

Warwick S. Johnson

The Secretary
Senate Legal & Constitution Committee
Parliament House
Canberra

**Defence Legislation Amendment
(Aid to Civilian Authorities) Bill 2005**



Submission by Warwick S. Johnson


1. I annex a copy of my submissions of 17 July 2000 on the same topic, a transcript of my evidence to the Senate Committee on 21 July 2000 and a copy of the advice to the Parliament, by the then Solicitor-General R.R. Garran, of 22 October 1920. I submit they are all relevant to the present Bill.
2. I submit that there is a threshold question to be considered. This is whether the proposed amendments which permit a Prime Minister or Authorising Ministers to make call-out orders, utilising the Defence Force against domestic violence, may be beyond the power of the Parliament.
3. Section 68 of the *Constitution Act* reads:

"The command in chief of the naval and military forces of the Commonwealth is vested in the Governor General as the Queen's representative."
4. I am concerned that the proposed amendments may be a partial divestment or at least an erosion of the Governor-General's power.


W.S.J.

5. I note the difference in s.71 of the said Act. It does provide for a delegation in prescribing the judicial power. The last sentence of that section reads:

"The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes."

6. The nation's fabric contains an inherent and sacred right that the power to utilise the Defence Forces in domestic affairs is vested solely in the Governor-General. Any erosion of that power which could result in it becoming a play toy of politicians would not be accepted.
7. The reason given, for this proposed sharing of power, is to ensure there is no delay in utilising the Defence Force when it is necessary as a matter of urgency. In my former submissions in 2000 I highlighted the need for instant approvals and orders.
8. Present means of communications, which is now in everyone's hands, ever dedicated and secure channels have cured this former problem.
9. There is always a duty Governor-General as there is a Chief of the Defence Force. Administrative procedures are in place which ensures that there is always a "captain on the bridge". It is now easier to contact a Governor-General than it is to contact "two authorising Ministers" on a wet Friday afternoon.
10. My reading of the Bill indicates that the calling out of the Reserves, under s.50D of the *Defence Act*, by the Governor-General is not affected by the proposed amendments.
11. I note that throughout the Bill the words "reasonable and necessary" are used. I again submit that only the "necessary" is necessary. My reasons are the same as set out in the transcript of 21 July 2000.
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12. On page 10 of the Bill in s.51SE(1)(a)iii the word "capture" is used. I suggest the word "secure" may be more appropriate. See my reasons in the 21 July 2000 transcript.
13. I again submit, that in any call-out order, there must be a direction as to whether the Forces should be armed or unarmed. It should not be left to the Force commander. Such a requirement would ensure the closest attention of the person or persons making the order and its sensitiveness when things go wrong. It may also have the result of "leave it to the Governor-General".
14. I am prepared, if requested, to attend any meeting of the Committee.



WARWICK S. JOHNSON

**SENATE FOREIGN AFFAIRS, DEFENCE AND TRADE
LEGISLATION COMMITTEE**

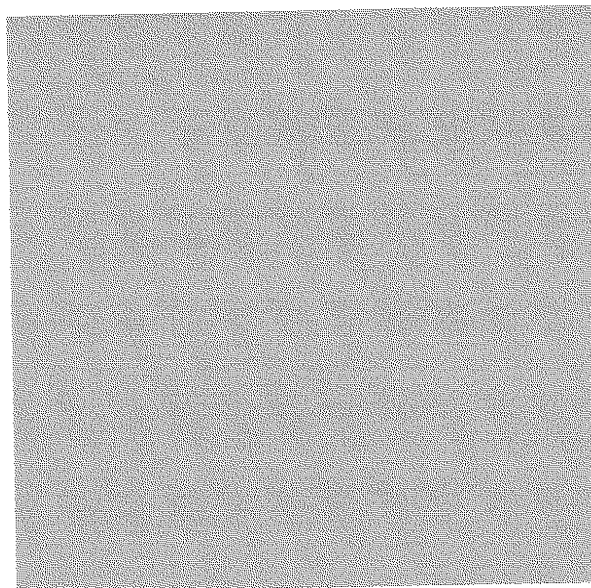
**DEFENCE LEGISLATION AMENDMENT
(AID TO CIVILIAN AUTHORITIES) BILL 2000**

SUBMISSION

Submission No: 9

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No. of Pages: 5

Attachments / Nil

WARWICK S. JOHNSON

17 July 2000

The Secretary
Senate Foreign Affairs, Defence and Trade
Legislation Committee
CANBERRA

Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000 Submission by Warwick S Johnson

"Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a Court of Law or otherwise discussed in public." See the note by Isaacs J, in Farey v Burnett 21 CLR 433 at 456.

