



AID TO THE CIVIL POWER — COUNTER TERRORISM — LEGAL ASPECTS

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Definition

Aid to the Civil Power may safely be defined as the use of members of the Defence Force:

- a. to execute and maintain the laws of the Commonwealth;
- b. to protect a Commonwealth interest;
- c. on the application of the Executive Government of the State, to protect the State against domestic violence.

The definition I suggest is safe because the Australian Constitution, the **Defence Act** and the Australian Military Regulations support each of these uses of the Defence Force in Aid to the Civil Power.

Statute Law

Let me now direct your attention to the specific provisions in our law which give that support.

Section 61 of the Constitution provides:

"The Executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution and of the laws of the Commonwealth."

I shall explain a little later on how this section supports the use of the Defence Force to maintain the laws of the Commonwealth.

Section 119 of the Constitution 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 as follows:

"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 (other than Reserve Forces) and in the event of their numbers being insufficient may also call out such of the Reserve Forces and the Citizen 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 Reserve Forces or the Citizen Forces shall not be called out or utilized in connexion with an industrial dispute."

Australian Military Regulation 415 provides:

"The provisions of this Part shall be applied as far as

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possible in the employment of military forces by the Commonwealth, on its own initiative, for the protection of its servants or property, or the safeguarding of its interests."

The words "the provisions of this Part" are significant because after the definition section of Part V the provision mentioned specifically refer to "officers called out for the protection of a State against domestic violence" or to "military forces which have been called out for the protection against domestic violence". Thus Part V of the Australian Military Regulations assumes a call out in all cases.

Employment of the Defence Force

Against this background, the position is that members of the Defence Force may be employed in the maintenance of law and order and the suppression or prevention of violence and disorder in two ways, namely;

- a. in the circumstances envisaged by section 119 of the Constitution on an application by a State Government for the assistance of the Commonwealth to restrain domestic violence in that State, followed by a call out of the forces by the Governor-General pursuant to section 51 of the **Defence Act**; or
- b. by the direct action of the Commonwealth Government to protect Commonwealth interests.

Other Assistance Under Other Legislation

On occasions members of the Defence Force are required to enforce Commonwealth law and protect Commonwealth interests in circumstances which are quite different to, and removed from Aid to the Civil Power, in the sense referred to above. Instances are the patrolling and surveillance of Australian waters by naval vessels or aircraft to prevent intruders. In some cases this is provided for by statute such as the **Continental Shelf (Living Natural Resources) Act 1968**, the **Fisheries Act** and the **Customs Act**. In these cases, the duties and powers of members of the Defence Force when so acting are defined in and derived from the particular legislation itself. In other cases the duties and powers of members are derived from the common law.

Common Law

I interpose here that a call out is not needed to enable and require members of the Defence Force to deal with violence, or threats of violence to the security of any place where they are stationed. Trespassers there may be arrested and handed over to the civil authorities to be dealt with according to law. These powers derive from the common law but are also provided for specifically under the **Defence Act** and the **Crimes Act**. There would be no purpose in mounting a guard, posting sentries and detailing pickets, or having Military Police on duty if they might not lawfully take action to protect the premises where they are stationed, and the property and persons there against unlawful intruders. In doing so they are exercising, in the course of military duty, the right, indeed the obligation, of every law abiding subject of the Crown to take reasonable measures available to him to prevent a crime or apprehend a criminal. Equally members of the Defence Force in these situations have the right to defend themselves and

to defend their comrades against assault, threatened assault and any form of violence, or threat of violence to life or limb.

Procedures

There are strict procedures which govern the use of the Defence Force in a law enforcement role. Those procedures provide a series of checks on the employment of military force and at the same time effectively vest responsibility for the use of military force in appropriate civilian officials and military commanders.

I will deal first with the position as it relates to section 51 of the **Defence Act** and then comment upon call out to protect Commonwealth interests. Although section 51 of the **Defence Act** does not apply to the use of the Defence Force to protect Commonwealth interests, the requirements for call out, requisition and request apply to the use of the Defence Force both to protect a State against domestic violence and to protect Commonwealth interests.

