

SENATE FOREIGN AFFAIRS, DEFENCE AND TRADE

LEGISLATION COMMITTEE

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

SUBMISSION

Submission No: 14

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FACSIMILE 02 6277 5818 - 7 PAGESMr P. Barsdell
Secretary
Foreign Affairs, Defence and Trade
References Committee
Legislation Committee
Parliament House
CANBERRA ACT 2600

Dear Mr Barsdell

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

I refer to your letter of 3 July 2000, received on 6 July 2000, directed to Mr Ian Dearden, President of the Queensland Council for Civil Liberties. This letter has been passed on to me for reply.

It has not been possible to lodge this submission by Friday, 14 July 2000. This represented 7 working days in respect of a policy change which has been under consideration Federally for 20 years (see comments by Mr Lindsay, Member for Herbert).

Indeed, considerable concern is expressed at the fact that this legislation has been introduced so hurriedly under circumstances where, if the legislation really is needed for the upcoming Olympics, there has been no justification extended for introducing this legislation effectively at the last minute.

Your Committee has to report by 16 August 2000. The Olympics start in September 2000.

It is noted that Mr Martin (Member for Cunningham) stated in the House that "The impetus for (the legislation) was the Hilton bombing at the time of the Commonwealth Heads of Government regional meetings in 1978 which led to the call out of significant numbers of the Defence Force to secure the town of Bowral".

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The bipartisan support for this legislation contains its own problems. If one has regard to the Parliamentary speeches which you have so helpfully appended to the Bill and Explanatory Memoranda, it is clear that the bipartisan support has been secured by way of background briefings undertaken by the relevant Government Minister shortly before the introduction of the amending legislation into the House.

A warning note should be sounded that bipartisan support for a move to give the Defence Forces extended powers may be understandable at a time of growing national euphoria just prior to the staging of the Olympic Games.

However, history has shown that strong and apparently unified public sentiment over a particular issue often produces the conditions for later problems.

The pub bombings on the English mainland in the 1970's produced police/military/community response that caused serious miscarriages of justice to occur. These miscarriages of justice were remedied 15 years later when convictions were overturned by the UK Court of Appeal.

One has only to look at the circumstances that caused those miscarriages of justice to understand that strong and apparently unified community support following a particular tragedy can often throw up problems which only become apparent at a much later time.

A similar observation can be made in respect of the Bill which is the subject of this submission.

The appended Parliamentary speeches have an almost jingoistic flavour to them. There is a self congratulatory strain to most, if not all, of the speeches which, while perhaps understandable in the lead up to the Olympic Games, has the consequence that significantly insufficient attention has been given to necessary accountability mechanisms within the legislative framework proposed.

A number of the Parliamentary speeches note that the scheme of the Bill is reflective of the Hope review in the wake of the 1978 Hilton bombing. While this rhetorical assertion is made in the Parliamentary speeches, one searches in vain for a dispassionate analysis of the Hope review in the Parliamentary speeches.

Further, there appears to be little or no recognition in the Parliamentary speeches of the significant accountability reviews which have occurred since the Hope Report. This will be dealt with separately in this submission.

The controversy surrounding the Hilton bombing also needs to be recalled in an appropriate historical context. While one cannot be critical of the deployment of the Defence Forces to secure Bowral for the CHOGM meeting, an analysis of subsequent court cases, especially Alister in the High Court, reveals a most unsatisfactory web of intrigue and unaccountability in

relation to ASIO's role in the Hilton bombing, particularly in relation to the informant Seary.

The Committee may be assisted by perusing Alister and related newspaper and analytical articles which examine the Hilton bombing. Those materials highlight that a dispassionate review of an event such as the Hilton bombing and the associated CHOGM meeting often reveals a set of problems which media coverage of the hysteria of the Hilton bombing moment simply ignored.

Similarly, the sympathetic and almost eulogistic support for the amending Bill highlights the fact that the accountability checks and balances have not been given sufficient attention.

Mr McClelland (Member for Barton) said in his Parliamentary speech that "No additional powers have been given to the Defence Forces. What is being done is to clarify the exercise of those powers to set a framework of accountability in place".

Indeed, surprisingly, Mr McClelland warned that this legislation should "not be seen as simply a short term measure that can be sunsetted after the Olympics".

