

## APPENDIX 4

### LETTER FROM THE ATTORNEY-GENERAL'S DEPARTMENT

00 / 6791

Monday, 31 July 2000

Mr Paul Barsdell

Secretary

Senate Foreign Affairs, Defence and Trade Legislation Committee

Parliament House

Canberra ACT 2600

By fax 6277 5818

4 pages in all

Dear Mr Barsdell

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

During the course of the Committee's hearing into *the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000* (the Bill) on Friday, 21 July 2000, I gave an undertaking that I would provide further advice on how the call out mechanism under the Bill might operate if one or more of the Governor-General, the Prime Minister, the Minister for Defence and the Attorney-General were to be taken hostage. My advice, which I have cleared with the Department of the Prime Minister and Cabinet, is as follows. (While the 'taken hostage' scenario is an unlikely one, it is a convenient example, given the purpose of the Bill, of where someone might suddenly and unexpectedly become unavailable to perform a function.)

#### *Acting Ministers: general principles*

2. Section 19 of *the Acts Interpretation Act 1901* provides that a reference in an Act, (such as the Defence Act) to any Minister (such as the Prime Minister, Attorney-General, Minister for Defence), shall be deemed to include any Minister acting for or on behalf of another Minister. Hence, an acting Attorney-General may exercise the statutory powers conferred on the Attorney-General provided the Minister acting as Attorney-General has been given authority to act. The Prime Minister can give such an authority to act including in relation to his own office. There may be other ways of conferring such authority: see *Attorney-General v Foster* (1999) 161 ALR 232 at 243.

I now set out what steps could be taken if one or more of the four key office-holders referred to above were to be taken hostage.

*The Minister for Defence and / or Attorney-General are taken hostage*

3. There is long established practice for the Prime Minister, through notification from one of his staff, to appoint Ministers to act for other Ministers, when for example, a Minister is overseas or taking leave. Accordingly, if one or both of the Minister for Defence or the Attorney-General were to be taken hostage, the Prime Minister could appoint other Ministers to act in those ministerial positions.

*The Prime Minister is taken hostage*

4. Ordinarily, when the Prime Minister is overseas or taking leave, he arranges for another senior Minister, such as the Deputy Prime Minister or the Treasurer to act as Prime Minister. The Prime Minister could issue a standing authority that should he be unable to exercise his powers, such as might occur if he were taken hostage, the next most senior Minister available, for example the Deputy Prime Minister, would act as Prime Minister. In absence of such an arrangement, the Governor-General could exercise his reserve powers to appoint an Acting Prime Minister, in all likelihood one of the two senior Ministers referred to above.

*The Governor-General is taken hostage*

5. Section 4 of the Constitution provides authority for the Queen to appoint an Administrator to act for the Governor-General. There is a practice of State Governors being granted dormant commissions by the Queen to act as Administrator of the Commonwealth. The powers, functions and authorities of the Governor-General vest in the Administrator. A dormant commission may be activated in accordance with Clause III of Letters Patent made on 21 August 1984. The Letters Patent provide, among other things, that the Prime Minister may request that a person holding a dormant commission assume the administration of the Commonwealth, if, due to death or incapacity, the Governor-General is incapable of carrying out his duties. The Letters Patent further provide that, should the Prime Minister and Governor-General die or be incapable of acting, the Deputy Prime Minister or next most senior Minister, may request that a person holding a dormant commission assume the administration of the Commonwealth. By convention the most senior State Governor ordinarily assumes the role of Administrator but there is nothing to prevent, particularly in emergency, another State Governor being asked to act as Administrator.

*The GG, PM, AG, Minister for Defence and CDF are all taken hostage*

6. In the unlikely event that the Governor-General, Prime Minister, Attorney-General, Minister for Defence and Chief of the Defence Force were all to be taken hostage at the same time, the following procedures could be followed to enable the Defence Force to be called out in accordance with the procedures set out in the Bill.

- The Deputy Prime Minister (or next most senior Minister who is available) could request, in accordance with the Letters Patent, that a State Governor act as Administrator;
- The Administrator could appoint the Deputy Prime Minister (or next most senior Minister available) to act as Prime Minister;
- The Acting Prime Minister could in turn appoint other available Ministers to act as the Minister for Defence and the Attorney-General; and
- The acting Minister for Defence could appoint an acting Chief of the Defence Force under paragraph 9C(1)(b) of the *Defence Act 1903*.

In the event that the administrative processes set out above were followed, the Defence Force may be called out and utilised in accordance with the provisions of proposed Part IIIAAA of the Defence Act.

*Other matters*

7. The Committee also asked why new section 51B requires that a request for call out come from a “State Government” when section 119 of the Constitution refers to a request being made by the “Executive Government of the State”. In accordance with the Committee’s request the Department raised the matter with the drafter of the Bill and his response to our enquiry is attached.

8. Please feel free to contact me should you, or the Committee, require further assistance in this matter.

Yours sincerely

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