation of the underlying principles).

Having made those three points it must be said that the apprehensions which have been expressed by the Western Australian Officers ought to be addressed. Those apprehensions result from the effect of S.109 of the Constitution. Legislation by the Commonwealth Parliament will, if within power, override State legislation if:

(i) the Commonwealth legislation is inconsistent with State legislation,

(ii) if the Commonwealth legislation purports to cover the field. It then displaces State law whether inconsistent in a particular or not.

The "field" covered by the proposed Defence Act Amendments is a fairly small paddock. Division 2 (Sections 51H and 51I) confers some powers in connection with the freeing of hostages; Division 3 (Sections 51J to 51S) confers powers with respect to premises and persons in an area declared to be a general security area, and some additional powers in a "designated area" within the general security area. In performing tasks under Divisions 2 and 3 the member is allowed by S.51T to use "such force against persons and things" as is "reasonable and necessary in the circumstances" but, "must not do anything that is likely to cause the death of, or grievous bodily harm to, the person unless the member believes on reasonable grounds that doing that thing is necessary to protect the life of, or to prevent serious injury to, another person including the member." There is an exception in the case of dealing with persons attempting to escape (S.52T(3).)

Most provisions of the "cordon" legislation seem to be within power. There may be a question mark over S.51I(1)(b)(ii) which allows a soldier to apprehend a person whom he believes has committed an offence against State law. It is not immediately apparent that this is within Commonwealth legislative power. This and perhaps some other provisions, may require mirror image legislation in cooperation with the States.

However the really important point, is that for almost 100 years the Commonwealth and the States have managed this branch of the law from legislation generated by the States. The AMR's have proceeded on that basis. Now the Commonwealth is to take over the field and it would seem sensible to have consultation at a higher level than that which has so far taken place.

In the meantime a Defence Instruction may be a quick method of introducing a new regime.

19.0 Conclusions

There are a number of features of the proposed legislation which would justify some caution in deciding whether to pass them into law. There is no doubt that it is desirable to clarify the powers of search, detention and seizure which cordons should possess. This could be done by a Defence Instruction (which has the effect of a General Order).

Even so it is undesirable that such an Instruction should restrict call out to the three named Ministers – PM, Minister for Defence and Attorney-General. Such a provision is, in any case, unconstitutional.

It also seems unwise to restrict call out to cases of "violence". Does this mean that the Army cannot be used to aid the Civil Power in times of bushfire or flood when no violence is apprehended?

Finally, there is a very serious change in Military Law being proposed by S.51T. We now know from the Senate hearing on 21st July that the States have not been consulted (otherwise than through Police officers in the counter terrorism committee). In a matter of great sensitivity in Commonwealth State Relations it seems desirable to consult before embarking on legislation which may override State Criminal Law, the law that has traditionally governed soldiers in Australia, and at the same time alter, in a significant way, the fundamental doctrine of "minimum force".

Respectfully submitted

John Greenwood QC NJC Greenwood