I was a private soldier in the Citizen forces (Militia) in 1939 when called up for full time duty, about 7 days before war was declared. This may be the only time the Reserved Forces have been called out for full time duty in Australia's history in peace time.

After that war I re-enlisted in Citizen Force and served in that Force until 1968. My final posting was in the Directorate of Infantry with the rank of Major. In February 1955 when floods occurred in the Hunter River, I was appointed as the army advisor to the civilian authorities in Maitland before the flood peaked and for some days thereafter.

I submit for your considerations the following:

- 1 The subject of the present bill is completely covered in the Protective Security Review of 1979 by Mr Justice R Hope.
- 2 A motion to add the proviso to Section 51 of the Defence Act 1903, was put to the Senate on 19 November 1914 and agreed to on that day. See Hansard p.785 to 812. It read in its present form:
"Provided always that the Citizen Forces of the Commonwealth shall not be called out or utilised in connection with an industrial dispute."
There was much debate on that occasion on when does an "industrial dispute" become "domestic violence".
- 3 Section 119 of the Commonwealth Constitution provides:
"The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence."

was only possible by water, mobile telephones had not been invented and my wireless set and operators were lost on the first morning as will be related later;

- (c) electricity in East Maitland was cut off by its local authority on its own initiative. This led to a mistaken belief that all electricity in the Maitland area was cut off and resulted in 3 deaths;
- (d) the delay in the appointment of an experienced advisor from the time the need was obvious to the State and the approval of the Commonwealth to the use of the Army personnel.

- 15 Section 511 of the Bill does not take into account that the need for taking the actions, therein set out, always occurs in driving rain, during a cyclone or bush fire and at night. In my experience it is impracticable and impossible if one has lost his pencil.
- 16 To expect any authorising officer, in the heat of an incident, to carry out the written paperwork envisaged by the proposed legislation is unrealistic.
- 17 It is usual in all riots or natural disasters in a city, looting occurs. This must be stopped instantly. It is like dysentery very catching and spreads quickly and without any warning. It can only be stopped by very tough physical restraint or as a last resort the firing of a weapon. In such a situation I would ask the civilian controller, whom I was advising, to fire the first shot at the target he had designated to me.
- 18 the automatic appointment of members of the Defence Force as special constables was recommended by Mr Justice Hope on page 342 of his report. I commend this step as a solver of most of the problems which arise at the "coal face" or the "waterfront".
- 19 The administrative steps which are envisaged by the proposed legislation, if adopted, must be incorporated in preplanned procedures to permit instant implementation at both the Commonwealth and State levels. To find Ministers and departmental officers on a Friday afternoon is often difficult. I know because it happened to me and was confirmed by a departmental officer last week.
- 20 The Maitland floods 24 February to 1 March 1955 demonstrated the need for a State body to co-ordinate and control natural disasters.
- 21 At that time I was a Reserved Forces Officer serving in the Infantry Brigade Head Quarters at Newcastle. At about 11 am on 25 February I agreed to act as the army's advisor to the civilian authorities at Maitland. I was informed that the State had asked the Commonwealth for assistance and was awaiting approval.