The ACCL's contention is that if this legislation is to be passed against a background of almost non-existent public debate, that in itself is a strong justification for the imposition of a sunset clause.

As indicated, a number of the Parliamentary speakers refer to the fact that the Bill is developed out of the Hope Report review. Even accepting, for the purpose of this submission, that that is the case, the Hope review is now over 20 years old and there have been significant developments in accountability procedures in respect of the exercise of police powers since the Hope Report.

This Council strongly contends that the almost breakneck speed at which this legislation has been introduced and is proposed to be passed of itself justifies the imposition of a sunset clause.

Nowhere in the Explanatory Memoranda or in the Parliamentary speeches is there any serious discussion of reviews of the use of the Defence Forces in aid of ordinary Police Services in Canada, the US or the UK.

Any Bill which proposes to statutorily enshrine powers to be given to the Defence Forces to exercise police powers ought to proceed only after an analysis of comparative legislation and accountability procedures in similar democracies such as the UK, Canada and the USA.

It is contended, therefore, that there is a very strong rationale for a sunset clause. A sunset clause will force the review of the Bill's provisions by your Committee but in circumstances where the impossibly short time frame for

consultation in respect of this Bill can be extended in respect of the review of the sunset clause.

Sunset clauses typically are inserted in respect of legislation dealing with police powers where it is felt that fine tuning of the legislation can be achieved once the police powers have been put into effect and used in particular operational circumstances.

On this basis, therefore, not only would a sunset clause be uncontroversial, it would be positively useful to enable a sober and considered review of the legislation, particularly for the purpose of examining overseas accountability measures, something which is not possible in the subject review because of the impossibly tight time frame.

New Powers

The following new powers are referred to in the Explanatory Memoranda:-

- . Section 51B outlines the process involved for using the Defence Force to protect a State against domestic violence;
- . The new Section 51D provides the Defence Force to be used for the purposes of protecting Commonwealth interests in a State or Territory;
- . The new Division 2 provides for extensive police powers for the Defence Force including the power to detain persons who a Defence Force member believes have committed an (this effectively means any) offence against the law of the Commonwealth, State or Territory;
- . The new Section 51L provides for an authorisation to search premises in a general security area for dangerous things;
- . The new Section 51O provides for a member of the Defence Force to erect barriers or other structures in a particular area to stop the means of transport and detain means of transport;
- . The new Section 51P provides for the search of persons in a general security area for dangerous things;
- . The new Section 51Q provides for the declaration of a designated area in which Defence Force personnel will be able to exercise police powers;
- . The new Section 51R relates to the control of movement in relation to a designated area within a general security area;
- . The new Section 51T allows a member of the Defence Force to use force against persons.

Accountability mechanisms - external review and judicial review

The nearest analogy to the powers proposed for the Defence Forces under this Bill and for necessary accountability mechanisms is the National Crime Authority.

The National Crime Authority has been plagued by problems of lack of accountability since its inception in the mid 1980's.

The principal accountability problems for the NCA derive from similar overlapping jurisdictional problems that also are likely to occur under this Bill.

The NCA operates under a structure where members of Police Services from other States and Territories are seconded to the National Crime Authority. The principal method of accountability in respect of complaints against seconded police officers to the NCA is that a complainant effectively has to go through an unsatisfactory internal review by the NCA of a particular complaint. As well, the Commissioner of the State or Territory Police Service from which the seconded NCA member originates may also have disciplinary responsibility in respect of a complaint against a seconded NCA member.

Similar considerations will apply in respect of members of the Defence Forces exercising police powers under this Bill. Who is to be responsible for investigating a complaint against a member of the Defence Force alleging any of the following:-

- . Use of excessive force;
- . Engaging in fabrication of evidence, eg. planting incriminating evidence at a scene;
- . Verballing suspects.

The Australian Law Reform Commission undertook a widely praised review of the NCA in its 1996 Report entitled "But Not by Integrity Alone".

The ALRC Report proposed an external CJC oversight body for the NCA but this proposal has not been enacted because the NCA has furiously lobbied against the implementation of the scheme.

