

SENATE FOREIGN AFFAIRS, DEFENCE AND TRADE

LEGISLATION COMMITTEE

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

SUBMISSION

Submission No: 12

Submitter: Ministry of Premier & Cabinet of WA

Contact: Ms Lucy Halligan
Principal Policy Officer
Federal & Constitutional Affairs

Address:

Telephone No: (08) 9222 9302

Fax: (08) 9222 9858

E-Mail LHalligan@mpc.wa.gov.au

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Attachments Nil

Our Ref: 200009585

Mr Paul Barsdell
Committee Secretary
Foreign Affairs, Defence and Trade
Legislation Committee
Parliament House
CANBERRA ACT 2600

Dear Mr Barsdell

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

I refer to the letter to the Hon Premier of Western Australia from Senator John Hogg dated 29 June 2000 inviting written submissions to the Legislation Committee inquiry on the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000.

I enclose Western Australia's written submission to the inquiry. Western Australia welcomes the amendments in relation to the Defence Force counter terrorist assault role. However, our comments raise issues of significance in relation to constitutional power and Commonwealth-State relations.

I understand that an oral presentation has been arranged for 11.15am EST by a telephone link. I confirm that the participants who will be appearing before the Committee are Jim Thomson, Assistant Crown Solicitor General, Lucy Halligan, Principal Policy Officer and myself.

If you have any questions about the submission or about Western Australia's appearance at the Committee hearing, please contact Ms Lucy Halligan on (08) 9222 9302.

Yours sincerely

PETRICE JUDGE
**ASSISTANT DIRECTOR GENERAL
FEDERAL AND CONSTITUTIONAL AFFAIRS**

20 July 2000

The seal of the Defence and Trade Legislation Committee is circular, featuring a central emblem with a star and the text 'DEFENCE AND TRADE LEGISLATION COMMITTEE' around the perimeter. It also includes the date '20 JUL 2000' and the text 'Foreign Affairs and Defence Committee'.

**DEFENCE LEGISLATION AMENDMENT (AID TO CIVILIAN AUTHORITIES)
BILL 2000 (CLTH) - SUBMISSION TO SENATE FOREIGN AFFAIRS,
DEFENCE AND TRADE LEGISLATION COMMITTEE**

- 1) Part IIIA of the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000 (Clth) (the Bill) significantly changes the existing call out arrangements in section 51 of the Defence Act 1903 (Clth) and may weaken States' positions in relation to section 119 of the Commonwealth Constitution including the mandatory obligation that the Commonwealth respond to a State request under section 119.
- 2) Proposed sections 51A and 51B of the Bill are of particular concern to Western Australia. The proposed section 51A allows the Commonwealth to unilaterally enter a State and protect undefined "Commonwealth interests" and the proposed section 51B does not require the Commonwealth to comply with a request by a State for protection against domestic violence. These proposed sections and their relationship to and interaction with section 119 of the Commonwealth Constitution raise significant constitutional issues.
- 3) Proposed section 51A of the Bill does not define "Commonwealth interests". In this context, the Commonwealth Parliament's power in respect to matters of domestic violence may include sections 51(vi) and 51(xxix) (and, possibly, section 51(xxix)) and 61 of the Commonwealth Constitution and, perhaps, an inherent prerogative power.

However, by not defining "Commonwealth interests", proposed section 51A may stray beyond the Commonwealth's constitutional power. Even if it does not do so, the concept of "Commonwealth interests" should be defined, for example, to provide clarity, guidance and certainty. It may well be that not everything that could be said to affect a "Commonwealth interest" would justify as a matter of law or Commonwealth-State relations the deployment of the Defence Force contrary to, or without the consent of, a State.

- 4) Proposed section 51A allows the Commonwealth to call out the Defence Force without the consent of, or a request from, a State. The Standing Committee on the Protection Against Violence provides for consultative mechanisms between the States and the Commonwealth in relation to anti-terrorist activities. The Bill should be amended so that a legislative requirement, or some other appropriate mechanism, exists to ensure that the States agree to the Commonwealth's use of the Defence Force or, at the very least, that States be consulted about the Commonwealth's intention to call out the Defence Force.
- 5) Under the Bill, the power of the Governor General to call out the Defence Force can only be done if the Prime Minister, Minister for Defence and the Attorney General (the authorising Ministers) are satisfied that domestic violence is occurring or likely to occur in a State and the State is not, or is unlikely to be, able to protect Commonwealth interests. Therefore, Defence Forces can be utilised even if domestic violence is not occurring. There only needs to be potential for such violence. This

expands the position under the current section 51 of the Defence Act 1903 (Clth) and section 119 of the Commonwealth Constitution.

- 6) As a result, where Commonwealth Ministers are satisfied of the criteria in proposed section 51A, then the Defence Force can unilaterally enter a State to protect "Commonwealth interests" even if domestic violence is not occurring.
- 7) Section 119 of the Commonwealth Constitution provides that the Commonwealth "shall protect the States" and does not place that protection at the discretion of the Commonwealth. In this context, it should be noted that proposed section 51B (unlike section 119 of the Commonwealth Constitution) does not place a mandatory obligation on the Commonwealth to comply with a State request for protection against domestic violence.
- 8) In this context, there may be an inconsistency between proposed section 51B and section 119 of the Commonwealth Constitution. Under proposed section 51B, the Commonwealth does not have to comply with a State's request for protection against domestic violence. Proposed section 51B requires the authorising Commonwealth Ministers to be satisfied that the matters in section 51B(1) (a), (b) and (c) have been satisfied.
- 9) The retention of the prohibition (currently in section 51 of the Defence Act 1903 (Clth)) against the use of the Defence Force in connection with industrial disputes should be retained.

Conclusion

- 10) There are at least two constitutional issues. First, the scope and breadth of the Commonwealth's constitutional power in relation to proposed section 51A. Secondly, the relationship between proposed section 51B and section 119 of the Commonwealth Constitution.
- 11) In addition to those matters, the proposed provisions raise important issues of Commonwealth-State relations. At least three examples are obvious:
 - a) First, the extent to which the Commonwealth can and should be able to unilaterally enter a State and protect (even where domestic violence is not occurring) undefined "Commonwealth interests";
 - b) Secondly, the extent (and circumstances in which) the Commonwealth must comply with a State's application for protection against domestic violence; and
 - c) Thirdly, the extent to which (while the provisions of proposed sections 51A and B are operating) State criminal laws and associated legislation may be rendered inconsistent by provisions in the Commonwealth Bill or its operation (for example, proposed sections 51I and 51R).