The procedures with which you must be fully familiar are as follows:

Call out. When a State seeks the assistance of the Defence Force to protect it against domestic violence the following conditions precedent must be fulfilled before the use of the Defence Force is lawful:

- a. the Governor of the State must proclaim that domestic violence exists therein;
- b. the Executive Government of the State must apply to the Commonwealth Government for assistance;
- c. the Governor-General must proclaim domestic violence in that State;
- d. the Governor-General must call out the Permanent Forces in accordance with section 51 of the **Defence Act**. If their number is insufficient such of the Reserve Forces and the Citizen Forces as may be necessary may be called out.

In giving military aid to a State the emphasis is that, until the Defence Force, or part of the Defence Force, is called out by the Governor-General, it is not qualified to act in aid to the civil power.

Let me give you a practical example. Three dangerous prisoners serving life sentences for murder, escape from Fremantle Gaol. You can imagine the temptation for the local police to ask the SASR to send a body of armed soldiers to help capture them. But this is a State matter and you cannot act to assist the State unless the procedure previously mentioned has been carried out.

Requisition. The part of the Defence Force called out by the Governor-General is not to act in aid to the civil power unless ordered to do so by the officer commanding them. He is not to order out troops unless he has received a **requisition** from the civil authority. He may order out troops without a requisition only in cases of great and sudden emergency.

The responsibility to decide whether to order out troops in response to the requisition remains with the officer in command. He also decides on the strength of the force to be ordered out.

Magistrate. If the officer in command decides to order out troops, he is to notify the civil authority of his decision and **require** the civil authority to **provide** a magistrate to accompany the troops at the scene of the domestic violence. You must ensure that the civil authorities understand this and **that** under the law as it is at present, a police officer cannot substitute for a magistrate.

Request. The function of the magistrate is to make an impartial assessment at the scene, and, if the police are unable to suppress the violence, to **request** the officer commanding the troops to take action. Preferably the request should be in writing. It should state the opinion of the magis-

trate that the police are unable to cope with the situation and that the situation demands the active interference of the military forces, and request the commander of the military forces to take action.

At the scene of violence, the officer commanding the troops is solely responsible to decide whether or not he will take action and, if he decides that he will take action, the nature and extent of it.

Emergency. In extraordinary cases of immediate and pressing danger which, in the opinion of the officer commanding troops who have been called out, demands his immediate interference, the officer is to take such action as he considers necessary, although he has not received a requisition from a civil authority or a request from a **magistrate**.

Commonwealth Interests

In Australia no State has called upon the Commonwealth to protect it from domestic violence by specific reference to section 119 of the **Constitution** and section 51 of the **Defence Act**. The action taken after the Hilton Hotel bombing was the first time the Defence Force has been called out by the Governor-General in Australia in aid to the civil power, and this was by the direct action of the Commonwealth to protect Commonwealth interests. True the Prime Minister had been in communication with the Premier of New South Wales, and apparently there was agreement between them, but the call out was for the purpose of safeguarding the national and international interests of the Commonwealth.

Let us now examine **the right** of the Commonwealth to use the Defence Force to protect its interests.

After the Bowral incident in 1978, the Commonwealth Attorney General sought the views of Sir Victor Windeyer about the call out and the legal position of the troops who were called out. Sir Victor gave this advice:

"The power of the Commonwealth Government to use the armed forces at its command to prevent or suppress disorder that might subvert its lawful authority arises fundamentally, I think, because the Constitution created a sovereign body politic with the attributes that are inherent in such a body. The Commonwealth of Australia is not only a federation of States. It is a nation. Section 61 of the Constitution is a recognition of the authority of the national Government to protect the nation.

"I do not doubt that the Commonwealth Government can, of 'its own initiative' employ members of its Defence Force 'for the protection of its servants or property or the safeguarding of its interests'. I take these words from Regulation 415 of the Australian Military Regulations. Regulation 511 of the Air Force regulations is in the same terms. But I consider it a mistake to regard the regulation of the source of Commonwealth power. It assumes it. It does not create it."