There is some suggestion in the Parliamentary speeches that the use of the Defence Forces in an emergency contemplated by the Bill's provisions would somehow be subject to Parliamentary review/accountability. This hope simply flies in the face of the demonstrated failure of Parliamentary review in respect of the model that most approximates the Defence Forces involvement in civilian policing, namely the NCA.

The Joint Parliamentary Committee on the NCA has complained almost since its inception that it has been unable to properly supervise the NCA either generally or in respect of specific

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complaints because the NCA has refused to fully cooperate citing operational secrecy and allied concepts.

Similarly, in respect of the Criminal Justice Commission, its Parliamentary Committee has been unable until recent times to properly supervise the CJC or deal with complaints against the CJC. The establishment of the Office of the Parliamentary Commissioner to the CJC at least enabled the Supervising Parliamentary Committee of the Criminal Justice Commission to ask the Parliamentary Commissioner for the CJC to conduct enquiries on its behalf in order to enable a proper resolution of either systemic complaints against the CJC or complaints against individual members.

Nothing appears in the Explanatory Memoranda to the above Bill dealing with these quite legitimate issues.

I recall the aftermath of the Hilton bombing and the use of the Defence Force to secure Bowral for the CHOGM meeting. The Defence Force members were said to have behaved with restraint and propriety in the Bowral area whilst the CHOGM meeting was in progress. This approach contrasted with unresolved controversy over ASIO's role in the incidents that gave rise to the Hilton bombing which occurred only days before the CHOGM meeting. Common factors to the Hilton bombing and the Bowral CHOGM meeting were the presence of numerous foreign Heads of State at both the Hilton Hotel and the CHOGM meeting in Bowral.

The fact that there were few complaints about the role of the Defence Force in Bowral arose from the fact that the CHOGM meeting occurred without any particular problems.

The tight knit community of Bowral was perhaps more prepared to tolerate the exclusion zone and like restrictions which were imposed by the Defence Force than would be the case if such exclusion zones/security areas etc had been promulgated in Sydney if the CHOGM meeting had actually occurred in Sydney.

Conclusion

Whilst opposing the indecent haste as which this legislation has been brought on, if it is to be passed in the context of the Olympics being the catalyst of the Bill, proper accountability and complaint mechanisms need to be put in place.

If the NCA had not been so successful in bureaucratically whiteanting the proposal for a CJC type oversight body, that body could have taken on the role of being an accountability mechanism in respect of the powers the Defence Forces will exercise under this Bill.

In the absence of an NCA external oversight body, the only available existing mechanism which can be inserted into the Bill is the Commonwealth Ombudsman.

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It is therefore contended that the Bill should be amended to provide that the Commonwealth Ombudsman is empowered to do the following in respect of the role of the Defence Forces in relation to the above Bill until the Bill is reviewed by a sunset clause:-

- . Conduct an overview and a review generally of the use of the Defence Forces in domestic policing type matters in the circumstances outlined in the enclosed Bill.
- . Conduct a review of individual complaints against Defence Force members who exercise police type powers under this Bill.

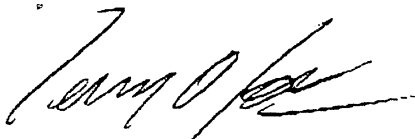
It is emphasised, however, that the Bill needs to make a specific monetary appropriation for the Commonwealth Ombudsman to perform the proposed supervision role in respect of this Bill. This observation is made because the ALRC Report "But Not by Integrity Alone" made it quite clear that one (but not the sole) reason for its recommendation for a CJC style oversight body in respect of the NCA was because of the inability of the Commonwealth Ombudsman to properly perform that role because of that Office's limited funding and its broad remit to deal with complaints spread across the entire Federal Government bureaucracy.

A preferred alternative to the Commonwealth Ombudsman having an overview/complaints role in respect of Defence Force activity under this Bill is the creation at least on an interim/sunset model of a Federal office equivalent to the Parliamentary Commissioner for the CJC.

In conclusion, the ACCL, like most organisations and people in Australia, wishes to see the Olympics succeed. However, a national mood of optimism and national pride in relation to the upcoming Olympics should not mask the very real problems which the lack of accountability mechanisms in the above Bill throw up.

Yours faithfully

AUSTRALIAN COUNCIL FOR CIVIL LIBERTIES



T P O'GORMAN
President

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27/07/00