- 22 I reported in about 2 pm and was allotted an amphibious vehicle (DUKW) and driver plus a Sergeant and Corporal from a signals unit. It was 2 or 3 hours later before my appointment was approved. [Public Service is not noted for speed on a Friday afternoon.]
- 23 It was either my Brigadier or my General who told me that I had no authority over the civilian organisations I was only their advisor.
- 24 I reported to the police station at Maitland where I was accepted as if I commanded the area. This attitude was one which all the civilian authorities adopted and all my suggestions were taken as orders. They were desperate for a leader. My uniform indicated that I had served during the war in the paratroops. Everyone called me "Sir".
- 25 That evening I established a control centre on the main road entrance to the town to control and direct the inflow of food, blankets and clothing from unco-ordinated charities. The local motor service station agreed to supply petrol and oil for the DUKW on my signature. The Army honoured this account very promptly.
- 26 I arranged for an early morning reconnaissance of the area with a local doctor, an Air Force padre and two policemen on board.
- 27 The only movement in the town was by water. Surf boats were under no control but were performing remarkable rescue feats in otherwise inaccessible places.
- 28 At about 9 a.m. on Saturday 26 February the tall vertical aerial of the wireless set touched the wires of the State Electricity grid and the two signallers who were sitting beside me were killed as was a policeman. The Padre and I successfully rescued the other policeman who was floating some distance away. I collected a burnt hand and the Padre collected an OBE in the next honours list.
- 29 I had been told at the police station that all electricity to the town had been cut off.
- 30 This accident left me without any means of communication except for those few working telephones on high ground.
- 31 On the Saturday afternoon the senior police officer reported to me that looting had started in the town and asked what action did I wish. I said to him "stop it quickly". He then asked if I wanted them arrested and I replied "I want it stopped now. How is a matter for you." He said "Can you do anything?" I replied "Yes I can put in my report that looting had been stopped by prompt action of the police or I can report that the police were unable to handle looting." He then asked if I could do a Lord Nelson. I replied "All I can do is put it in my report". He told me later the looting had stopped, no charges had been necessary and it would not reoccur.

- 32 The following days were spent co-ordinating routine collections from roof tops, taking food and clothing to isolated houses, setting up on central feeding facilities and sanitary facilities as the sewerage system was under water. The only difference of opinion I had was with the town's engineer. He told me I should stick to soldiering and leave engineering to him.
- 33 By Tuesday 1 March the waters in the main town area had subsided and the town hall was again running the town. I returned later that day to my practice with a bandaged left hand.
- 34 I trust that the latter part of this submission will provide some insight into situations which face a member of the Defence Forces, in peace time, when the Senate is considering the practical applications of the legalisation for which you are responsible. Particular emphasis must be given to the need for speed in the initiating procedures.

WARWICK S. JOHNSON



COMMONWEALTH OF AUSTRALIA

Proof Committee Hansard

SENATE

FOREIGN AFFAIRS, DEFENCE AND TRADE LEGISLATION
COMMITTEE

Reference: Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000

FRIDAY, 21 JULY 2000

CANBERRA

CORRECTIONS TO PROOF ISSUE

This is a **PROOF ISSUE**. Suggested corrections for the Bound Volumes should be lodged **in writing** with the Committee Secretary (Facsimile (02) 6277 5818), **as soon as possible but no later than:**

Friday, 11 August 2000

BY AUTHORITY OF THE SENATE

[PROOF COPY]

SENATE
FOREIGN AFFAIRS, DEFENCE AND TRADE LEGISLATION COMMITTEE

Friday, 21 July 2000

Members: Senator Sandy Macdonald (*Chair*), Senator Hogg (*Deputy Chair*), Senators Bourne, Ferguson, Payne and Schacht

Participating members: Senators Abetz, Bolkus, Boswell, Brown, Chapman, Cook, Coonan, Crane, Eggleston, Faulkner, Ferris, Gibbs, Gibson, Harradine, Hutchins, Knowles, Mason, McGauran, Murphy, Tchen, Tierney and Watson

Senators in attendance: Senators Hogg and Sandy Macdonald

Terms of reference for the inquiry:

Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000

Committee met at 9.08 a.m.

JOHNSON, Mr Warwick Stanley (Private capacity)

CHAIR—I declare open this public meeting of the Senate Foreign Affairs, Defence and Trade Legislation Committee which is inquiring into the provisions of the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000. This is the first public hearing to be conducted by the committee on this matter.

In its 10th report of 2000, the Selection of Bills Committee recommended that the provisions of this bill be referred to the Senate Foreign Affairs, Defence and Trade Legislation Committee to provide the community with an opportunity to comment on the bill's contents. On 28 June, the Senate referred this bill to this committee for report by 16 August 2000. The inquiry was advertised in the press on 1 and 3 July. To date, the committee has received 13 submissions.

I welcome Mr Warwick Johnson to this hearing. The committee prefers all evidence to be given in public, but should you at any stage wish to give any part of your evidence in private, you may ask to do so and the committee will consider your request. The committee has before it a written submission from you. Are there any alterations or additions that you would like to make to the submission at this stage?

Mr Johnson—Not at this stage.

CHAIR—I invite you to make a brief opening statement and then we will proceed to questions.

Mr Johnson—I am here as a former member of the Army. I could perhaps read the first two paragraphs of my submission. It identifies why I am here.