Sir Victor then cites a decision of the Supreme Court of the United States which he says is apposite for Australia:

"The entire strength of the Nation may be used to enforce in any part of the land the full and free exercise of all national powers, and the security of all rights entrusted by the Constitution to its care . . . If the emergency arises, the army of the Nation and all its militia are at the service of the Nation to compel obedience to its laws."

Let me interpose here, that these quotations establish the legal **right** of the Commonwealth to use the Defence Force to protect itself and its interests. What we then have to consider is the **procedure**, the machinery which is to be employed so that the Defence Force may lawfully be used to protect Commonwealth interests or to maintain the laws of the Commonwealth.

Powers of the Governor-General

State. It is quite clear that the Defence Force **cannot** be used to protect the State against domestic violence unless the State applies for that assistance and the Governor-General calls out members of the Defence Force for that purpose. Call out is followed by requisition and request. It is essential for the State to provide a magistrate.

Commonwealth. Regulation 415 of the Australian Military Regulations requires the provisions of Part V of those regulations to be applied as far as possible in the employment of military forces by the Commonwealth on its own initiative, and the provisions of Part V referred to assume that such forces will have been called out.

The Defence Instructions (General) require call out if there is any likelihood that force will be used.

It is obviously a very sound policy that if members of the Defence Force are to be used by the Commonwealth to protect its interests they should be called out, particularly if they are to be employed on tasks complementing the civil power. Let me remind you of those tasks:

- a. cordoning;
- b. control of public movements;
- c. picketing and guarding;
- d. neutralisation, including capture of terrorist groups (which may include snipers, hijackers, kidnappers, bombers or assassins);
- e. neutralisation of aircraft and ships;
- f. recovery of hostages and property; and
- g. recovery of buildings and installations.

Clearly if troops are to be armed they should be called out, because they will not be armed unless there is a likelihood that they might have to use force.

As Sir Victor Windeyer said in relation to Bowral:

"The ultimate constitutional authority for the calling out of the Defence Force in February 1978 was thus the power and the duty of the Commonwealth Government to protect the national interest and to uphold the laws of the Commonwealth. Being by order of the Governor-General, acting with the advice of the Executive Council, it was of unquestionable validity . . ."

In summary then, when military forces are used to protect Commonwealth interests they should be called out and the requirements for requisition and request will be applicable. Equally those forces will have the same power to act in cases of immediate and pressing danger as they would have when called out to protect a State against domestic violence.

The only difference in procedure between call out to protect a State against domestic violence and to protect Commonwealth interest is that relating to the magistrate. While a military commander must insist on the presence of a magistrate if a State requests aid, if call out is initiated by the Commonwealth a magistrate will be provided only if the civil authority considers it practicable to do so.

Rights and Duties of the Members Called Out

The rules and principles governing the rights and duties of soldiers called out to aid the civil power are contained in Part V of the Australian Military Regulations. These principles are recognised in the Defence Instructions (General) which specify the principles to be applied in providing aid to the civil power to be:

- a. the primacy or supremacy of the civil power;
- b. the use of minimum force; and
- c. members of the Defence Force remain under military command and are accountable as such.

These general principles are fundamental in any action by members of the Defence Force in aid of the civil power in time of peace, whether the purposes of their employment be to

frustrate terrorism or to maintain public peace against other forms of disorder.

Primacy of the Civil Power

The primacy of the civil power means that the civil power remains paramount throughout, and the civil law supreme. A call out of the Defence Force in aid of the civil power is not like a declaration of martial law. The law of the land is not suspended or superseded. Members of the Defence Force are called out to be in readiness to uphold the law. They remain subject to it, and are liable to its penalties.

