



Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliaments House
CANBERRA ACT 2600

Dear Mr Curtis

Inquiry into the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005

I am writing to request that the Senate Legal and Constitutional Legislation Committee (the Senate Committee) accept a late submission by the Law Council of Australia on the *Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005* (the Bill).

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The proposed amendments were announced by Senator Hill on 8 December 2005, allowing just over 1 month for submissions to be made to the Committee, a period that is substantially reduced by the holiday period. I note that the Committee has a reporting deadline of 7 February 2006, substantially restricting its capacity to engage in a proper consideration of the very serious implications of this Bill.

The Law Council submits that this is an unacceptably short time frame. There is no apparent reason for providing such a short time frame to consider the proposed amendments. However, there is substantial cause for concern that the legislation, as drafted, grants extensive powers to the Government and Defence Forces, with serious potential for abuse.

For example, the Bill provides at proposed section 51SF(2) that the authorising Ministers may declare an area is an 'offshore general security area' and that the area:

- “(a) may be specified by reference to an area surrounding one or more vessels or aircraft, or surrounding a class of vessels or aircraft, being an area the boundaries of which change as the location of the vessels or aircraft changes; and
- (b) may include areas within the internal waters of a State or Territory if the order under section 51AA includes the internal waters of a State or Territory.”

Under section 51AA, where the Ministers are satisfied that there is a “threat in the Australian offshore area to Commonwealth interests”, the Minister may make an order that the Defence Forces be called out. The section further provides that:

- where the threat relates to the internal waters of a State or Territory, the Governor-General may make an order directing the Chief of the Defence Forces to utilize the Defence Forces in the internal waters of that State or Territory;
- the Governor General may make such an order, notwithstanding that the State or Territory does not request the making of the order; and
- where the Ministers are satisfied that there is sufficient urgency, there will be no requirement to consult the Government prior to making such an order.

Finally, while sub-section 51SF(3) requires that the details of any such order be notified to the persons in the designated ‘offshore general security area’, published in the *Gazette* and forwarded to the presiding officer in each house of Parliament within 24 hours, sub-section 51SF(4) allows the Minister to dispense with this requirement if they feel that other Defence Force operations might be compromised.

The cumulative effect of these provisions is to vest extraordinary powers in the Minister for Defence. In effect, it would seem that the Minister, in certain circumstances, will be empowered to act independently, even of his or her own Government, without any requirement to inform the Parliament, the State or Territory Government concerned, or persons affected by the actions of Defence personnel.

The Law Council does not claim that the Defence Forces should not be used in circumstances of a legitimate threat to domestic security. However, there must be guidelines or provisions describing what action Defence Forces may take or when the most severe action, such as destroying aircraft or firing upon persons suspected of engaging in terrorist acts, becomes necessary.

At an absolute minimum, the Law Council would expect Ministers to outline the situations that have led the Government to include the measures contained in the Bill, for the future reference of the Parliament and the Courts. There is no reference in the Bill, or the Explanatory Memorandum accompanying the Bill, to the reasons for granting power to the

Commonwealth over the internal waters of a State – that would normally be within the jurisdiction of the state government authorities. Nor is there reference to the circumstances in which it is anticipated that the Government may make the extraordinary decision to authorise action without consulting any of those affected.

It is also concerning that the law in this area has been Federalised to such an extent that the Commonwealth Government would have almost complete power in respect of combating domestic terrorism by virtue of section 109 of the *Constitution Act 1901*. State Government authorities may have no jurisdiction to prosecute members of the Defence Forces or government who commit offences under State or Territory laws by, for example, authorising actions or operations resulting in civilian deaths in circumstances not anticipated by the proposed amendments. The Commonwealth Attorney-General and the Commonwealth Director of Public Prosecutions would have sole discretion as to whether any action is taken against the Defence Force Officers or Government Ministers responsible. There may be limited scope for such prosecutions in any case, due to the broad and ambiguous language of the Bill. What safeguards exist preventing the proposed laws being abused? What mechanisms for review exist? Will the review function be entirely Parliamentary, or will judicial review also be available?

The Law Council holds grave concerns over the Bill as it is presently drafted and I urge the Committee to seek an extension of its reporting deadline until at least the end of February 2006.

I regret that the Law Council is unable to be represented at the Senate Committee's hearings in relation to the Bill, to be held on 31 January 2006 in Sydney. However, I ask that the Senate Committee consider the matters raised in this letter and make appropriate inquiries of those present at the hearings.

I would be please to discuss these matters with the Senate Committee. Alternatively you may contact Nick Parmeter on (02) 6246 3715 if you have any queries regarding this letter.

Yours sincerely

A handwritten signature in black ink, appearing to read 'John North', written in a cursive style.

John North

27 January 2006