CHAIR—We have read your submission, Mr Johnson. If you would like to read it in, please do so.

Mr Johnson—I thought it might be of interest for people who are sitting behind me to know where I come from.

CHAIR—Certainly.

Mr Johnson—I was a private soldier in the citizen forces in 1939 when called up for full-time duty about seven days before war was declared. This may be the only time the reserve forces have been called out for full-time duty in Australia's history in peacetime. After that war, I re-enlisted in the citizen force and served in that force until 1968. My final posting was in the directorate of infantry with the rank of major. In February 1955, when floods occurred in the Hunter River, I was appointed as the Army adviser to the civilian authorities in Maitland before the flood peaked and for some days thereafter.

The only thing that I would like to emphasise generally is the need for speed in calling on the forces. The procedures presently laid down are quite inadequate and out of date. Of course, in the states now we have emergency services organisations. My recommendation, which I commend to you, is that there should be a procedure whereby access to the armed forces is accelerated so that you can have instant, or almost instant, reaction. You will get no warning in an earthquake. An earthquake occurred in Newcastle. To use the permanent forces or the reserve forces in such an instant natural disaster is essential.

Speed is my theme and the greater use of the reserve forces, particularly in remote country towns in New South Wales. The floods in Maitland and Nyngan are perfect examples. The resources in those remote

country towns are very limited. I am aware that in one case there was a minor flood in one country town where the local reserve forces were available to be used—and were dying to be used—but the approval was not forthcoming.

My recommendation to you, which is not in my submission but which is recent thinking, is that there should be delegation down from the civil authorities to people of relatively senior rank in the emergency services to give them the authority to deal with the armed forces at relatively senior rank. I can only add that the use of the reserve forces in remote country towns seems to be a great asset to the nation. It is particularly so in states like Western Australia in the north-west, which is sensitive at the moment. I believe the reserve forces are an asset that is not properly used. I have nothing more to add.

CHAIR—Thank you, Mr Johnson. You note in section 51D that the Chief of the Defence Force must utilise the Defence Force in such manner:

... as is reasonable and necessary, for the purposes of protecting the Commonwealth interests specified in the order, in the State or Territory specified in the order, against the domestic violence ...

Could you explain in greater detail why you think the word 'reasonable' is not necessary and should be deleted? Is the inclusion of this word simply not needed or does it create problems in your mind?

Mr Johnson—I believe it is not needed. I believe the all-embracing 'is necessary' is sufficient. It will go to precluding members of my own profession arguing before the High Court one day what is really intended by the section.

CHAIR—You have raised the very interesting point that the words 'defend or' should be inserted before the word 'recapture'. Could you explain in greater detail why you think this is necessary?

Mr Johnson—It is my experience that sometimes it is better to grab the higher ground first. If a building is even threatened, that is a situation which occurs before it needs to be recaptured. The thought I had was to give that authority to move in first.

Senator HOGG—How would you determine in that pre-emptive state what was a likely domestic violence situation as opposed to one which was not? This is the difficulty in giving the power under this legislation and just giving people carte blanche to determine that there might be a situation where there is domestic violence. How does one get around that problem?

Mr Johnson—I believe you just have to leave that to the discretion of the person in charge of the exercise at that moment. For example, about a year ago the American Consulate in Castlereagh Street in Sydney was under threat of domestic violence and rocks were thrown at it. What I had in mind was the power to move in to protect those obviously threatened premises.

Senator HOGG—I understand that comes under a different authority. I will be looking to the Department of Defence and A-G's for some advice on that when they come before us. I understand that is not territory which is territory of Australia and, therefore, this legislation, as I understand it, would not apply.

Mr Johnson—No.

Senator HOGG—The same applies to embassies, consulates and high commissions around here, so I understand your concern. We can address that with the Department of Defence.

Mr Johnson—Perhaps I selected a bad example in using a foreign embassy or consulate. I still think the same applies.

Senator HOGG—You suggest that in 51D the word 'reasonable' be dropped, as raised by Senator Macdonald. In 51D it says:

If the Governor-General makes an order under section 51A, the Chief of the Defence Force must—

so it is not optional for him or her—

subject to sections 51E, 51F and 51G, utilise the Defence Force, in such manner as is reasonable and necessary ...