Minimum Force

A separate paper could be written on this subject. Today I will merely quote a classic statement of the law:

"Soldiers when called upon and required to aid the civil magistrate in apprehending or opposing persons engaged in a riot will be justified in using the force necessary for that purpose. Any excess will be illegal . . . the only rule that can be given is that the force to be legal and justifiable must in every instance . . . be governed by what the necessity of the particular occasion may require."

This is the law in Australia today. It is applicable not only in riots, but in any cases where members of the Defence Force are called out to enforce the law.

Military Command

The principle that soldiers must remain under military command, and cannot be placed under police command is so well established and accepted that it requires no further comment.

The Soldiers Legal Position

It follows from these three general principles, that members of the Defence Force called out by the Governor-General and requisitioned on 13 February 1978 "for the purpose of safeguarding the national and international interests of the Commonwealth and for giving effect to the obligations of the Commonwealth in relation to the protection of internationally protected persons":

- a. were subject at all times to the rules of the common law;
- b. were subject to the legal duty and possessed legal authority to protect the persons mentioned in the order;
- c. had legal authority to take whatever steps were necessary, including the use of reasonable force to achieve that end;
- d. had lawful authority to apprehend persons believed on reasonable grounds to intend injury or death to the persons whom it was their duty to protect.

It also follows that:

- e. force resulting in injury or death, provided always it was no more than was necessary, would have been legally justifiable; and
- f. if excessive force had been used, the individual soldier using that excessive force would have been legally liable under the general law.

Rules of Engagement

Rules of engagement, based upon the rules applicable in Northern Ireland, were issued to members of the Defence Force called out on 13 February 1978. These rules accorded with the legal principle of minimum force and may, in my view, be regarded as rules which could be applied generally.

The Minister for Defence issued a direction to the Chief of Defence Force Staff requiring him to ensure that the Defence Force used only the minimum force necessary to carry out its duty.

Pursuant to that requirement, the Chief of Defence Force

Staff issued a set of 'Rules of Engagement' for the guidance of commanders and troops operating collectively or individually. Its principle provisions were:

- never use more force than the minimum necessary to carry out the duty;
- always try to handle situations by other means than opening fire;
- if forced to fire, fire only aimed single shots and do not fire more rounds than are absolutely necessary;
- whenever possible a clear and loud warning should be given before firing; and
- when operating collectively, open fire only when ordered to do so.

Minimum Force — A Last Word

As lawyers you must be fully conversant with the law relating to the use of minimum force, or if you prefer, relating to the prohibition against the use of excessive force, but you must not misinterpret that law. Deadly force may be used at times, but not if lesser means will achieve the object. Depending upon the circumstances, the minimum force necessary to restore law and order can vary from the mere appearance of troops to the use of all the force at a commander's disposal.

But remember that troops can meet force with force. A soldier whose life is endangered does not have to wait until the terrorist is almost successful.

In a terrorist situation I think the law becomes simplified. In counter-terrorist operations members of the Defence Force are dealing with desperate, fanatical, armed adversaries determined to achieve their mission at any cost. They can meet the force they are offered with appropriate force, provided they do not use more force than is reasonably necessary. Troops ordered to assault a building or aircraft to release hostages, will have sound military intelligence and appreciation of the force they are likely to encounter. They are entitled to make the assault with such force as is necessary to meet and overcome the anticipated force, but they must not use force which is excessive in the circumstances and especially, they must not use force for the purpose of retribution or vengeance. If they use excessive force they render themselves, as individuals, liable to trial and punishment, but if they abide by the principles previously explained, both you and they will find the law will safeguard and protect you.

Finally, if the matter is put to the test, the test is whether, in the circumstances, at the particular time, the force used was reasonable. That is to say, reasonable in the circumstances as the soldier believed them to be at the time. The fact that subsequent investigations and inquiry might show the circumstances to have been, in fact, different is irrelevant. It is what the soldier believed to be the circumstances at the time which is the critical criterion. The position has been put very clearly by Lord Diplock as recently as July 1976 in a case known as **Attorney-General for Northern Ireland's Reference** (1976 3 WLR 235; [1976] 2 All ER 937). Let me first quote the 13 facts which were stated in the Reference:

- (i) The accused, who was a soldier on duty, killed the deceased, who was a young man, with one shot from his S.L.R. rifle when the deceased was less than 20 yards from him in a field in a country area in daylight. The field was close to the farmhouse where the deceased lived with his parents and formed part of the farm.
- (ii) The shot was a quick snap shot at the body of the deceased after the accused had shouted "halt" and the deceased had immediately run off. The shot was not preceded by a warning shot.