Why would you want to see the removal of 'reasonable'? That would be seen by many people as being a safeguard against the Defence Force acting improperly or beyond its mandate in this sort of area. If the word 'necessary' only were left there, it may well end up in circumstances that people might otherwise not appreciate. So would you necessarily persist with the removal of the word 'reasonable'? Is there some fundamental, telling reason why the word 'reasonable' should not be there? Is it such an inhibitor to the operations of the defence forces that we should consider the removal of it when this legislation comes before the Senate? That is basically what I am asking.

Mr Johnson—It is my submission that it should stand. One is put in a dilemma by having to decide: firstly, is it 'reasonable' and, secondly, is it 'necessary'. To prevent any legal argument on the correct

interpretation of the section, I submit that the word 'necessary' is the only one that is necessary. You cannot arrive at being 'necessary' unless you have already considered reasonableness anyway.

CHAIR—Could it not be that the word 'reasonableness' emphasises the need for troops to use the minimum force necessary to accomplish the task they have been sent to do? It is an indicative response.

Mr Johnson—It is my view that it has got to get to being necessary. Any rungs in the ladder, like 'reasonableness', are only part of the process of arriving at the 'necessary' level. I was just looking forward to one day when there is an argument as to whether or not it was reasonable but not necessary. I think it makes it easier for people to decide under the all-embracing umbrella of was it 'necessary'. If it were unreasonable, you would not get to the necessary in the mental process anyway. I just think it would make it have greater clarity.

CHAIR—Yes. What is reasonable is what is commonsense, isn't it?

Senator HOGG—You note that the automatic appointment of members of the Defence Force as special constables was recommended by Mr Justice Hope in his 1979 report. You agree with his recommendation. In its submission, on page 10, the Department of Defence stated that it considered it desirable that the ADF should be 'granted all the same authorities as the police', as this would encourage the view that the ADF is a substitute for the police rather than a supplement. Further, it stated that it was more desirable to spell out as clearly as possible the tasks that are expected of the ADF and confine the extent of the authorities to this as a limitation of employment of the ADF. Would you like to respond to the Department of Defence's explanation as to why defence members should not have police powers?

Mr Johnson—No, I cannot respond to that. I have not had the benefit of reading that submission. I would like the opportunity to consider their submission instead of just answering it off the cuff.

Senator HOGG—All right. I think their submission is available over on the table there today. If you would take that away, have a look at the reference I have just directed you to and respond to the committee as reasonably as you can, we would appreciate that, because we are on a short reporting time frame.

CHAIR—I do not know whether Senator Hogg explored this. Mr Johnson, are there any particular powers that a special constable has that the ADF members under this bill would not have or should have?

Mr Johnson—I have not considered that.

CHAIR—Finally, the Victoria Police submitted that the legislation is unnecessary as the police are able to handle domestic violence if necessary with police brought in from other states or territories rather than resort to the ADF. Are you able to comment on these claims?

Mr Johnson—I find it difficult to do so, not having had the opportunity of reading other people's submissions, and I would like to reserve my comments until I do.

CHAIR—Mr Johnson, I have just a generic question to you as somebody who was involved in a civilian call-out as you were in 1955. As somebody who lived north of the Hunter I always grew up remembering or being told about that flood. I can remember as a small child seeing the mark on the telephone post where the water went up to. Do you see a problem where the legislation makes it clear that the local police are in command of the situation and the ADF have to work in cooperation? I know that commonsense would obviously conclude that, if there was an emergency type situation, they would cooperate. But can you see a problem of command if you have ADF who are under the authority of their commanding officer or upwards to the Minister for Defence and local police are in control of the situation?

Mr Johnson—No. The civilian authorities must be in command. My experience was that there was no problem. Legally, I was there to advise the civil authorities, including the police, and was nothing more than an adviser, as I said in my submission. It was either my brigadier or my general who gave me very firm instructions over the telephone that I was there purely as an adviser and I was not in command.

CHAIR—Who was your brigadier in 1955?

Senator HOGG—That is an unfair question, Senator Macdonald!

CHAIR—It was not Brigadier—

Mr Johnson—It was not Colonel Macdonald. It was either Brigadier, later General, Paul Cullen or Brigadier, later General, Denzil Macarthur-Onslow. I served with them at various times. I found that on arrival in Maitland, after an inordinate delay waiting for Canberra and Macquarie Street in Sydney to approve my going, there was no leader. There was no-one in command. Certainly, the police force were doing their very best with their limited backgrounds. They just adopted me as the leader of what was going on. They thought that I was in charge. With all the fragmented actions going on by all sort of charitable organisations and other state authorities, the policeman was not really trained to act in control of a multidisciplined team. I

suggest that all my advice in the heat of the kitchen was framed in the terms of an order and they all carried it out and wanted to do so.