- (iii) The deceased had not been under arrest at the time when the accused shouted "halt".
- (iv) At the time of firing the shot the accused was a member of an Army patrol of sixteen men which was on foot and which had been engaged in searching the area and seeking information about persons suspected of terrorist activities.
- (v) The said area was one in which troops had been attacked and killed by the I.R.A.; it was an area in which soldiers faced a real threat to their lives and where the element of surprise attack by the I.R.A. was a real threat. The said patrol had been briefed to expect attack and to be wary of being led into an ambush. The patrol was in an area which the members of the patrol were entitled to regard as containing people who might be actively hostile.
- (vi) There had been no terrorist activity in the said area on the day on which the accused shot the deceased or during the days preceding the day of the shooting, but this did not mean that there was not a real threat of attack to the said Army patrol, and the threat was increased by the patrol having spent a number of hours in the said area.
- (vii) Before firing the shot the accused and other members of the said Army patrol had been searching the out-building of the said farmhouse, and the said patrol had been briefed that the said farm, and two other farms in the said area, were places where terrorists might be hiding.
- (viii) The deceased was unarmed and appeared to the accused to be unarmed.
- (ix) The deceased was alone and was not one of a number of persons acting in a group.
- (x) The accused was wearing full military equipment and a pack.
- (xi) When the deceased ran off after the accused's shout of "halt", individual pursuit by the accused was not a reasonable possibility. The accused was 70 yards from other members of the patrol and the chase could have led anywhere and over open ground and the briefing about the risk of being led into an ambush was in the mind of the accused.
- (xii) The deceased was an entirely innocent person who was in no way involved in terrorist activity.
- (xiii) When the accused fired he honestly and reasonably believed that he was dealing with a member of the Provisional I.R.A. who was seeking to run away but he had no belief at all as to whether the deceased had been involved in acts of terrorism or was likely to be involved in any immediate act of terrorism. This being the state of mind of the accused when he fired, he did so because he thought it was his duty so to do and that firing was the reasonable and proper way to discharge his duty in the circumstances.

A Judge, sitting without a jury, acquitted the soldier of murder holding that he had no conscious intention to kill or seriously injure and the killing was justifiable homicide.

The following quote is a lengthy passage from Lord Diplock's judgement which is crammed full of relevance to the subject of Aid to the Civil Power:

"To kill or seriously wound another person by shooting is **prima facie unlawful**. There may be circumstances, however, which render the act of shooting and any killing which results from it lawful, and an honest and reasonable belief by the accused in the existence of facts which if true would have rendered his act lawful is a defence to any charge based on the shooting. So for the purposes of the present reference one must ignore the fact that the deceased was an entirely innocent person and must deal with the case as if he were a

member of the Provisional I.R.A. and a potentially dangerous terrorist, as the accused honestly and reasonably believed him to be.

"The facts to be assumed for the purposes of the reference are not capable in law of giving rise to a possible defence of 'self-defence'. The deceased was in fact and appeared to the accused to be, unarmed. He was not attacking the accused: he was running away. So if the act of the accused in shooting the deceased was lawful it must have been on the ground that it was done in the performance of his duty of prevent crime or in the exercise of his right to stop and question the deceased under section 16 or to arrest him under section 12 of the **Northern Ireland (Emergency Provisions) Act 1973**.