Senator HOGG—You raised a good point: there is an assumption of who is in charge instead of necessarily knowledge of who is actually in charge. That can be brought about in some instances by virtue of the character or nature of a particular person—they may well be seen to assume command, when in effect they do not have the authority. This legislation needs to be able to clearly distinguish between those who have the authority and those who might otherwise maintain that they do or in some way, not in a devious way, pretend to have or think they have the authority. Part of the thrust of this legislation is to clarify those chains of command—those who have authority and those who do not have authority. A couple of nods from the rear every now and again would help me to know whether that is right.

Mr Johnson—I am not getting the benefit of the nod.

Senator HOGG—No, you are not getting the benefit of the nod.

CHAIR—You are not getting any noes at the back either.

Senator HOGG—I think that is the intended purpose.

Mr Johnson—Yes. I do not get the benefit of a mirror, Senator. I would love to see whether the fellows in uniform behind me are shaking their heads or nodding.

Senator HOGG—They have been holding their scorecards up high—they have been good scorecards.

Mr Johnson—I will go back to the police authority. As I pointed out in a very light way, the sergeant asked me what I wanted done about the looting. He wanted to pass the buck to me. He wanted me to say what he should do to correct looting. I dodged that and pointed out to him that it was his responsibility, not mine, as to what he did. But he tried very hard to get me to make the decision. It might be overstating it, but if someone without my legal background had been in my position—appreciating the niceness of the situation of being an aid to the state authorities—they might have been ~~trapped~~ by the policeman.

CHAIR—You might have been stringing them up left, right and centre.

Mr Johnson—Yes. To me it has to be very plainly stated, as it was stated to me, that you are there as an aid only. But where the civilian authority in a remote country town has no experience at all, if you do not step in and couch your advice in the form of fairly strong words, nothing gets done effectively. Take recent occurrences in some of the country towns where there have been riots. Hotels have been torched by some overexuberant people, usually on pension day. The local authority, which is the police force, have not got the manpower. You get a town of three or four people, headed by a sergeant who is on leave. When the accident happens you have a young constable as the most senior fellow, and he has had no background training at all. *incident*

Senator HOGG—But there are reserve police forces which can be taken into the situation in those circumstances. My interpretation of this legislation is that in the first instance it is always to be the civil authorities that try to address the problem that arises. It seems to me, again from my reading of the legislation, that it would be in only the most extreme circumstances that the powers would be brought into operation.

CHAIR—Mr Johnson, thank you for coming before the committee. We would be pleased if you would make a further submission on the points you raised in response to questions. We value your time.

Mr Johnson—May I apologise. There is one item I would like to raise here.

CHAIR—Certainly.

Mr Johnson—In the call-out of the armed forces there should be a direction as to whether they should be armed or unarmed. I do not think it is wise to throw the onus on the force commander to decide whether they be armed or unarmed. It is a matter for the Governor-General and Executive Council to make a decision as to whether or not the call-out should be armed or unarmed.

CHAIR—Using the force that is necessary.

Proceedings suspended from 9.36 a.m. to 9.50 a.m.

police station

1) Opinion No. 991.

*PROTECTION OF STATES AGAINST DOMESTIC VIOLENCE
USE OF DEFENCE FORCE TO PROTECT COMMONWEALTH INTERESTS FROM DOMESTIC
VIOLENCE: REQUEST BY STATE NOT NECESSARY: USE OF CITIZEN FORCES IN
CONNECTION WITH INDUSTRIAL DISPUTE
CONSTITUTION, s. 119; DEFENCE ACT 1903, ss. 45, 51*

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The Secretary, Department of Defence:

22 October 1920

The following memorandum has been submitted to me for advice:

I am directed to inform you that the question has arisen of the necessity in the event of an outbreak of domestic violence in any part of the Commonwealth of ensuring the safety of magazines for explosives which are the property not only of the Commonwealth but also of the **State Governments** and **private firms**. It has been proposed that the safety of these magazines should be ensured by the provision of military guards immediately upon occasion arising for taking precautionary measures. Owing to the limited strength of the Permanent Forces and the existence of many such magazines in outlying parts of the States where no permanent troops are stationed it might be necessary to employ troops of the Citizen Forces also for the purpose.