"There is little authority in English law concerning the rights and duties of a member of the armed forces of the Crown when acting in aid of the civil power; and what little authority there is relates almost entirely to the duties of soldiers when troops are called upon to assist in controlling a riotous assembly. Where used for such temporary purposes it may not be inaccurate to describe the legal rights and duties of a soldier as being no more than those of an ordinary citizen in uniform. But such a description is in my view misleading in the circumstances in which the Army is currently employed in aid of the civil power in Northern Ireland. In some parts of the province there has existed for some years now a state of armed and clandestinely organised insurrection against the lawful government of Her Majesty by persons seeking to gain political ends by violent means — that is, by committing murder and other crimes of violence against persons and property. Due to the efforts of the Army and police to suppress it, the insurrection has been sporadic in its manifestations but, as events have repeatedly shown, if vigilance is relaxed the violence erupts again. In theory it may be the duty of every citizen when an arrestable offence is about to be committed in his presence to take whatever reasonable measures are available to him to prevent the commission of the crime; but the duty is one of imperfect obligation and does not place him under any obligation to do anything by which he would expose himself to risk of personal injury, nor is he under any duty to search for criminals or seek out crime. In contrast to this a soldier who is employed in aid of the civil power in Northern Ireland is under a duty, enforceable under military law, to search for criminals if so ordered by his superior officer and to risk his own life should this be necessary in preventing terrorist acts. For the performance of this duty he is armed with a firearm, a self-loading rifle, from which a bullet, if it hits the human body, is almost certain to cause serious injury if not death.

"The use of force in the prevention of crime or in effecting the lawful arrest of suspected offenders is now regulated by section 3 of the **Criminal Law Act (Northern Ireland) 1967** as follows:

(1) A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.

(2) Subsection (1) shall replace the rules of the common law as to the matters dealt with by that subsection.

"That section states the law applicable to the defence raised by the accused at the trial of his case."

The Hope Report

Following the Sydney Hilton bombing, on 21 March 1978 the Prime Minister appointed The Hon Mr Justice Hope CMG

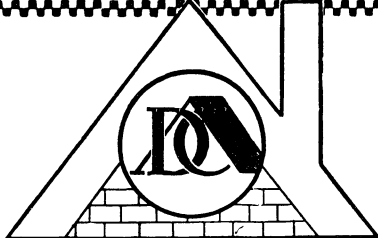
to conduct a review of protective security, and the Judge's report was presented on 15 May 1979. It is called Protective Security Review, published by the Australian Government Publishing Service, and I commend it to you.

Mr Justice Hope recommended some major changes to the **Defence Act**. The present section 51 will be replaced by a new Division of the Act to deal with the use of armed members of the Defence Force for the protection of States against domestic violence, enforcement of Commonwealth laws and protection of Commonwealth interests.

The proposed provisions were subject to much debate by the previous Government. I do not know the attitude of the new Government so I will only deal with the broadest outline:

- a. When the Government of a State requests assistance of armed members of the Defence Force, it will still be necessary for the Governor-General to authorise that assistance.
- b. It will also be necessary for the Governor-General to authorise the use of armed members of the Defence Force to execute or maintain the laws of the Commonwealth, to assist in executing and maintaining those laws, and to protect or assist in protecting Commonwealth interests.
- c. The minister will be empowered to give the Chief of Defence Force Staff directions as to the maximum number of troops.
- d. In certain circumstances (still to be finalised) the call out will have to be reported to the Parliament.
- e. It is expected that the Magistrate will virtually disappear and his role will be taken over by Commissioners of Police and senior Police Officers.
- f. When armed members of the Defence Force are called out, the Chief of Defence Force Staff may direct that **members of the Defence Force other than armed members** may assist those armed members.
- g. Members called out will be given the duties and powers of police officers.
- h. The Reserve can not be used unless the Governor-General by proclamation authorises their use and states the reasons for it. The Reserve can not be used in an industrial dispute.

Army will continue to stress the need to spell out with some precision the rights, duties and obligations of soldiers called out, and will continue to fight for their adequate protection under the law. Even a clause along the lines of section 3 of the **Criminal Law Act (Northern Ireland)**, cited in the passage I quoted from Lord Diplock, would be very helpful.



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