(2) Before the matter of the employment of military troops in this connection is dealt with the favour of your advice is asked upon questions dealing with the power of the Commonwealth to employ Permanent and Citizen Force troops under such circumstances.

(3) Section 119 of the Constitution Act provides:

The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.

Section 51 of the Defence Act provides:

Where the Governor of a State has proclaimed that domestic violence exists therein, the Governor-General, upon the application of the Executive Government of the State, may, by proclamation, declare that domestic violence exists in that State, and may call out the Permanent Forces, and in the event of their numbers being insufficient may also call out such of the Militia and Volunteer Forces as may be necessary for the protection of that State, and the services of the Forces so called out may be utilized accordingly for the protection of that State against domestic violence:

Provided always that the Citizen Forces of the Commonwealth shall not be called out or utilized in connexion with an industrial dispute.

Section 45 of the Defence Act provides:

The Permanent Forces shall at all times be liable to be employed on war service and in the defence and protection of the Commonwealth and of the several States.

(4) In the event of a state of domestic violence breaking out, should the police protecting these magazines by military troops have been adopted, it would in all probability be imperative to provide adequate military guards for these magazines prior to the issue of the proclamations by the Governor or Governor-General under section 51 of the Defence Act.

(5) Advice is desired as to whether the Permanent and Citizen Military Forces could be so employed prior to the issue of these proclamations.

(6) It is supposed that the Commonwealth Government would have power, in exercise of the common law right of the Crown, to call out the necessary troops to protect Commonwealth magazines from acts of violence, but as each State is sovereign within its own limits it is doubtful whether the Governor-General would have power to call out troops for the protection of State and private magazines until the Commonwealth had been called upon to do so by the State Governments concerned.

(7) In regard to the proviso to section 51 of the Defence Act a state of domestic violence might occur as the result of an industrial dispute. The favour of advice is desired as to whether the Citizen Forces could be lawfully utilized to suppress domestic violence so arising and, if this provision prohibits the use of Citizen Forces under such circumstances, whether in view of section 119 of the Constitution Act the Commonwealth Government could not nevertheless lawfully employ Citizen Forces in such circumstances where their employment was essential in addition to that of the Permanent Forces to suppress domestic violence in any State after the protection by the Commonwealth had been requested by that State.

The question whether the Commonwealth has legal power to take steps for suppression of a riotous outbreak depends to a great extent upon the circumstances of the case.

It is not by any means to be assumed that in no instance may the Commonwealth without a request from a State Government, interfere to suppress domestic violence within that State. The Commonwealth Government has plenary power to protect itself and accomplish its objects:

... the functions of the Commonwealth Government are so many and its agencies and instrumentalities so far reaching, that internal disorder on any large scale could hardly leave them unaffected. For their protection, the Commonwealth Government could intervene on its own initiative (Moore, *Constitution of the Commonwealth: Australia*, 2nd edn, pp. 338-9).

The Commonwealth could, in the event of an outbreak which threatens magazines containing explosives belonging to the Commonwealth, take whatever steps were necessary to safeguard those magazines. Such action could be taken irrespective of whether or not the Governor of a State had proclaimed the existence of domestic violence or the Executive Government of that State had sought Commonwealth assistance.

Unless, however, an outbreak of domestic violence is such as to jeopardise operations of the Commonwealth Government or the rights and privileges of federal citizenship it is not the function of the Commonwealth, in the absence of a request from the State Government, to intervene to suppress the outbreak.

If the possible consequences of domestic violence within a State are limited to the destruction or damage of State or private magazines, it is considered that the Commonwealth could not properly intervene without a request from the State Government.

The calling out or use of the Citizen Forces in connexion with an industrial dispute is prohibited by the proviso to section 51 of the *Defence Act 1903-1918*.

In my opinion this provision does not necessarily operate to prevent the use of those Forces in connection with violence arising out of an industrial dispute. The object of the proviso is to prevent the forces being used to the prejudice of industrialists (*sic*) in any dispute affecting their wages or conditions of employment. If participants in such a dispute resort to violence or rioting, and Commonwealth functions or federal rights are thereby affected, the Citizen Forces may, in my opinion, be utilised to restore order.

[Vol. 17, p. 117]

R. R. GARRAN
Solicitor-General